NORTH CAROLINA REPORTS

VOLUME 215

This book is an exact photo-reproduction of the original Volume 215 of North Carolina Reports that was published in 1939.

Published by
THE STATE OF NORTH CAROLINA
RALEIGH
1973

Reprinted by
COMMERCIAL PRINTING COMPANY
RALEIGH, NORTH CAROLINA

NORTH CAROLINA REPORTS

VOL. 215

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

FALL TERM, 1938
SPRING TERM, 1939

REPORTED BY
ROBERT C. STRONG
AND
JOHN M. STRONG

RALEIGH
BYNUM PRINTING COMPANY
PRINTERS TO THE SUPREME COURT
1939

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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 AND SPRING TERMS, 1938-39.

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:

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SUPREME COURT REPORTER:

ROBERT C. STRONG.*

CLERK OF THE SUPREME COURT:

EDWARD MURRAY.

MARSHAL AND LIBRARIAN:

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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 L. Stevens	Sixth	Warsaw.
W. C. Harris	Seventh	Raleigh.
John J. Burney	Eighth	Wilmington.
Q. K. Nimocks, Jr.	Ninth	Fayetteville.
Leo Carr	Tenth	Burlington.

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.
William H. Bobbitt	Fourteenth	Charlotte.
Frank M. Armstrong	Fifteenth	Troy.
Wilson Warlick	Sixteenth	Newton.
J. A. Rousseau	Seventeenth	North Wilkesboro.
J. Will Pless, Jr.	Eighteenth	Marion.
Zeb V. Nettles	Nineteenth	Asheville.
Felix E. Alley, Sr.	Twentieth	Waynesville.
Allen H. Gwyn	Twenty-first	Reidsville.

SPECIAL JUDGES

A. Hall Johnston	Skyland.
Sam J. Ervin, Jr.	Morganton.
Hubert E. Olive	Lexington.

EMERGENCY JUDGES

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.

SOLICITORS

EASTERN DIVISION

Name	*District*	*Address*
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DONNELL GILLIAM	Second	Tarboro.
ERNEST R. TYLER	Third	Roxobel.
CLAUDE C. CANADAY	Fourth	Benson.
D. M. CLARK	Fifth	Greenville.
J. ABNER BARKER	Sixth	Roseboro.
WILLIAM Y. BICKETT	Seventh	Raleigh.
DAVID SINCLAIR	Eighth	Wilmington.
F. ERTEL CARLYLE	Ninth	Lumberton.
WILLIAM H. MURDOCK	Tenth	Durham.

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.
AVALON E. HALL	Seventeenth	Yadkinville.
C. O. RIDINGS	Eighteenth	Forest City.
ROBERT M. WELLS	Nineteenth	Asheville.
JOHN M. QUEEN	Twentieth	Waynesville.
R. J. SCOTT	Twenty-first	Danbury.

SUPERIOR COURTS, SPRING TERM, 1939

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

THIS CALENDAR IS UNOFFICIAL

EASTERN DIVISION

FIRST JUDICIAL DISTRICT

Spring Term, 1939—Judge Carr.

Beaufort—Jan. 16* (2); Feb. 20† (2); Mar. 20* (A); April 10†; May 8† (2); June 26.

Camden—Mar. 13.

Chowan—April 3.

Currituck—Mar. 6; May 1†.

Dare—May 29.

Gates—Mar. 27.

Hyde—May 22.

Pasquotank—Jan. 9†; Feb. 13†; Feb. 20* (A); Mar. 21†; May 8† (A) (2); June 5*; June 12† (2).

Perquimans—Jan. 16† (A); April 17.

Tyrrell—Feb. 6†; April 24.

SECOND JUDICIAL DISTRICT

Spring Term, 1939—Judge Thompson.

Edgecombe—Jan. 23; Mar. 6; April 3† (2); June 5 (2).

Martin—Mar. 20 (2); April 17†; June 19.

Nash—Jan. 30; Feb. 20† (2); Mar. 13; April 24† (2); May 29.

Washington—Jan. 9 (2).

Wilson—Feb. 6*; Feb. 13†; May 15*; May 22†; June 26†.

THIRD JUDICIAL DISTRICT

Spring Term, 1939—Judge Bone.

Bertie—Feb. 13; May 8 (2).

Halifax—Jan. 30 (2); Mar. 20† (2); May 1*; June 5† (2).

Hertford—Feb. 27*; April 17‡ (2).

Northampton—April 3 (2).

Vance—Jan. 9*; Mar. 6*; Mar. 13†; June 19*; June 26†.

Warren—Jan. 16 (2); May 22 (2).

FOURTH JUDICIAL DISTRICT

Spring Term, 1939—Judge Parker.

Chatham—Jan. 16; Mar. 6†; Mar. 20†; May 15.

Harnett—Jan. 9*; Feb. 6† (2); Mar. 20* (A); April 3† (A) (2); May 8†; May 22*; June 12†.

Johnston—Jan. 9† (A) (2); Feb. 13 (A); Feb. 20† (2); Mar. 6 (A); Mar. 13; April 17 (A); April 24† (2); June 26*.

Lee—Jan. 30† (A) (2); Mar. 27 (2).

Wayne—Jan. 23; Jan. 30†; Feb. 6† (A). Mar. 6† (A) (2); May 29; June 5†; June 12† (A) (2).

FIFTH JUDICIAL DISTRICT

Spring Term, 1939—Judge Williams.

Carteret—Mar. 13; June 12 (2).

Craven—Jan. 9*; Jan. 30† (3); April 10‡; May 15†; June 5*.

Greene—Feb. 27 (2); June 26.

Jones—April 3.

Pamlico—May 1 (2).

Pitt—Jan. 16†; Jan. 23; Feb. 20†; Mar. 20 (2); April 17 (2); May 8† (A); May 22† (2).

SIXTH JUDICIAL DISTRICT

Spring Term, 1939—Judge Frizzelle.

Duplin—Jan. 9† (2); Jan. 30*; Mar. 13† (2).

Lenoir—Jan. 23*; Feb. 20† (2); April 10; May 15† (2); June 12† (2); June 26*.

Onslow—Mar. 6; April 17† (2).

Sampson—Feb. 6 (2); Mar. 27† (2); May 1† (2).

SEVENTH JUDICIAL DISTRICT

Spring Term, 1939—Judge Stevens.

Franklin—Feb. 6*; Mar. 20† (A) (2); April 17* (A).

Wake—Jan. 9*; Jan. 16† (2); Jan. 23 (A) (2); Jan. 30†; Feb. 6† (A); Feb. 13†; Feb. 20† (2); Feb. 20 (A) (2); Mar. 6*; Mar. 6† (A); Mar. 13† (2); Mar. 20† (A) (2); Mar. 27† (2); April 10*; April 10† (A); April 17† (2); April 24 (A); May 1†; May 8*; May 8† (A); May 15†; May 22† (2); May 22 (A); June 5*; June 5† (A); June 12† (2); June 26† (2); June 26 (A) (2).

EIGHTH JUDICIAL DISTRICT

Spring Term, 1939—Judge Harris.

Brunswick—Jan. 9†; April 10; June 19†.

Columbus—Jan. 30; Feb. 6 (A); Feb. 20† (2); May 1 (2); June 26*.

New Hanover—Jan. 16*; Feb. 6† (2); Mar. 6† (2); Mar. 20*; April 17† (2); May 15*; May 29† (2); June 12*.

Pender—Mar. 27 (2).

NINTH JUDICIAL DISTRICT

Spring Term, 1939—Judge Burney.

Bladen—Jan. 9; Mar. 20*; May 1†.

Cumberland—Jan. 16*; Feb. 13† (2); Mar. 6* (A); Mar. 13*; Mar. 27† (2); May 8† (2); June 5*.

Hoke—Jan. 23; April 24.

Robeson—Jan. 30* (2); Feb. 27† (2); Mar. 20* (A); April 10* (2); May 8* (A) (2); May 22† (2); June 12†; June 19*.

TENTH JUDICIAL DISTRICT

Spring Term, 1939—Judge Nimocks.

Alamance—Jan. 30† (A); Feb. 27*; April 3†; May 15* (A); May 29† (2).

Durham—Jan. 9† (3); Feb. 20*; Feb. 27† (A); Mar. 6†; Mar. 20† (A); Mar. 27*; April 24† (A); May 1† (2); May 22*; May 29† (A) (3); June 26*.

Granville—Feb. 6 (2); April 10 (2).

Orange—Mar. 20; May 15†; June 12; June 19†.

Person—Jan. 23 (A); Jan. 30†; April 24.

WESTERN DIVISION

ELEVENTH JUDICIAL DISTRICT

Spring Term, 1939—Judge Clement.

Ashe—April 17*; May 29† (2).
Alleghany—May 1.
Forsyth—Jan. 9 (2); Jan. 16† (A) (3); Jan. 23† (2); Feb. 6 (2); Feb. 20† (2); Mar. 6 (2); Mar. 20† (2); April 3 (2); April 17† (A) (2); May 8 (2); May 29† (A) (2); June 5† (A) (2); June 12 (2); June 26† (2).

TWELFTH JUDICIAL DISTRICT

Spring Term, 1939—Judge Sink.

Davidson—Jan. 30*; Feb. 20† (2); April 3† (2); May 8*; May 29†; June 5† (A); June 26*.
Guilford—Jan. 9† (2); Jan. 23*; Feb. 6† (2); Feb. 20† (A) (2); Mar. 6* (2); Mar. 20† (2); April 3† (A) (2); April 17† (2); May 1*; May 15† (2); June 5† (2); June 19*.

THIRTEENTH JUDICIAL DISTRICT

Spring Term, 1939—Judge Phillips.

Anson—Jan. 16*; Mar. 6†; April 17 (2); June 12†.
Moore—Jan. 23*; Feb. 13†; Mar. 27† (A) (2); May 22*; May 29†.
Richmond—Jan. 9*; Feb. 6† (A); Mar. 20†; April 10*; May 29† (A); June 19†.
Scotland—Mar. 13; May 1†.
Stanly—Feb. 6†; Feb. 13† (A); April 3; May 15†.
Union—Jan. 30*; Feb. 20† (2); Mar. 27†; May 8†.

FOURTEENTH JUDICIAL DISTRICT

Spring Term, 1939—Judge Gwyn.

Gaston—Jan. 16*; Jan. 23† (2); Mar. 13* (A); Mar. 20† (2); April 24*; May 22† (2); June 5*.
Mecklenburg—Jan. 2†; Jan. 9† (A); Jan. 9*; Jan. 16† (A) (2); Jan. 30† (A) (2); Feb. 6† (3); Feb. 13† (A) (2); Feb. 27*; Feb. 27† (A) (2); Mar. 6† (2); Mar. 13† (A) (2); Mar. 20* (A) (2); Mar. 27† (A) (2); April 3† (2); May 1† (2); May 15*; June 12*; June 19†.

FIFTEENTH JUDICIAL DISTRICT

Spring Term, 1939—Judge Bobbitt.

Alexander—Feb. 6 (A) (2).
Cabarrus—Jan. 9 (2); Feb. 27†; Mar. 6† (A); April 24 (2); June 12† (2).
Iredell—Jan. 30 (2); Mar. 13†; May 22 (2).
Montgomery—Jan. 23*; April 10† (2).
Randolph—Mar. 20† (2); April 3*.
Rowan—Feb. 13 (2); Mar. 6†; Mar. 13† (A); May 8 (2).

SIXTEENTH JUDICIAL DISTRICT

Spring Term, 1939—Judge Armstrong.

Burke—Feb. 20; Mar. 13† (2); June 5 (3).
Caldwell—Feb. 27 (2); May 22† (2).
Catawba—Jan. 16† (2); Feb. 6 (2); April 10† (2); May 8† (2).
Cleveland—Jan. 9; Mar 27 (2); May 22† (A) (2).
Lincoln—Jan. 23 (A) (2).
Watauga—April 24 (2); June 12† (A).

SEVENTEENTH JUDICIAL DISTRICT

Spring Term, 1939—Judge Warlick.

Avery—April 10*; April 17†.
Davie—Mar. 20; May 29†.
Mitchell—Mar. 27 (2).
Wilkes—Mar. 6 (2); May 1† (2); June 5† (2).
Yadkin—Feb. 27*; May 15† (2).

EIGHTEENTH JUDICIAL DISTRICT

Spring Term, 1939—Judge Rousseau.

Henderson—Jan. 9† (2); Mar. 6 (2); May 1† (2); May 29† (2).
McDowell—Jan. 2*; Feb. 13† (2); June 12 (2).
Polk—Jan. 30 (2).
Rutherford—Feb. 27†; April 17† (2); May 15 (2); June 26† (2).
Transylvania—April 3 (2).
Yancey—Jan 23†; Mar. 20 (2).

NINETEENTH JUDICIAL DISTRICT

Spring Term, 1939—Judge Pless.

Buncombe—Jan. 9† (2); Jan. 23; Jan. 30; Feb. 6† (2); Feb. 20; Mar. 6† (2); Mar 20; April 3† (2); April 17; May 1† (2); May 15; May 29; June 5† (2); June 19 (2).
Madison—Feb. 27; Mar. 27; April 24; May 22.

TWENTIETH JUDICIAL DISTRICT

Spring Term, 1939—Judge Nettles.

Cherokee—Jan. 23† (2); April 3 (2); June 19† (2).
Clay—
Graham—Mar. 20 (2); June 5† (2).
Haywood—Jan. 9† (2); Feb. 6 (2); May 8† (2).
Jackson—Feb. 20 (2); May 22 (2).
Macon—April 17 (2).
Swain—Jan. 16† (A) (2); Mar. 6 (2).

TWENTY-FIRST JUDICIAL DISTRICT

Spring Term, 1939—Judge Alley.

Caswell—Mar. 20 (2).
Rockingham—Jan. 23 (2); Mar. 6 (2); April 17; May 8 (2); May 22 (2); June 12 (2).
Stokes—April 3*; April 10†; June 26*.
Surry—Jan. 9*; Jan. 16†; Feb. 13*; Feb. 20† (2); April 24*; May 1†; June 5†.

*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.

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CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM, 1938

EMMA C. IVESTER AND HUSBAND, R. B. IVESTER, v. CITY OF WINSTON-SALEM.

(Filed 1 February, 1939.)

1. **Eminent Domain § 8—**

It is fundamental law in this State, grounded in equity and justice, that private property may not be taken, even for a public purpose, without the payment of just compensation.

2. **Eminent Domain § 2: Nuisance § 3: Municipal Corporations § 16—Pollution of air resulting in depreciation of value of land constitutes taking.**

The operation of a municipal sewage disposal plant, incinerator and abattoir, resulting in the discharge of noxious odors, ashes and cinders into the air, and the attraction and breeding of rats, mosquitoes and other vermin, to the extent that the value of contiguous private lands is depreciated, is a taking of such private lands to the extent of the damage, and the municipality may be required to pay just compensation therefor notwithstanding that the damage results from its discharge of a governmental function.

3. **Eminent Domain § 21: Municipal Corporations § 16—Complaint held to allege cause for compensation for taking of property by eminent domain.**

The complaint and amended complaint in this action against a municipality alleging that the operation by the city of its sewage disposal plant, incinerator and abattoir resulted in the discharge of noxious odors and ashes and the breeding of vermin and constituted a nuisance which depreciated the value of plaintiffs' land and constituted a taking of same

without the payment of just compensation, states a cause of action to recover damages for the taking of private property by eminent domain, notwithstanding allegations that the city was negligent in operating the abattoir in dumping all kinds of refuse, junk and rubbish, creating an unsightly appearance and an insanitary condition, the gravamen of the complaint being the partial taking of plaintiffs' property by the creation of a nuisance, and not an action for damages for negligence.

4. Municipal Corporations § 46—

Substantial compliance with the provisions of a city charter requiring notice of claim as a condition precedent to an action against the city in tort, is sufficient, the provision being in derogation of common law, and the notice in this case *is held* in substantial compliance with the statute and sufficient.

5. Municipal Corporations § 47—Action against city for damages to private lands from continuing nuisance is governed by charter provisions relating to eminent domain.

An action to recover for damages to private lands resulting from the operation by a city of its sewage disposal plant, incinerator and abattoir, constituting a continuing or recurring nuisance, is an action for the partial taking of land by imminent domain and is governed by the provisions of the city charter requiring actions against the city for the taking of private property to be instituted within two years of such taking (sec. 59, ch. 232, Private Laws of 1927), and not by the provisions of its charter prescribing a one-year limitation for actions against the city in tort (sec. 115, ch. 232, Private Laws of 1927), and the action being for a continuing or recurring nuisance, only damages sustained prior to the two-year limitation are barred. C. S., 442, 1330.

6. Limitation of Actions § 6—Each separate act of continuing or recurring nuisance gives rise to separate cause of action.

This action was instituted against a municipality to recover damages to private lands resulting from a continuing or recurring nuisance in the operation of its sewage disposal plant, incinerator and abattoir. *Held:* Each successive act constitutes a distinct and separate renewal of the wrong, and only damages suffered prior to the bar of the statute are affected thereby, and plaintiff is entitled to recover for such partial taking of his land the difference in the value of his land at the time of the institution of the action and its value at the time the statute ceased to bar his claim.

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

APPEAL by plaintiffs from *Hill, Special Judge,* at April Term, 1938, of FORSYTH. Reversed.

This is an action brought by plaintiffs against defendant to recover damages for alleged injury in taking plaintiffs' real estate, rendering it unfit for habitation by erecting, maintaining and continuing certain nuisances, in close proximity, viz.: The sewage disposal plant which was erected prior to 1926. The incinerator which was erected in 1931. The abattoir which was erected less than two years before this action was

commenced. Summons in this action was issued 12 October, 1937; notice of claim to defendant was given 17 July, 1937. The sewage disposal plant, the incinerator and the abattoir are separate projects housed in separate buildings. The plaintiffs own 6.4 acres of land. The property is right up against the incinerator and from three hundred to six hundred feet from the abattoir. There is a city dump for cinders and other refuse from the incinerator within 400 feet from plaintiffs' home. There is plenary evidence of offensive odors from the abattoir and mosquitoes from stagnant water in the dump.

The complaint alleges, in part: "That the incinerator of the defendant adjoins the lands of the plaintiffs; that the defendant's sewer disposal plant and the abattoir are located near plaintiffs' land. . . . That the noxious and violent odors emanating from the disposal plant, the gaseous smoke, fumes and ashes arising from said incinerator so contaminate the atmosphere on plaintiffs' entire premises that said land has become unfit for use and unfit for human habitation, causing and creating a permanent and continuous nuisance upon the lands and property of said plaintiffs. That the defendant's abattoir is also located near plaintiffs' property; that the defendant, pursuant to an ordinance duly adopted, requires that all animals slaughtered for the purpose of sale in the city of Winston-Salem be dressed and inspected at its abattoir as aforesaid. That near plaintiffs' premises, the defendant has negligently dumped all kinds of refuse, junk and rubbish; that because of this negligent and careless conduct, there has been created an unsightly appearance, as well as an insanitary condition adjacent to plaintiffs' premises; that because of this and other negligent conduct of said defendant, a condition has been created contiguous to plaintiffs' said land which has caused the breeding of innumerable rats, mosquitoes, other harmful insects and vermin, causing said plaintiffs' property to become almost worthless and wholly undesirable for human habitation. That the plaintiffs are unable to dispose of their lands for any appreciable sum for any purpose because of the violent, noxious and offensive odors, falling ashes and other causes herein complained of which amount to the taking of plaintiffs' property by defendant without compensation and without due process of law; that because of the unjust taking of plaintiffs' land by said defendant, the plaintiffs have suffered damage and loss," etc.

An amendment, which we do not think changes the cause of action, but amplifies it, was allowed to the complaint, which was filed on 1 March, 1938, and reads as follows: "That all of the offal from the slaughtered animals killed in the abattoir are disposed of in said plant; that in the disposition of this offal, the entrails of the slaughtered animals are torn into shreds as they are taken from the carcasses and

cooked; that the grease is separated from the 'tankage' and both are disposed of and hauled away; that in the cooking and carrying away of this offal obnoxious and nauseating odors are created and the air is permeated with them; that the animals are kept in pens preparatory to their being slaughtered; that a great many houseflies are hatched and that they infest the premises of the plaintiffs; that, while these cattle are impounded awaiting slaughter, the noises made by them greatly disturb these plaintiffs and render their property unfit for any purpose other than agricultural lands; that the blood and offal which is the natural results of slaughtering animals, are carelessly and negligently left in and around this abattoir, which adds to, if possible, the odors emanating from the slaughterhouse itself; that in the mounds of cinders which have been placed on other property than that belonging to the city, which is adjacent to and almost surrounds the property of the plaintiffs, rats' den and rats have become so numerous that it is almost impossible for the plaintiffs to raise chickens or any grain on the lands mentioned in the complaint; that these acts on the part of the defendant have rendered the property of the plaintiffs almost entirely worthless; that these acts are permanent, constant and continuing and, as a result thereof the defendant has appropriated the property of the plaintiffs mentioned in the complaint; and that the falling cinders, ashes and soot and odors emanating from the incinerator plant, together with the erection and maintenance of the abattoir, have also added an increased burden on the property of the plaintiffs."

There was evidence to sustain the allegations of the complaint. The evidence is to the effect that the allegation of damages from the abattoir occurred within two years before the action was commenced. The defendant denied the material allegations of the complaint and set up the defense that plaintiffs' notice was not sufficient in law—"It is denied that said paper writing is in conformity with the laws of the State of North Carolina, or section 115 of the charter of the city of Winston-Salem."

At the close of plaintiffs' evidence the defendant in the court below made a motion for judgment as in case of nonsuit. C. S., 567. The court below overruled the motion. At the conclusion of all the evidence the defendant renewed its motion for judgment as in case of nonsuit. The motion was granted. The plaintiffs excepted, assigned error and appealed to the Supreme Court.

John C. Wallace and Parrish & Deal for plaintiffs.
Ratcliff, Hudson & Ferrell for defendant.

CLARKSON, J. We think there was error in granting the nonsuit, as the evidence was sufficient to be submitted to the jury.

In *Shute v. Monroe,* 187 N. C., 676 (683), is the following: "The Anglo-Saxon holds no material thing dearer than the ownership of land, his home is termed his 'castle.' Although there is nothing in the Constitution of North Carolina that expressly prohibits the taking of private property for public use without compensation (the clause of the United States Constitution to that effect applies only to act by the United States and not to government of the State), yet the principle is so grounded in natural equity and justice that it is a part of the fundamental law of this State that private property cannot be taken for public use without just compensation. *Johnson v. Rankin,* 70 N. C., 555." *McRae v. Fayetteville,* 198 N. C., 51 (54); *Reed v. Highway Com.,* 209 N. C., 648 (654).

In *Metz v. Asheville,* 150 N. C., 748 (751), speaking to the subject, it is written: "The reason of this distinction in regard to property seems to lie in the fact of ownership, vested rights, which no one can invade, not even the government, unless for public purposes, and then only by paying the owner for it. Where, in the discharge of its governmental functions and police powers, the officers of a municipality invade property rights, the doctrine of *respondeat superior* applies and the corporation is liable for their acts."

In *Hines v. Rocky Mount,* 162 N. C., 409 (412), citing a wealth of authorities, it is stated: "This general principle is subject to the limitation that neither a municipal corporation nor other governmental agency is allowed to establish and maintain a nuisance, causing appreciable damage to the property of a private owner, without being liable for it. To the extent of the damage done to such property, it is regarded and dealt with as a taking or appropriation of the property, and it is well understood that such an interference with the rights of ownership may not be made or authorized except on compensation first made pursuant to the law of the land. . . . In affording redress for wrongs of this character, injuries caused by a nuisance wrongfully created in the exercise of governmental functions, our decisions hold as the correct deduction from the above principle that the damages are confined to the diminished value of the property affected." *Moser v. Burlington,* 162 N. C., 141.

In *Rhodes v. Durham,* 165 N. C., 679 (680), it is said: "We have held, in several recent cases, that damages may be recovered for a wrong of this character, and, to the extent that the value of plaintiff's property is impaired, the right is not affected because the acts complained of were done in the exercise of governmental functions. *Donnell v. Greensboro,* 164 N. C., 331, and authorities cited. . . . (pp. 682-3) And in the citation to Lewis on Eminent Domain, *supra* (1 Vol. [3rd Ed.], sec. 230), referring to the kind of injuries which may be treated as a

taking of property, the author says: 'The owner of land has a right that the air which comes upon his premises shall come in its natural condition, free from artificial impurities. This right has its corresponding obligation, which is that one must not use his own premises in such a manner as to discharge into the atmosphere of his neighbor dust, smoke, noxious gases, or other foreign matter which substantially affects its wholesomeness. This right is very fully treated by Mr. Wood in his work on Nuisances, and a reference thereto will suffice. The right to pure air is property, and to interfere with the right for public use is to take property. There can be no question that the erection of gas works, or the setting up of any other noxious trade, in the vicinity of my premises that emits noxious odors, which are sent over my lands in quantity and volume, sufficient to essentially interfere with the use of that air for the ordinary purposes of breath and life, so as to constitute a legal nuisance, is such a taking of my property as the legislature may not permit without compensation.' "

The defendant contends that this is an action in tort for negligence. To be sure the use of the word negligent, etc., is used, but the allegations are specific that plaintiffs' property is taken on account of the nuisance without the payment of "just compensation." "That the plaintiffs are unable to dispose of their lands for any appreciable sum for any purpose because of the violent, noxious and offensive odors, falling ashes and other causes herein complained of, which amount to the taking of plaintiffs' property by the defendant without compensation and without due process of law; that because of the unjust taking of plaintiffs' land by said defendant, the plaintiffs have suffered damage and loss," etc. To the same effect is the amendment to the complaint, which was allowed.

Liberally construed, "The gravamen of the complaint is the partial taking of plaintiffs' property by the creation of a nuisance." *Jones v. High Point,* 202 N. C., 721 (722).

The principles of law in reference to this controversy were thoroughly discussed in *Gray v. High Point,* 203 N. C., 756. In that case the issue was: "Has plaintiffs' land as described in the complaint been wrongfully taken by the defendant through noxious odors from the operation of defendant's sewer plant, as alleged in the complaint?" *Durham v. Lawrence, post,* 75.

In the old case of *Dargon v. Waddill,* 31 N. C., 244, it is held: "A stable in a town is not, like a slaughter pen or a hog sty, necessarily or *prima facie* a nuisance. But if it be so built, so kept, or so used, as to destroy the comfort of persons owning and occupying adjoining premises and impairing their value as places of habitation, it does thereby become a nuisance. If the adjacent proprietors be annoyed by it in any manner,

which could be avoided, it becomes an actionable nuisance, though a stable in itself be a convenient and lawful erection." *S. v. Bass,* 171 N. C., 780.

In *King v. Ward,* 207 N. C., 782, it is held: "If operator of cotton gin during ginning season encouraged and permitted persons bringing cotton to be ginned to park their teams in front of plaintiff's home for operator's convenience, and to remain in street for long periods, emitting odors which impaired comfortable occupancy of plaintiff's home, nuisance would be shown. It will be seen that a thing not a nuisance may become so by its use."

The defendant's main contention is that the notice given it by plaintiffs is not sufficient in law, and pleads section 115, of chapter 232, Private Laws of 1927—Charter of City of Winston-Salem. Said section is as follows: "All claims and demands against the city of Winston-Salem arising in tort shall be presented to the board of aldermen of said city or to the mayor, in writing, signed by the claimant, his attorney or agent, within ninety (90) days after said claim or demand is due or the cause of action accrues; that no suit or action shall be brought thereon within ten (10) days or after the expiration of twelve (12) months from the time said claim is so presented, and unless the claim is so presented within ninety (90) days after the cause of action accrued, and unless suit is brought within twelve (12) months thereafter, any action thereon shall be barred." However, there is another section (59), which is as follows: "The city of Winston-Salem, whenever it shall require lands, or interests in lands, lying within the corporate limits, may proceed to acquire title to the same under this charter; or it may, as the board of aldermen may determine, proceed under the public laws of North Carolina relating to eminent domain and municipal corporations. As to all lands taken, or claimed by the owner to have been taken by the city of Winston-Salem for public use, all actions or proceedings for damages by the owner of the lands shall be commenced within two years after the first occupancy by the city and not afterwards." C. S., 442. See N. C. Code, 1935 (Michie), sec. 1330; *Sugg v. Greenville,* 169 N. C., 606 (617).

In White's Negligence of Municipal Corporations, sec. 667, it is stated: "Statutes requiring written notice of claim as a condition precedent to an action against the city, being in derogation of common law, are to be strictly construed." McQuillan Municipal Corporations, sec. 2629 (Revised Vol. 6). In recognition of the constitutional nature of the cause of action arising from the taking of land by the maintenance of a nuisance, it is stated in McQuillan, etc., *supra:* "The requirement has no application for the abatement of a continuing nuisance recurring from time to time."

In *Thomann v. Rochester*, 245 N. Y. Supp., 680, 230 App. Div., 612, it is held that: If the requirement of written notice of claim is applicable to cases of continuous damages to neighborhood property from the maintenance of a city dump, to such an extent the legislation is unconstitutional.

In *Graham v. Charlotte*, 186 N. C., 649 (659), it is stated: "But a substantial compliance with the statute is all that is required, and the notice need not be drawn with the technical nicety necessary in pleading. McQuillan on Municipal Corps. (Vol. VI), section 2718." It is not necessary to "Dot an I, or cross a T." We think the statute was substantially complied with and the notice sufficient. These special privilege statutes given by the General Assembly to municipalities should be liberally construed.

In *Lightner v. Raleigh*, 206 N. C., 496 (504), it is said: "The principle is set forth in 37 C. J., 'Limitations of Actions,' part sec. 249, pp. 883-4: 'Cases frequently arise where damages resulting from an act are continuing or recurring so that they cannot presently be ascertained or estimated so as to be presently recoverable in a single action. In such cases separate and successive actions may be brought to recover the damages as they accrue, and a judgment rendered in one of such actions for damages accrued up to the time when suit was brought is no bar to another action to recover damages accruing after the judgment. To cases of this character, the statute of limitations does not have the same rigid application as to cases where all the damages may be recovered in a single action, and the two main principles applying are as follows: Where continuing or recurring injury results from a wrongful act or from a condition wrongfully created and maintained, such as a continuing nuisance or trespass, there is not only a cause of action for the original wrong, arising when the wrong is committed, but separate and successive causes of action for the consequential damages arise as and when such damages are from time to time sustained; and therefore so long as the cause of the injury exists and the damages continue to occur plaintiff is not barred of a recovery for such damages as have accrued within the statutory period beyond the action, although a cause of action based solely on the original wrong may be barred, and this has been termed the general rule, to which the rule, where the injury is permanent, is an exception.' *Perry v. R. R.*, 171 N. C., 38; *Teeter v. Telegraph Co.*, 172 N. C., 783; *Morrow v. Florence Mills*, 181 N. C., 423; *Anderson v. Waynesville*, 203 N. C., 37; *Gray v. High Point*, 203 N. C., 756; *Langley v. Hosiery Mills*, 194 N. C., 644 (646)."

As the alleged nuisance is a continuing or recurring one, we think the two-year statute is applicable, as the alleged nuisance when it be-

comes effective is such an occupancy and appropriation of private property for public use for which an action would lie.

N. C. Code, 1935 (Michie), section 441 (3), is as follows: "Within three years an action (3) For trespass upon real property. When the trespass is a continuing one, the action shall be commenced within three years from the original trespass, and not thereafter." Speaking of this section, *Hoke, J.,* in *Sample v. Lumber Co.,* 150 N. C., 161, pp. 165-6, for the Court said: "True, the statute declares that actions for trespass on real estate shall be barred in three years, and when the trespass is a continuing one such action shall be commenced within three years from the original trespass, and not thereafter; but this term 'continuing trespass' was no doubt used in reference to wrongful trespass upon real property, caused by structures permanent in their nature and made by companies in the exercise of some *quasi*-public franchise. Apart from this, the term could only refer to cases where a wrongful act, being entire and complete, causes continuing damage, *and was never intended to apply when every successive act amounted to a distinct and separate renewal of wrong.*" (Italics ours). *Teeter v. Telegraph Co.,* 172 N. C., 783 (785-6).

We think the case of *Lightner v. Raleigh, supra,* applicable to this action. In that case this Court approved the following charge (at pp. 505-6): "The damages which the plaintiffs would be entitled to recover, if any, would be limited to what has occurred within the last three years prior to the beginning of this suit. . . . We now come to the last issue, or the fifth issue: What damages, if anything, are the plaintiffs entitled to recover of the defendant by reason of the operation and maintenance of said sewerage system? Now, gentlemen of the jury, let me impress this upon you. It is the law, as I understand it, and for the purpose of this action it is the law, that if you allow the plaintiffs any damages in this case it will only be such damages as were inflicted upon the lands since 13 February, 1929, up to the beginning of this action. That is, permanent damages, . . . the burden of this issue is upon the plaintiffs. They argue to you that they have been damaged during the years 1930, 1931, 1932 and 1933; that there has been an additional burden cast upon the lands by reason of the overflow of sewage during that period and that you ought, in good conscience, to allow them damages for the depreciation of the value of the land due to this additional burden. These are all questions to be resolved by you, gentlemen, and so, in conclusion, remembering that the measure of damage is the difference in value between the lands prior to 13 February, 1929, and after the acts of trespass complained of on the part of the city. That is, gentlemen, you will estimate what was the fair market value of these

lands prior to any act of trespass on the part of the city during the past three years. You will then estimate what the lands were worth after the acts complained of during the past three years prior to the institution of this action. You will deduct the latter figure from the former and the difference between the two would be your answer to this issue."

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

Reversed.

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

BELK BROTHERS COMPANY OF CHARLOTTE v. A. J. MAXWELL, COMMISSIONER OF REVENUE.

(Filed 1 February, 1939.)

1. Taxation § 30—"Belk" stores held a chain store as defined by statute and liable for chain store license tax.

"Belk" stores, having similarity of name and benefit in whole or in part of group purchase of merchandise and perhaps common management, *held* to come within the statutory definition of a chain store, and by interpolating such definition in the statute above the tax-levying provision, the statute imposes the chain store license tax on the Belk Company for each of its stores according to the schedule set out in the statute. Section 162 of the Revenue Act of 1933.

2. Taxation § 23: Statutes § 5a—

In construing a revenue statute, a definition of those subject to its provisions may be interpolated above the tax-levying provision to give the statute meaning and effectuate the obvious intention of the Legislature.

3. Constitutional Law § 4b—

It is peculiarly the function of the lawmaking body to levy assessments and to devise a scheme of taxation.

4. Taxation § 2c—Classification of chain stores for taxation held not unreasonable or arbitrary as applied to plaintiff corporation.

The stores upon which plaintiff corporation paid under protest the chain store license tax imposed by sec. 162 of the Revenue Act of 1933, were separately incorporated, but had one president, similar names, standardization of form and method of advertising, commonalty of brand or label, group purchase of merchandise in whole or in part, uniformity of accounting, common knowledge, general integration and financial aid by plaintiff corporation in advancing expenses, etc. *Held:* The advantages enjoined by the operation of the stores under such methods are sufficient to sustain their classification as a chain store and the imposition of the chain store license tax, and the classification as to plaintiff corporation is reasonable and not arbitrary.

5. Same—

The General Assembly has the right to classify businesses, trades and professions for the purpose of taxation, subject to the limitation that the classification must be reasonable and not arbitrary.

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

APPEAL by plaintiff from *Sinclair, J.*, 26 April, 1938. From WAKE.

Civil action to recover "chain-store" license tax paid under protest, and alleged to have been wrongfully and illegally collected.

On 28 June, 1934, the plaintiff, in response to demand therefor, paid to the defendant, under protest, $3,620 balance of assessment as a "chain-store" license tax for the fiscal year 1 June, 1933, to 1 June, 1934, on 46 "Belk" Stores in North Carolina, and immediately demanded refund thereof, which was "respectfully declined." In apt time and pursuant to the provisions of the statute, plaintiff brings this action to recover back the tax so paid.

On the hearing, a jury trial was waived and the case was submitted to the court on an agreed statement of facts, which, in summary, follow:

1. The tax in question was collected and paid under section 162 of the Revenue Act of 1933, the pertinent provisions of which follow:

"Sec. 162. *Branch or Chain Stores.* Every person, firm or corporation engaged in the business of operating or maintaining in this State, under the same general management, supervision or ownership, two or more stores or mercantile establishments where goods, wares and/or merchandise is sold or offered for sale at wholesale or retail shall be deemed a branch or chain store operator, shall apply for and obtain from the Commissioner of Revenue a State license for the privilege of engaging in such business of a branch or chain store operator, and shall pay for such license a tax according to the following schedule."

(Schedule omitted, as amount of tax not in dispute.)

"The term 'chain store' as used in this section shall include stores operated under separate charters of incorporation, if there is common ownership of a majority of stock in such separately incorporated companies and/or if there is similarity of name of such separately incorporated companies and/or if such separately incorporated companies have the benefit in whole or in part of group purchase of merchandise or of common management."

2. The plaintiff is engaged in the general retail mercantile business in the cities of Charlotte, Mooresville and Kings Mountain, this State, operating therein four units, upon which it has paid and admits its liability for a "chain-store" license tax.

3. The stores in question herein, 46 in number, are scattered throughout the State of North Carolina and bear the name "Belk" in some form

or combination, as specifically set out and shown in paragraph 13 of the agreed facts. Each of the stores listed (with the exception of three) is a corporation organized under the State law, and with certain minor exceptions not here in controversy, none of the said corporations owns stock in any of the others.

4. W. H. Belk owns stock in each of the corporations, but neither he nor any other person, firm or corporation, owns a majority of the stock in any of them (except the plaintiff owns a majority of the stock in two of the units mentioned in paragraph 2 above, and controls the other two). The said W. H. Belk participated in the organization of all of the corporations, is president of each, and a member of each board of directors, otherwise, the directors are composed of different individuals.

5. The said stores are generally referred to by the public as "Belk" Stores. They generally use wrapping paper upon which is printed: "Belk Stores, the South's Largest Distributors of Reliable Merchandise. 145 Retail Department Stores."

6. Each of the corporations furnishes to W. H. Belk, its president, a weekly trial balance statement, which in turn is turned over to the common accountant or auditor, employed jointly by all the corporations, with offices in Charlotte. The salaries of the auditor and his assistants are first paid by the plaintiff, and at the end of each quarter, the several corporations refund these expenses to the plaintiff, with interest, on a pro rata basis. The auditor also prepares annually an audit of the financial affairs of each of the corporations, and likewise prepares its State and Federal income tax returns.

7. The said corporations jointly maintain and support a "Buying Office" in New York City, the expenses of which are handled in the same manner as the auditor's office in Charlotte. Group purchases may be effected through the Buying Office, though this is optional with the individual store. Each corporation is likewise permitted to purchase and sell articles of merchandise labeled or branded "Belk."

8. Lastly, it is "stipulated and agreed that if the court should determine the plaintiff or any or all of the corporations or stores listed in paragraph 13 above are liable for the chain-store tax imposed by section 162 of the 1933 Revenue Act, then the plaintiff shall not recover of the defendant the $3,620 heretofore paid by the plaintiff to the defendant."

The court being of opinion that upon the pleadings and the facts agreed, the plaintiff was not entitled to recover the amount of the tax paid under protest, entered judgment dismissing the action. From this ruling, the plaintiff appeals, assigning error.

Guthrie, Pierce & Blakeney for plaintiff, appellant.

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

STACY, C. J. The intention of the lawmaking body is not difficult of discernment, albeit the language used to express it is awkward enough. Indeed, our principal concern is to ascertain whether the tax-levying provision of the statute covers every "chain store" as subsequently defined in the act. *Harwood v. Maxwell, Comr. of Revenue,* 213 N. C., 55, 195 S. E., 54. That the plaintiff comes within the statutory definition of a chain store seems clear, but whether the act is so drawn as to levy a chain-store license tax on the 46 "Belk" Stores having similarity of name and benefit in whole or in part of group purchase of merchandise and perhaps common management is the question for decision. However, if the statute be read with the definition of the term "chain store" interpolated above the tax-levying provision, where it really belongs and was intended to be inserted, which is permissible in our quest for the legislative intent, most of the difficulty would seem to be somewhat minimized. It is true, this rearrangement presents some awkwardness of expression, nevertheless it gives significance and meaning to the obvious purpose and intention of the General Assembly, which, after all, is the real heart of the statute. *Trust Co. v. Hood, Comr.,* 206 N. C., 268, 173 S. E., 601. Moreover, in dealing with a fiscal system, and more particularly in interpreting a revenue act, "some play must be allowed for the joints of the machine." *M. T. & K. Ry. Co. v. May,* 194 U. S., 267. It is peculiarly the function of the lawmaking body to levy assessments and to devise a scheme of taxation. *Bank v. Doughton,* 189 N. C., 50, 126 S. E., 176.

The constitutionality of section 162, as it appeared in the Revenue Act of 1929, was upheld in *Tea Co. v. Maxwell,* 199 N. C., 433, 154 S. E., 838, and this ruling was affirmed by the Supreme Court of the United States in a memorandum opinion, 284 U. S., 575, on authority of *State Board of Tax Comrs. v. Jackson,* 283 U. S., 527, 73 A. L. R., 1464.

The only change made in the section in 1933 was the addition of the definition of the term "chain store," following the schedule of rates. This enlargement or expansion was clearly made for the purpose of bringing the "Belk" Stores, and others similarly situated, within the purview of the chain-store license tax.

The question then arises whether this application of the statute operates unreasonably or arbitrarily against the plaintiff. *Hans Rees' Sons v. North Carolina,* 283 U. S., 123. We cannot say that it does.

All the advantages and perhaps others accruing from the operation of chain stores as pointed out in the *Jackson case, supra,* and there held to be sufficient to warrant the imposition of a chain-store license tax, would seem to be present here, where there is: singularity of president; similarity of name; standardization of form and method of advertising; commonalty of brand or label; group purchase of merchandise in whole

or in part; uniformity of accounting; common knowledge; general integration, and action by plaintiff as head of the chain in advancing expenses, etc. See *Great A. & P. Tea Co. v. Grosjean,* 301 U. S., 412, 81 L. Ed., 1193; *Fox v. Standard Oil Co.,* 294 U. S., 87; *Liggett Co. v. Lee,* 288 U. S., 517; *Maxwell v. Shell,* 90 F. (2d), 39, *certiorari* denied, 82 L. Ed., 552.

The power of the General Assembly to impose license taxes of the character here in question is undoubted, and the right of classification is referred largely to the legislative will, with the limitation that it must be reasonable and not arbitrary. *S. v. Elkins,* 187 N. C., 533, 122 S. E., 289; *Smith v. Wilkins,* 164 N. C., 135, 80 S. E., 168; *Clark v. Maxwell,* 197 N. C., 604, 150 S. E., 190, affirmed 282 U. S., 811.

The rule is authoritatively stated by *Hoke, J.,* in *Land Co. v. Smith,* 151 N. C., 70, 65 S. E., 641, as follows: "The power of the Legislature in this matter of classification is very broad and comprehensive, subject only to the limitation that it must appear to have been made upon some 'reasonable ground—something that bears a just and proper relation to the attempted classification, and not a mere arbitrary selection.'"

The observations made in *Brown-Forman Co. v. Kentucky,* 217 U. S., 563, would seem to be pertinent: "A very wide discretion must be conceded to the legislative power of the State in the classification of trades, callings, businesses or occupations which may be subjected to special forms of regulation or taxation through an excise or license tax. If the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law."

In *Liggett Co. v. Lee, supra,* it was pointed out that "there is a clear distinction between one owner operating many stores and many owners each operating his own store with a greater or less measure of cooperation voluntarily undertaken," and it was said the Legislature may make this distinction the occasion of classification for purposes of taxation, but it was not there held that the taxation of the voluntary as well as the integrated chain would be in excess of the legislative power. See *Fox v. Standard Oil Co., supra.*

The whole matter is summed up by *Mr. Justice Stone* in the pithy statement that "the equal protection clause does not forbid discrimination with respect to things that are different." *Puget Sound P. & L. Co. v. Seattle,* 291 U. S., 619. For full discussion of the subject and analysis of the authorities, see *Hurt v. Cooper,* 130 Tex., 433, 110 S. W., (2d), 896; *S. c.,* 113 S. W. (2d) (Tex. Civ. App.), 929; *Smith Co. v. Fitzgerald,* 270 Mich., 659, 259 S. W., 352.

It is stipulated in the concluding paragraph of the facts agreed that should liability be found in any respect, the action shall fail. Plaintiff

admits liability to the tax in question for four of the 46 "Belk" Stores, not here in controversy. We think the record supports the judgment imposing liability for the remaining 42. In the circumstances, the judgment of dismissal will be upheld.

Affirmed.

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

DR. VIRGINIA HUMPHREY v. MARY SUE BEALL AND J. F. BEALL.

(Filed 1 February, 1939.)

1. **Deeds § 16—Purchasers of lots in subdivision may enforce restrictive covenants inter se only if there is a general plan for development.**

   A purchaser of a lot in a subdivision restricted by deed from the owner of the subdivision to use for residential purposes may restrain another purchaser by *mesne* conveyances from the common source from violating the residential restrictive covenant applicable to his lot only if there is a general scheme for the development of the subdivision for residential purposes and there is some equality of burden and privilege in regard thereto among the purchasers of lots therein.

2. **Same—Covenants and reservations in deeds for lots sold by developer held to show as matter of law absence of general plan for development.**

   Each deed to lots sold by the developer under restrictive covenants provided that the restrictions therein inserted might be changed at any time by mutual written agreement of the grantor and the owner of the lot therein conveyed, and half of the deeds contained a further provision that nothing therein contained should impose any restriction upon the unsold land of the developer and that the developer reserved to itself the free and unrestricted use and right of alienation as to lots not sold. *Held:* The provisions in the registered deeds constituted notice to the grantee or grantees in all the deeds of said provisions, and the covenants and reservations disclose as a matter of law that there was no general scheme to restrict the lots in the development to residential purposes, and therefore a purchaser of a lot by *mesne* conveyances from the developer may not restrain a purchaser from the common source from violating the residential restrictive covenants applicable to his lot.

APPEAL by defendants from *Ervin, Special Judge,* at 28 March, 1938, Extra Civil Term of MECKLENBURG.

Civil action to enjoin defendants from erecting and maintaining a dry cleaning plant and laundry upon lot adjacent to residence lot of plaintiff in alleged violation of restrictive covenants inserted in deeds

pursuant to an alleged general plan for and development of a subdivision of an area of land known as Dilworth in the city of Charlotte.

Plaintiff owns Lot No. 6 and defendants own the adjoining or south half of Lot No. 7 in Block 35 in a subdivision of land covered by map recorded in Map Book 3, at page 10, in the office of register of deeds of Mecklenburg County, and being a portion of the area known as Dilworth. Plaintiff and defendants, respectively, claim title through *mesne* conveyances from a common source, Charlotte Consolidated Construction Company, which conveyed the title to both Lot No. 6 and the said one-half of Lot No. 7 in said block, by deed dated 4 November, 1925, to B. F. Wellons, which was made subject to building restrictions, among others, that the lots should be used for residential purposes only, in dwellings to cost not less than $12,000, which restrictions should be held to run with and bind the lands to be conveyed and all subsequent owners and occupants thereof, provided, however, that any of such restrictions might be changed at any time and in any manner by and with the mutual written consent of the grantor or its successors, and the owner or owners for the time being of the land conveyed, and "provided further, that nothing herein contained should be held to impose any restriction on the land of the grantor not hereby conveyed."

Plaintiff offered evidence tending to show these facts: The Charlotte Consolidated Construction Company, owning certain lands within the corporate limits of the city of Charlotte, began to develop and sell same as high-class suburban property, known as Dilworth. About the year 1922 the company caused to be prepared and registered in Map Book 3, page 10, in the office of the register of deeds of Mecklenburg County, a map covering and showing the plan for subdividing and laying off into blocks and lots (255 lots) a portion or subdivision of Dilworth. Nearly two hundred of the lots in said subdivision were sold under restrictions that lots should be used for residential purposes only, and that dwelling houses to cost from $4,500 to $12,000, the amount being specified in each case and varying in price with respect to location, should be constructed on any lot. In each deed for all the property fronting on Dilworth Road the restrictions as to residence cost was fixed at not less than $12,000. In each of the deeds for all the lots sold except four said residential restrictions were inserted, and in each it is provided that any of the conditions and restrictions therein contained may be changed at any time and in any manner by and with the mutual consent of the grantor, or its successors, and the owner or owners, of the time being, of the land thereby conveyed. In approximately one hundred and twenty-five of those deeds there is inserted the additional provision that nothing therein contained shall be held to impose any restriction upon

any land of the grantor not thereby conveyed, and further reserving all rights, title, and interest in and control over and the right to alter, change or close up any and all the streets shown upon the map in question which are not contiguous to and not necessary to the full enjoyment of the lot described in the deed. This further reservation is also in the deed from Charlotte Consolidated Construction Company to B. F. Wellons.

In the entire development only four lots have been sold and conveyed in nonconformity to such building restrictions: (1) A lot on McDowell Street on the outer edge of the subdivision, conveyed to J. R. Harris without restrictions except as to members of the white race. (2) The Oasis Temple lot, which is restricted to use either for residential purposes or Shrine Temple or for a church. (3) Lot designated as Scottish Rite lot, which is restricted to Scottish Rite Cathedral, or residential purposes. (4) Lot known as Woman's Club lot, which is restricted to use for residential purposes or for a Woman's Club.

Plaintiff has erected on her lot a residence valued at from $24,000 to $30,000. On lots in the subdivision approximately one hundred and fifty dwellings have been erected in conformity to the residential restrictions contained in the said deeds. Along Dilworth Road in a southerly direction all buildings are residences which cost not less than $12,000, many of them being handsome homes costing from $15,000 to $30,000. Approximately sixty lots "scattered over the development" are unsold, and no written instrument has been registered by the Charlotte Consolidated Construction Company imposing any restriction on the unsold lots. And defendants are about to erect a dry cleaning and laundry establishment on their said lot in alleged violation of the restriction under which it was conveyed by the common grantor.

Defendants admit that they intend to erect and maintain a model laundry and dry cleaning plant on their said lot at an early date unless restrained by the court. They deny, however, that in developing the area under consideration the Charlotte Consolidated Construction Company had a general plan or scheme for development and set up other defenses, and offered evidence in support of their contentions.

The court submitted these issues, which were answered by the jury as follows:

"1. Was the subdivision of the lands of the Charlotte Consolidated Construction Company shown in the platted lots upon the map registered in Map Book 3, at page 10, made by the Charlotte Consolidated Construction Company and the restrictive covenants contained in the deeds from it to purchasers of lots thereof heretofore sold inserted in such deeds pursuant to a general plan or development that the use of

lots in such subdivision should be restricted to residential purposes for the mutual benefit of the Charlotte Consolidated Construction Company and purchasers of lots in such subdivision, as alleged in the complaint? Answer: 'Yes.'

"2. Did the plaintiff purchase Lot No. 6, Block 35, of such subdivision by *'mesne'* conveyance from the Charlotte Consolidated Construction Company, as alleged in the complaint? Answer: 'Yes.'

"3. Did the defendants purchase the southern half of Lot No. 7, Block 35, of such subdivision, with notice that the use of such lot was restricted to residential purposes, as alleged in the complaint? Answer: 'Yes.'

"4. Have such substantial, radical and fundamental changes taken place in such subdivision as to render the lots of the plaintiff and defendants and the other lots in the immediate vicinity thereof, in such subdivision, unsuitable for residential purposes, as alleged in the answer? Answer: 'No.'"

From judgment thereon and for permanent injunction, defendants appealed to Supreme Court and assign error.

Stancill & Davis and Hunter Jones for plaintiff, appellee.
H. L. Taylor for defendants, appellants.

WINBORNE, J. The refusal of defendants' motion for judgment as in case of nonsuit, here assigned as error, present this basic question: Do the covenants and reservations in the deed for lots sold by the developer negative a general plan or scheme for the development of the area of land in question for residential purposes? We are of opinion that as a matter of law the answer is "Yes." The exception is well taken. *Davis v. Robinson,* 189 N. C., 589, 127 S. E., 697.

As a general rule, "the right of grantees from a common grantor to enforce *inter se* restrictive covenants entered into by each with the common grantor is confined to cases where there is proof of a general plan or scheme for the improvement of property, and its consequent benefit, and the covenants have been entered into as part of a general plan to be exacted from all purchasers and to be for the benefit of each purchaser, and the complainant has bought with reference to such general plan or scheme and the covenant has entered into the consideration of his purchase." Vendor and Purchaser, sec. 530; 27 R. C. L., p. 765.

"The fundamental theory upon which these developments are founded is that of equality of burden and equality of privilege; that is to say, each property owner is entitled to the same privilege from the encroachment of undesirable buildings or enterprises, and, therefore, each prop-

erty owner is subjected to the same burden or obligation of doing nothing or permitting nothing to be done to change the essential character of the community." *Brogden, J.*, in *Starkey v. Gardner,* 194 N. C., 74, 138 S. E., 74.

In the present case it is observed that in each deed in which restrictions are inserted, it is provided that at any time and in any manner any of the conditions and restrictions therein inserted may be changed by the mutual written agreement of the grantor and the then owner of the lot conveyed thereby. This provision is notice that the grantee or grantees in any or all of the deeds with the written consent of the Charlotte Consolidated Construction Company may place any kind of building on any lot within the area without right of interference by the owner of any other lot.

It is also observed that in more than half of those deeds there is also inserted the further provision that nothing therein contained shall be held to impose any restriction upon any land of the grantor not thereby conveyed. This provision is notice that the Charlotte Consolidated Construction Company expressly reserves to itself the "free and unrestricted use and right of alienation" of the unsold lots, *Davis v. Robinson, supra,* and may sell without any restriction. The deed under which plaintiff claims contains these covenants. The plaintiff bought with knowledge of them. The plaintiff is charged with notice of the same provisions in the numerous other deeds duly registered.

There is no covenant or other instrument that any future conveyance will contain residential restrictions. The unsold lots are located in various sections of the development. The right to change the restrictions as to lots sold, and the right to sell the unsold lots without restrictions, as above stated, refute the idea of a general plan for residential purposes to be exacted alike from all purchasers, and to be for the benefit of each purchaser.

The plaintiff relies upon the case of *Franklin v. Realty Co.,* 202 N. C., 212, 162 S. E., 199. On the factual situation the decision there is not controlling here.

For these reasons there is error in refusing to grant defendants' motion for judgment as in case of nonsuit, and in granting permanent injunction. The judgment below is

Reversed.

HIRAM WESTBROOK v. THE TOWN OF SOUTHERN PINES, D. G. STUTZ, MAYOR OF SAID TOWN OF SOUTHERN PINES, AND L. V. O'CALLAGHAN, CHAS. S. PATCH, R. L. HART, H. J. BETTERLEY AND E. C. STEVENS, CONSTITUTING THE BOARD OF COMMISSIONERS OF SAID TOWN OF SOUTHERN PINES.

(Filed 1 February, 1939.)

1. Taxation § 4—Fact that library financed wholly from funds other than taxes is included in municipal building does not invalidate bonds.

Defendant municipality, pursuant to a resolution approved by a majority of its qualified voters, proposed to purchase land and construct thereon a municipal building constituting a necessary municipal expense. The municipality proposed to include in said building a public library financed wholly by funds donated by the Federal Government and by private citizens, and which should not in any way interfere with the legitimate use of the property for necessary municipal purposes. *Held:* The validity of the bonds is to be determined by the purpose for which they are issued as appears from the resolutions of its board, and the inclusion of a public library to be financed wholly by donations without aid from funds derived from taxation, does not invalidate the proposed bonds.

2. Same—

The erection, equipment and support of a public library is not a necessary municipal expense, and a municipality may not expend public moneys or pledge its faith and credit therefor without approval of a majority of its qualified electors.

3. Same—Held: Taxpayers should not be precluded from restraining city if it should attempt to expend public moneys for support of library without approval of majority of qualified voters.

Defendant municipality, with the approval of a majority of its qualified voters, proposed to issue bonds for a necessary municipal building. It also proposed, without submitting the question to a vote, to include therein a public library to be constructed and supported wholly by funds donated by the Federal Government and private citizens. *Held:* Decree dissolving the temporary order restraining the issuance of the bonds was proper, but its provisions which might preclude interested taxpayers from instituting suit if the municipality should hereafter undertake to construct, equip or support the library with public moneys, is modified.

APPEAL by plaintiff from *Bivens, J.*, at December Term, 1938, of MOORE.

This is an action to restrain the issuance and sale of certain serial bonds of the town of Southern Pines.

The board of commissioners of said town, by ordinance duly adopted, authorized the issuance of bonds in the maximum sum of $12,000 for the purpose of purchasing land adjoining the post office to be used as a site on which to erect public buildings which the town may legally

erect and for which it might levy an unlimited tax. An election was called and the issuance of the bonds was duly authorized. At a later meeting the town board reduced the total amount of bonds to be sold to $9,000. The cause came on to be heard in the court below on the notice to show cause why the temporary restraining order should not be made permanent. Upon said hearing the court found the facts and, upon the facts found, dissolved the restraining order and dismissed the action. The plaintiff excepted and appealed.

J. Vance Rowe for plaintiff, appellant.
U. L. Spence for defendants, appellees.

BARNHILL, J. The plaintiff admits that the proceedings preliminary to the sale and issuance of the proposed bonds were in all respects regular; that an election was duly had and a majority of the qualified voters of the town voted in favor of the issue and sale of said bonds; and that if the defendants were acting in good faith to acquire said site and erect thereon public buildings of the character provided in the ordinance adopted by said town there could be no question as to the validity of the proposed bonds, which are purportedly being sold "For the purpose of purchasing land adjoining the new post office to be used as a site on which to erect public buildings which the town may legally erect and for which it might levy an unlimited tax." But the plaintiff alleges that the real purpose of the defendants is to acquire the land for the purpose of erecting thereon a public library building, which is not a building of the type specified in the resolutions and ordinances.

The defendants admit that the defendant town has accepted an offer by the Federal Government of a grant to be used in part payment of the cost of erection of a public library building and that it is their purpose to erect said building upon the land to be secured through the use of the proceeds of said bonds, but the defendants assert that the said land is being acquired for the purpose of erecting a municipal building and that the entire lot is necessary for such building, but that it is sufficiently large for the erection thereon of the proposed library building without subtracting from the usefulness or attractiveness of the municipal buildings to be erected, and that the erection of the library building is wholly incidental to the purpose of the defendants in acquiring said site for the location of municipal buildings. The defendants further allege that local citizens have agreed to donate the entire expense, other than the contribution from the Federal Government, incident to the construction of the library building.

The court below found: That the defendants were proceeding in good faith to acquire said property as a site for erection of municipal build-

ings which are required and necessary for the use and ordinary transactions of the business and affairs of said municipality; that the expenditure of the proceeds of said bonds for said purpose is a necessary expense; that the purpose of the defendants to erect thereon a public library building is purely incidental; that the land is sufficiently large to permit the same without subtracting from its usefulness as a site for municipal buildings; that the entire cost of the construction of the library building is to be paid by the Federal Government and private citizens, a substantial part of said contributions having already been made; that the acquisition of said land for the location of necessary municipal buildings constitutes both the initial and ultimate purpose of the defendants in the issuance and sale of said bonds and the acquisition of said site, but as incidental to said purpose of the defendants it is likewise the intention and purpose of the defendants, if permitted to do so, under the judgment and decrees of the court in this cause, to permit the erection on said site of the public library building for the use of the public generally, the cost of said public library building to be wholly paid by individuals and persons other than the defendants; and that the defendants propose to acquire the land for the location of municipal buildings even if it be adjudged that they have no authority to permit the erection of a public library building thereon.

The proceedings for the sale of said bonds are admittedly regular. An election was had and a majority of the qualified voters of the defendant town approved the issuance of the bonds which, as expressed in the ordinances and resolutions and the call for election, are to be issued for the purpose of purchasing land as a site on which to erect public buildings which the town may legally erect and for which it might levy an unlimited tax. It is found by the governing board and by the court below that said land is to be acquired as a site for a municipal building, which constitutes a necessary expense of said municipality. It follows that the issuance and sale of said bonds is a valid exercise of municipal power. That the town authorities contemplate using a portion of said lot as a site for a public library building to be donated to the city does not invalidate the bonds and furnishes no reason for enjoining their issue. Their validity is to be determined by the purpose for which they are issued as appears from the resolutions of the board. *Hightower v. Raleigh*, 150 N. C., 569.

The court below properly dissolved the order restraining the defendants from issuing and selling said bonds. But the judgment contains the further provision: "It is further considered, adjudged, and decreed by the court that this judgment and decree constitutes a final adjudication of all the matters and things alleged in the complaint and involved

in this action under the pleadings filed herein, and it is thereupon considered, adjudged and decreed by the court that the action of the defendants be and it is hereby dismissed as final adjudication of all the matters involved in this action."

The plaintiff alleges in effect that the town authorities have pledged the faith and credit of the town to procure a grant from the Federal Government to be used in the erection of a library building by the town authorities. It further appears by implication, at least, that it is the purpose of the town authorities to support and maintain a public library in the building to be erected by funds donated by individuals and granted by the Federal Government. We do not question the right of the defendants to accept the donation of the cost of a public library building, nor their right to permit the erection of such building upon property owned by the town in such manner and at such location thereon as will not interfere with the legitimate use of the property for necessary government buildings. If, however, the town authorities do not now have in hand donated funds which, when added to the grant from the Federal Government, are amply sufficient to pay for the cost of the erection of the proposed library building, then the application of the defendant to the Public Works Administration of the Federal Government for a grant in fact pledges the faith and credit of the town to the extent of fifty-five per cent of the cost of said building. In the application the liability of the town is not limited to donations received. The obligation is unqualified.

A public library is not a necessary expense. *Twining v. Wilmington*, 214 N. C., 655. (See also ch. 365, P. L. 1933.) The town authorities are without power to pledge the faith and credit of the town to procure a grant for the erection of a public library without a majority vote of the qualified electors, nor to expend public moneys in the equipment, support and maintenance of such an institution. Considering the allegations in the complaint and the counter allegations in the answer, the quoted portion of the judgment might well be interpreted as adjudicating these matters in favor of the defendant.

If the defendants should hereafter undertake to exercise the taxing power in order to comply with its contract with the Federal Government, or if it is the purpose of the defendants to furnish, equip, maintain and support a public library in the proposed building by the use of public funds raised by taxation, the plaintiff herein and other taxpayers should not be precluded from the remedies available to them to prevent such unauthorized exercise of power by the town authorities.

To the end that the rights of the plaintiff and other taxpayers in respect to the future conduct of the defendants in connection with the

matters and things alleged in the pleadings, other than the actual issuance and sale of the proposed bonds and the purchase of said land, may be preserved the quoted portion of the judgment below should be stricken therefrom.

The defendants are entitled to a judgment dissolving the order restraining them from issuing and selling the proposed bonds.

Modified and affirmed.

STATE OF NORTH CAROLINA EX REL. RUTH TAYLOR ROBINSON v. LEON M. HAM, JR., SADIE STERN AND W. W. HAM.

(Filed 1 February, 1939.)

1. Guardian and Ward § 13—

A guardian is not an insurer of loans and investments of guardianship funds, but is required only to act in good faith and in the exercise of due care and diligence.

2. Same—

A loan of guardianship funds on good and sufficient real estate security, within the jurisdiction of the court, is a proper investment.

3. Same—Evidence held insufficient to show lack of good faith and want of due diligence on part of guardian investing funds in mortgage notes.

Plaintiff relator's evidence tended to show that defendant guardian invested guardianship funds in notes secured by deeds of trust, one loan being made to the guardian's uncle and another to a corporation of which the guardian's father and uncle were officers, without evidence that the borrowers were insolvent and without evidence that at the time of the loans the value of the real estate was not sufficient to secure the loans. *Held:* The evidence is not insufficient, considered in the light most favorable to plaintiff, to show lack of good faith or want of due diligence on the part of the guardian in so investing the funds, and *held further*, evidence of the value of one of the lots some years after the loan thereon was made, and at a time when real estate values were at their low of the depression, is no evidence that its value was insufficient to secure the loan at the time it was made.

BARNHILL, J., dissents.

APPEAL by plaintiff from *Bivens, J.*, at April 18, 1938, Civil Term of GUILFORD.

Civil action to recover on guardianship bond for funds of ward received and loaned by guardian upon notes secured by real estate allegedly made carelessly and negligently and in lack of good faith.

Defendant denies material allegation of plaintiff.

The uncontroverted facts are substantially these: Defendant Leon M. Ham, Jr., on 8 April, 1927, qualified in the Superior Court of Guilford County as guardian of Ruth L. Taylor, minor, now Ruth Taylor Robinson, and on 8 April, 1930, he as principal, with defendants Sadie Stern and W. W. Ham, as sureties, executed and delivered a guardian's bond in the penal sum of $2,000.

Defendant guardian received for the benefit of his said ward $1,364.34. On 1 December, 1930, he loaned $294 to F. C. Boyles, his uncle by marriage, taking his note therefor bearing interest at rate of 6 per cent per annum payable semi-annually, due 1 December, 1931, and secured by deed of trust duly executed and registered and conveying lot No. 45 of the Roseway subdivision, Greensboro, N. C. On 7 January, 1931, he loaned $945 to Ham Real Estate Company, a corporation of which his father was then president and said F. C. Boyles, secretary, taking its note therefor bearing interest at the rate of 6 per cent per annum, payable semi-annually, due 7 January, 1934, and secured by deed of trust duly executed and registered and conveying lot of land at Joyner's Corner on Warren Street in Morehead Township, Guilford County, North Carolina.

In report of date 27 January, 1930, guardian sets forth the receipt of $1,045 on 7 January, 1928, loaned to Ham Estate, Inc., the same day, and receipt of interest thereon to 7 January, 1930, and paid to use of his ward, leaving a balance of $1,045. In report of 25 November, 1931, the guardian reports payment of $100 to his ward on court order of 27 January, 1930, leaving a balance of $945, "secured by first mortgage executed by Ham Real Estate Company." This report also shows receipt from Mattie Gray estate the sum of $319.34, from which are deducted items paid to ward and to attorney, leaving a balance of $294, with notation, "first mortgage from F. C. Boyles, December 1, 1930, securing $294." This report bears endorsement: "Audited, approved and ordered filed and recorded. This Nov. 25/31. A. Wayland Cooke, C. S. C." In further reports of 1 April, 1933, 20 July, 1934, and 24 July, 1936, each contains items: "First mortgage secured by Ham Real Estate Co., $945," and "First mortgage secured by F. C. Boyles $294." In these reports there are listed items of interest received to 7 January, 1934, on Ham Real Estate Company loan, and to 1 June, 1934, on Boyles' loan, and paid to or for the use of ward, and for taxes from time to time.

Upon the ward becoming twenty-one years old on 4 January, 1935, she made demand upon the guardian for a settlement. Whereupon the guardian then, and on call of the case for trial below, offered to deliver the said notes and deeds of trust to her, but she has refused to accept same.

Plaintiff further offered witnesses who gave testimony tending to show: That when notified by the clerk to file final report the defendant guardian came in promptly, brought the notes and mortgages with him, discussed with the clerk how best to settle the estate, and on various occasions consulted with the clerk and stated that he wanted to do what was best for his ward under the circumstances; that the guardian came whenever the clerk sent for him; that, while he has not filed final report, the clerk did not advise him to sell the property and do so; that he could not file report until the property had been foreclosed; and, that the guardian informed the ward as to the nature of the loans and to whom made, and consulted with her and her husband about the wisdom of advertising and selling the property, she declining to advise or tell him to sell or not to sell.

Plaintiff further offered testimony tending to show that on 1 December, 1930, as against Lot No. 45 of the Roseway Division, there were street paving, sidewalk, sewer and other assessments, totaling more than $600, payable over a period of ten years, of which $217.72 was past due, but that others refinanced such assessments, and said assessments can now be refinanced by paying ten per cent of the amount due and balance over a period of nine years.

Plaintiff introduced one witness only as to values. He testified in substance that he had no opinion as to the market value of Lot No. 45 on 1 December, 1930, that he was paying no attention to town lots at that time, and that in his opinion the reasonable value of the lot on Warren Street on 7 January, 1934, was about $600; that he did not know the value prior thereto; that the lot is located between two settlements, one occupied by white people, and the other by colored people; that the banks closed in Greensboro about 1930 or 1931; that "in the years 1933 and 1934 we were at the height of the real estate depression. Property values had steadily declined. They reached the bottom about January 1, 1934. . . . Property is greatly increasing in value and I would put a higher price on it today."

At the close of plaintiff relator's evidence, motions of the defendants for judgment as in case of nonsuit were allowed. From judgment in accordance therewith, plaintiff relator appeals to the Supreme Court and assigns error.

Younce & Younce for plaintiff, appellant.
Stern & Stern for defendants, appellees.

WINBORNE, J. Taking the evidence in the light most favorable to plaintiff and giving to her the benefit of every reasonable intendment and reasonable inference to be drawn therefrom, is there sufficient evidence

of lack of good faith and want of due diligence on the part of the defendant guardian in making the loans challenged by plaintiff and in the management of his ward's estate to take the case to the jury? Careful consideration of all the evidence and review of the decisions of this Court impel us to hold in the negative.

It is a settled rule of law that a guardian is not an insurer of loans and investment of guardianship funds. All that sound public policy requires is that he shall act in good faith and in the exercise of due care and diligence. *Deberry v. Ivey,* 55 N. C., 370; *Nelson v. Hall,* 58 N. C., 32; *Sheets v. Tobacco Co.,* 195 N. C., 149, 14 S. E., 355; *Stroud v. Stroud,* 206 N. C., 668, 175 S. E., 131.

A loan of the ward's funds on good and sufficient real estate security, within the jurisdiction of the court, is always a proper investment. 28 C. J., 1142.

By statute, guardians in this State are given power to lend any portion of the estate of their wards, upon bonds with sufficient surety, which they may assign to the ward on settlement with him. C. S., 2308; *Goodson v. Goodson,* 41 N. C., 238; *Cobb v. Fountain,* 187 N. C., 335, 121 S. E., 614.

"As a general rule a guardian may discharge himself at the termination of his trust by turning over to the person lawfully entitled thereto whatever securities he may have taken in good faith as a result of the prudent management of his ward's estate." *Adams, J.,* in *Cobb v. Fountain, supra.*

In *Sheets v. Tobacco Co., supra, Connor, J.,* stated: "An investment of guardianship funds, made by a guardian, may be challenged by the ward or person entitled thereto upon a final settlement, upon the ground that such investment was not made in good faith and in the exercise of due diligence, unless such investment was expressly authorized by statute or by order of court obtained prior to the making of the investment. If the investment was made under statutory authority, or pursuant to an order of court, the guardian cannot be held liable for losses resulting therefrom, in the absence of fraud or gross negligence. In the case of investments not so expressly authorized, the good faith and due diligence of the guardian may be challenged, and if successfully challenged, he will be held liable for any and all losses resulting from the investment. Good faith and due diligence on the part of the guardian, however, will protect the guardian, and the sureties on his bond, from liability for losses."

Applying these principles to the factual situation of the case in hand, we fail to find evidence of bad faith on the part of the guardian, or of his failure to exercise due care and diligence in making the loans and in the management of the ward's estate, as charged by the plaintiff.

The loans were secured by deeds of trust on real estate. There is no evidence that at the time the loans were made the borrowers were insolvent, nor is there evidence that the value of the real estate conveyed as security for the loans was then insufficient security therefor. There is no evidence as to the value of one of the lots at any time. Evidence of value of the other lot in 1934, at the "height of the depression" when the values of land had steadily declined, standing alone, is no criterion for judging values in 1930 and 1931. Nor can we agree that making a loan to the guardian's uncle, and another to a corporation of which his father and uncle were officers, both loans being secured by real estate, nothing else appearing, is evidence of bad faith or lack of due diligence on the part of the guardian. While it is true that as against one lot there is evidence of past due assessments which were prior liens on the lot, the evidence shows that these assessments could be put in good standing by paying ten per cent of the assessment and spreading the remainder over a period of nine years. There is no evidence that at the time the loan was made the value of the lot was not sufficient security for the loan, even after taking into account the amount of the assessment liens. It is appropriate to note, too, that guardian's report on 25 November, 1931, showing these loans, was audited and approved by the clerk of Superior Court.

There is no error in the judgment dismissing the action as in the case of nonsuit.

Affirmed.

BARNHILL, J., dissents.

JOHN LOVE, EMPLOYEE, v. TOWN OF LUMBERTON, EMPLOYER; AND MARYLAND CASUALTY COMPANY, CARRIER.

(Filed 1 February, 1939.)

1. Master and Servant § 40a—

Injuries to an employee are compensable under the Workmen's Compensation Act if they result from an accident which arises out of and in the course of the employment.

2. Master and Servant § 40d—

An "accident" as defined in the Workmen's Compensation Act is an unlooked for and untoward event which is not expected or designed by the injured employee.

3. Same—Evidence that employee got lime in his eye in course of employment held to support finding that injury resulted from "accident."

Evidence that claimant employee got lime in his eye while pouring lime in water in the course of his employment, rubbed his eye with a

handkerchief which had lime on it, causing an infectious condition resulting in the loss of his eye, *is held* sufficient to sustain the finding of the Industrial Commission that the injury resulted from an accident as defined by the Compensation Act.

APPEAL by defendants from *Sinclair, J.*, at October Term, 1938, of ROBESON. Affirmed.

The judgment of the court below, which indicates the controversy, is as follows: "This cause coming on to be heard and being heard by the undersigned judge of the Superior Court presiding at this term upon appeal by the defendants, Town of Lumberton (Employer) and Maryland Casualty Company (Carrier), from the award of the North Carolina Industrial Commission heretofore rendered in this case, and upon the record of this cause certified to this court by said Commission as by law provided, the court adopts the findings of fact as found by the Full Commission, and further finds that the injuries sustained by the plaintiff, John Love, arose out of and in the course of his employment; that he had been engaged in said employment for a great many years and had never sustained any injury in the course of such employment before; and that the cause of the injury was an unusual and unexpected event: It is thereupon considered, ordered and adjudged that the injuries sustained by the said John Love was an accident arising out of and in the course of his employment, causing him to lose his right eye, and the award of the North Carolina Industrial Commission is hereby in all respects affirmed. N. A. Sinclair, Judge Presiding."

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

Johnson & Floyd for plaintiff.

W. C. Ginter and Varser, McIntyre & Henry for defendants.

CLARKSON, J. The question involved: Did the plaintiff sustain an injury by accident arising out of and in the course of the employment, as found by the North Carolina Industrial Commission and affirmed by the court below? We think so.

The defendants in their brief say: "We concede at the outset that the court will not review the evidence, except when it is necessary to determine whether there was any evidence to support a finding of fact. For the sake of this argument, we admit that the findings of fact by the Industrial Commission are binding upon both the plaintiff and the defendants. The question, therefore, arising whether upon the facts as found by the Commission it may be concluded as a matter of law that plaintiff suffered an injury by accident arising out of and in the course of his employment."

In *Conrad v. Foundry Co.*, 198 N. C., 723 (725), is the following: "The Workmen's Compensation Law prescribes conditions under which an employee may receive compensation for personal injury. Section 2 (f) declares that 'injury and personal injury shall mean only injury by accident arising out of and in the course of the employment, and shall not include a disease in any form, except when it results naturally and unavoidably from accident.' The condition antecedent to compensation is the occurrence of an (1) injury by accident (2) arising out of and (3) in the course of the employment. . . . (p. 726). The word 'accident,' as used here, has been defined as an unlooked for and untoward event which is not expected or designed by the person who suffers the injury."

Honnold on Workmen's Compensation, Vol. 1, sec. 85, p. 85, *et seq.*, in part, says: "The word 'accident' refers to the cause of the injury, and is here used in its ordinary and popular sense as denoting an unlooked for mishap or an untoward event which is not expected or designed by the workman himself, a physiological injury as the result of the work he is engaged in, an unusual effect of a known cause, a casualty. It implies that there was an external act or occurrence which caused the injury or death. It contemplates an event not within one's foresight and expectation resulting in a mishap causing injury to the employee. Such an occurrence may be due to purely accidental causes, or may be due to oversight and negligence. It may be due to carelessness, not willful, to fatigue, or to miscalculation of the effects of voluntary action." At p. 281 (note) we find: "It was a personal injury by accident where a dock laborer, who was unloading bran containing grit, got some in his eye, and rubbing it, caused an abrasion, necessitating the removal of the eye. *Adams v. Thompson* (1912), 5 B. W. C. C., 19, C. A." The above is a case in all respects similar to the present action.

Workmen's Compensation Law (Schneider), Vol. 1, 2nd Ed., p. 513, is as follows: "The words 'undesigned' or 'unforeseen' refer to the result produced, and not to its cause. When a man lifts a heavy weight, he intends to do exactly what he does do; nevertheless, if he strains a muscle, or ruptures a blood vessel, the injury is due to accident."

Plaintiff Love testified, in part: "I have charge of putting chemicals in the water. On or about the 6th of July, 1937, I had occasion to put chemicals in the water. I put lime in a bucket and then in a hopper; we call it a feeder; which is an automatic feeder. On this night I went and got my lime to put it in and got up on the platform to put it in, went to pour it over, and the lime flew in my face and got in my eyes. I tried to get it out and went to the bowl we had there and washed my face. It gave me awful pain, commenced after that in the night, com-

menced paining me, just rubbed it, and fooling with it all night, trying to get it out. No one else is at work at the water plant during the night except me. The next morning when Mr. Warwick, the superintendent of the department, came, he said, 'What is the matter with your eye?' I said, 'I got lime in it.' He said, 'Why don't you go and get somebody to wash it out, you go to some of these eye doctors and get it washed out, it is a dangerous contraption to get that thing in there like that.' I went to a doctor."

Dr. Russell S. Beam testified, in part: "Plaintiff told me he got lime in his eye while emptying sack of lime in a hopper and rubbed his eye with a handkerchief which had lime on it. . . . I found nothing on examining his eye after removal that would indicate that it was not a normal eye prior to his injury. . . . I would have to say that the loss of the eye was caused by injury. . . . I am satisfied in my own mind that in all likelihood this trouble was caused by the lime that got in his eye. I don't think there is any doubt about that."

From the evidence we think the Full Commission was justified in finding: "The Full Commission affirms the findings of fact of the hearing Commissioner, and makes the additional finding of fact: That the plaintiff sustained an injury by accident arising out of and in the course of his regular employment on or about July 6, 1937, when he got lime in his right eye, which was the proximate cause of an infectious condition developing in the right eye necessitating the enucleation of same."

The court below "adopts the findings of fact as found by the Full Commission, and further finds that the injuries sustained by the plaintiff, John Love, arose out of and in the course of his employment; that he had been engaged in said employment for a great many years and had never sustained any injury in the course of such employment before; and that the cause of the injury was an unusual and unexpected event."

The court adjudged: "That the injuries sustained by the said John Love was an accident arising out of and in the course of his employment, causing him to lose his right eye, and the award of the North Carolina Industrial Commission is hereby in all respects affirmed." *Slade v. Hosiery Mills,* 209 N. C., 823, and *Neely v. Statesville,* 212 N. C., 365, are distinguishable from the present case.

Plaintiff had been in the employment of the town of Lumberton for about twenty-four years, working seven nights a week, and in all that period was only off his job for less than five days, until the injury in question occurred. A faithful servant, injured in the performance of duty, such as the Workmen's Compensation Act was passed to protect.

We think the evidence plenary to sustain the findings of fact and compensable under the Workmen's Compensation Act.

The judgment of the court below is

Affirmed.

STATE v. GLENN MAXWELL.

(Filed 1 February, 1939.)

1. Homicide § 26—When defendant pleads not guilty, court may not direct jury to find him guilty of murder in the first or second degree, even though defendant himself testifies he shot and killed deceased.

It is error for the court to instruct the jury that they might render one of two verdicts, guilty of murder in the first degree or of murder in the second degree, but that in no event might they return a verdict of guilty of manslaughter or not guilty, even though defendant testifies that he shot and killed deceased, since on defendant's plea of not guilty the presumption of innocence attaches until removed by the verdict of the jury, and the credibility of the testimony is for the jury to determine.

2. Criminal Law § 53c—

The court may not express an opinion as to the weight or credibility of the evidence or as to defendant's guilt. C. S., 564.

STACY, C. J., dissents.

BARNHILL, J., dissenting.

APPEAL by defendant from *Phillips, J.*, at May Term, 1938, of ALLEGHANY. New trial.

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

W. B. Austin, H. A. Cranor, and Trivette & Holshouser for defendant, appellant.

SCHENCK, J. The defendant was convicted of murder in the first degree of Charlie Shepherd and from sentence of death by asphyxiation appealed to the Supreme Court, assigning error.

The defendant testified in his own behalf: "After I started back home I came on back up this way and saw Charlie over there in the garden with his mammy. I had not seen Charlie anywhere or at any time that day. I hadn't seen him before then. I didn't know he was working over there. When I saw him I went over there to ask him about this racket they had and asked him did he hit that boy with an axe, and on the spur of the moment—he never said a word that I could understand, and I took it for granted that he had hit my boy with an axe. I shot him—that is what I done, flew all to pieces—I shot him because he didn't make me no answer. I had not intended to shoot or kill anybody up to this time; never had no intention whatever. Up to this time

me and Charlie had been neighbors and good friends. . . . After the shooting, when I came to myself, I was there in the road, going back toward home. I don't remember how many times I shot. After the shooting I went back up home and left my gun at home."

The following excerpt from the charge is made the basis of an exceptive assignment of error: "But the court charges you, gentlemen of the jury, your verdict will be one of two: Your verdict will be 'guilty of murder in the first degree,' as charged in the bill of indictment, or 'guilty of murder in the second degree,' and in no event will your verdict be 'guilty of manslaughter,' or 'not guilty.' "

We are constrained to sustain this assignment of error. The defendant had pleaded not guilty and the presumption of innocence followed him until removed by the verdict of the jury. While the court may have been justified in instructing the jury that if they found the facts to be as testified by the defendant, or if they believed the testimony of the defendant himself, they could not return a verdict of guilty of manslaughter or of not guilty, the verdict was required to be predicated upon the findings of fact by the jury from all of the evidence in the case—the credibility of the testimony being for the jury to determine. Under our system of trial the judge is prohibited from expressing an opinion as to defendant's guilt.

"Rev. Code, ch. 31, sec. 130 (C. S., 564), provides that 'no judge, in delivering a charge to the petit jury, shall give an opinion, whether a fact is fully or sufficiently proved, such matter being the true office and province of the jury.' This statute is but in affirmance of the Constitution, Art. I, secs. 13-17, and the well-settled principles of the common law, as set forth in *Magna Carta*. The jury must not only unanimously concur in the verdict, but must be left free to act according to the dictates of their own judgment. The final decision upon the facts rests with them, and any inference by the court tending to influence them into a verdict against their convictions is irregular and without the warrant of law. The judge is not justified in expressing to the jury his opinion that the defendant is guilty upon the evidence adduced." *S. v. Dixon,* 75 N. C., 275.

For error assigned there must be a

New trial.

STACY, C. J., dissents.

BARNHILL, J., dissenting: As set out in the statement of facts in the majority opinion, the defendant was sworn and testified in his own behalf. In so doing he admitted that he shot the deceased because he did not make any answer to the defendant's inquiry about trouble be-

tween the deceased and the defendant's boy. Thus, the defendant solemnly admitted in open court under oath that he intentionally shot the deceased.

It has long been the established law of this State that when a killing with a deadly weapon is admitted or established by the evidence, the law raises two presumptions against the slayer: First, that the killing was unlawful, and, second, that it was done with malice; and that an unlawful killing with malice is murder in the second degree. *S. v. Fowler,* 151 N. C., 731; *S. v. Benson,* 183 N. C., 795; *S. v. Walker,* 193 N. C., 489; *S. v. Miller,* 197 N. C., 445; *S. v. Ferrell,* 202 N. C., 475. Likewise, it is now elementary law that when the defendant admits the killing with a deadly weapon and undertakes to reduce the killing to manslaughter or to excuse it altogether on the grounds of self-defense, accident, misadventure, or insanity, the burden is cast upon him to prove to the satisfaction of the jury, the legal provocation that will rob the crime of malice and thus reduce it to manslaughter, or will excuse it altogether.

The defendant admitted the killing with a deadly weapon. Under the foregoing rules of law uniformly followed by this Court this admission made him presumptively guilty of murder in the second degree, at least. He offered no evidence which would rebut the presumption of malice, nor did he offer any evidence of any fact or circumstance which the law recognizes as a legal excuse for a killing. Therefore, the jury could not, on the evidence in this case, return a verdict of "Guilty of manslaughter," or "Not guilty," without violating its oath to return a true verdict upon the evidence. It was the duty of the judge to instruct them as to the law in this respect, and the statement in the charge to the jury that, "In no event will your verdict be 'guilty of manslaughter' or 'not guilty,' " when considered in connection with the charge as a whole, was clearly a statement, as a matter of law, that the defendant had offered no evidence which would rebut the presumption of malice arising upon the defendant's admission and thus reduce the crime to manslaughter; and that the defendant had likewise offered no evidence, which in law, justified or excused the killing. This was a correct statement of the law upon the evidence in this case.

I cannot concur in the statement of the majority opinion that the presumption of innocence followed the defendant until removed by the verdict of the jury. It followed him only up to the time he admitted the killing with a deadly weapon. When this admission was made the presumption of innocence vanished and the burden shifted to the defendant. Had the defendant made the admission by plea or through counsel it would have been recognized and acted upon by the court with the full approval of the law. His solemn admission on the witness stand should not be given less force and effect than an admission made through coun-

sel or by way of plea. Speaking to the subject in *S. v. Miller, supra, Stacy, C. J.*, says: "The prisoner, who testified that he was not drinking on the day in question, tendered a plea of murder in the second degree, but this was not accepted by the State. The appeal, therefore, presents the single question as to whether the evidence tending to show premeditation and deliberation is sufficient to warrant a verdict of murder in the first degree." Thus it was held that a tendered, but an unaccepted, plea of murder in the second degree eliminated any consideration of the evidence with a view to determining whether a verdict of manslaughter or not guilty was permissible.

The credibility of witnesses is not involved. The charge was based upon the admission. Had the State relied solely upon evidence offered by it then an entirely different question would be presented and the charge as given would be erroneous. For, in such instance, it would have been the duty of the court to submit the question of credibility of witnesses to the jury for its consideration and determination. This might likewise be true if the defendant had made conflicting statements as to the shooting. The jury would then have to determine the facts, but here there is no modification, contradiction, repudiation or retraction of his statement that he shot the deceased under the circumstances outlined by him. There is no evidence tending to mitigate or excuse to be considered by the jury.

It is apparent that the defendant offered his testimony to rebut the allegation that the killing was without premeditation and deliberation. No doubt this view was forcefully presented to the jury. In any event, the defendant is not allowed to impeach or discredit his own testimony or the testimony of his witnesses. However, notwithstanding this rule that a defendant is not permitted to impeach his own testimony, this cause is sent back for a new trial, because the judge below did not give the jury the opportunity to say by its verdict that it did not believe or accept the defendant's admission that he killed the deceased with a deadly weapon. It is not the way of the courts to permit a defendant to thus blow hot and cold according to the exigencies of the situation. Having admitted the killing with a deadly weapon he should not now, in this Court, be permitted to urge as error a clearly correct statement of the law based on the defendant's admission; nor to urge as error the failure of the court to give the jury an opportunity to say that he was not telling the truth, and in fact he did not kill the deceased, notwithstanding his admission to that effect.

R. S. CHEEK v. PILOT LIFE INSURANCE COMPANY.

(Filed 1 February, 1939.)

1. Insurance § 27—Under terms of receipt given for payment of two weeks premium, insurance contract was not consummated.

Plaintiff applied for insurance on his infant children, paid the insurer's soliciting agent two weeks premium on the policies, and received a receipt denominated "Binding receipt" in large letters on its face, followed by a notation to "see the reverse side." The reverse side stipulated that if the application was approved by insurer at its home office and the person proposed for insurance is on the date of the receipt alive and in sound health, the insurance should be effective from the date of the receipt. *Held:* Approval of the application by insurer at its home office is a necessary condition precedent to the consummation of the contract, although actual delivery of the policy is not prerequisite, and while insurer may not reject or withhold its approval arbitrarily or unreasonably, even when insured's illness or death has intervened, evidence that it rejected the application because investigation disclosed that the infants were under the minimum weight considered by insurer necessary to make an infant insurable, without any evidence of unreasonable or arbitrary action, justifies insurer's motion to nonsuit in plaintiff's action to recover for the death of one of the infants.

2. Same: Evidence § 39—

Parol representations of the soliciting agent that the policy would be immediately effective upon the payment of two weeks premium and the delivery of the premium receipt is not competent to contradict the written provisions of the receipt that the insurance would not be effective until the application was approved by insurer at its home office.

3. Courts § 2d: Justices of the Peace § 3—

Where plaintiff declares on a contract of insurance in an action instituted in a magistrate's court, he may not contend in the Supreme Court on appeal for reformation of the policy for fraud or mistake, since the magistrate has no jurisdiction of a suit for reformation, and therefore the Superior Court could acquire no such jurisdiction on appeal, its jurisdiction being derivative.

APPEAL by defendant from *Phillips, J.*, at June Term, 1938, of FORSYTH.

This is an action to recover $125.00 alleged to be due on a contract of insurance.

Twins having been born to the plaintiff and his wife 28 February, 1938, W. R. Baines, agent of the defendant, called on plaintiff to solicit an application for insurance on said children. Upon his solicitation, plaintiff made application for a twenty pay life policy on each child. In the application it is represented that the exact weight of the boy baby is seven and one-half pounds and of the girl baby is seven pounds.

Thereupon the agent issued to the plaintiff a receipt, at the top of which is printed in large letters, "Binding receipt," followed by the notation: "See reverse side."

The agent collected the first two weekly premiums on each policy, totaling $1.00. This receipt contains the following provisions:

"If the application is approved by the company at its home office in Greensboro, North Carolina, and if the person proposed for insurance is, on the date of this receipt, alive and in sound health, the person proposed is insured as from the date of this receipt in accordance with the terms and conditions contained or inserted by the company in a policy issued in this particular case. The said sum will thereupon be applied towards payment of the premiums thereon."

"If the application is declined or postponed by the company, no policy of insurance will be issued, and in such event the settlement will be promptly returned to the applicant on the surrender of this receipt."

The plaintiff admitted that this receipt was read to him at the time and that he was thereby advised of its contents; but he asserts that the agent assured him that the children were insured from that date.

The boy baby died 4 March, 1938. The plaintiff reported the death to the defendant and filled out proof of death and filed same with the company.

Upon receipt of the applications, the defendant directed its local agent to make inspections of the children and ascertain the exact weight. Before the investigation was completed and before the application was accepted, or any policy issued thereon, the child died and this action was instituted in the court of a justice of the peace for the recovery of the sum of $125.00, the amount of the policy applied for until the child arrived at the age of six.

In the trial below, under a charge by the court that if the jury believed the evidence and found the facts to be as the evidence tended to show it would be its duty to answer the issue "Yes," the jury answered the issue in favor of the plaintiff. From judgment thereon the defendant appealed.

Elledge & Wells for plaintiff, appellee.
Manly, Hendren & Womble for defendant, appellant.
(I. E. Carlyle, of counsel.)

BARNHILL, J. The "Binding receipt" delivered by the defendant's agent to the plaintiff at the time application for insurance was made and two weekly premiums paid does not constitute a contract of insurance. The terms of the receipt make the consummation of the contract dependent upon the approval of the application by defendant at its home office.

Gardner v. Ins. Co., 163 N. C., 367; *Insurance Company v. Young's Administrator*, 90 U. S., 85, 23 L. Ed., 152; *Hill v. Life and Casualty Insurance Company*, 181 S. E., 104. Speaking to the subject in *Gardner v. Ins. Co., supra*, *Walker, J.*, says: "When properly executed, the binding slip protects the applicant for insurance against the contingency of sickness intervening its date and the delivery of the policy, if the application for insurance is acceptable. If the application is not accepted in the proper exercise of the company's right, and the insurance, therefore, is refused, the binding slip ceases *eo instanti* to have any effect. It does not insure of itself, but is merely a provision against any illness supervening it, if there is afterwards an acceptance of the application, upon which it depends for its vitality." The contract of insurance becomes effective upon approval of the application at the home office and the delivery of the policy is not a prerequisite.

In holding that the binding receipt does not of itself constitute a contract of insurance we do not decide that where a binding slip has been delivered to the applicant the company, in the event of the death or illness of the applicant occurring subsequently, but before the acceptance of the application, may arbitrarily or unreasonably reject or withhold its approval or the approval of the medical director, and thereby avoid its liability, under the clause in the binding slip requiring the approval of the application at the home office. Here, there is no evidence of arbitrary or unreasonable delay. The company directed investigation as to the actual weight of the insured. This investigation in fact disclosed that the weights of the infants were under the minimum considered by the company necessary to make an infant insurable.

In the summons issued the plaintiff does not specifically base his action upon the binding receipt. He merely alleges that the amount is due "By contract." His contention that there was an oral contract of insurance by reason of the statement of the agent that: "If I would pay him a dollar it would put it in full benefit, if I did. He said it would be in effect just as soon as I paid my money," cannot be sustained. This evidence contradicts the written instruments executed by the parties at the time. Furthermore, there is a total absence of evidence of any authority on the part of the local soliciting agent to bind the company by contract of insurance.

But the plaintiff contends that in any event he should be allowed to recover of the defendant by reforming the contract due to a mistake on the part of the plaintiff and fraud on the part of the defendant. This contention is without merit. The plaintiff declares upon the contract—he does not seek a reformation thereof. Should we take that view of the case, then it immediately becomes apparent that the court below was without jurisdiction. The cause was instituted in the court of a

magistrate. The jurisdiction of the Superior Court was derivative. As the justice of the peace had no jurisdiction of any action seeking the reformation of a contract for fraud and mistake, the court below was without authority to try the case upon that theory. This contention seems to be first presented in this Court.

It is stated in the brief for the defendant that "The use of the binding receipt as followed in this case by the defendant company is one of the well recognized insurance methods approved by the law of this and other states." While we are compelled to hold that the law of the case is with the defendant, we do not wish it to be understood that the use of the binding receipt in the form exhibited in evidence has our commendation, or that the statements or representations made by the agent command our approval. We are prone to believe that the methods used are not "Well recognized insurance methods." The binding receipt is misleading and is calculated to deceive those citizens who usually have to resort to industrial insurance for protection. In respect to his use of such receipt in this instance the defendant's agent testified: "The receipt that I have, and which I said I gave him, has at the top of it in big headlines 'Binding receipt.' I tell the people this is something in force right now, subject to the approval of the home office. I tell them that most of the time. It is very seldom I omit it. That is one of the biggest sales talks, that I am selling them something that will give them protection right now. That is what I emphasized to Mr. Cheek." To say the least, that is not a laudable method to pursue in obtaining applications for insurance, and it cannot be regarded as a practice worthy of a great business corporation. *Frances v. Insurance Company,* 106 Pac., 323 (Ore.).

As the plaintiff failed to establish any contract of insurance, the defendant's motion to dismiss as of nonsuit should have been allowed.

Reversed.

ANNE M. PERRY v. R. J. SYKES, WILLIAM SCHOLTES AND BLUE BIRD CAB, INCORPORATED.

(Filed 1 February, 1939.)

1. Appeal and Error § 41—

On appeal from judgment of the Superior Court entered upon appeal from the county court, only exceptions relating to matters which may recur upon a second trial and necessary to a determination of the correctness of the judgment of the Superior Court, will be considered, and the decision of the Supreme Court does not necessarily imply approval or disapproval of exceptions not considered.

2. Carriers § 21a—

Instruction as to the degree of care required of a carrier for the safety of passengers in accord with *Daniel v. R. R.*, 117 N. C., 592, *held* erroneous, the rule as given in *Hollingsworth v. Skelding*, 142 N. C., 246, approved.

3. Negligence § 20—Instruction held for error as placing burden on defendant to show that its negligence was not proximate cause of injury.

An instruction to the effect that if the jury found by the greater weight of the evidence that appealing defendant's evidence did not concur in producing the injury in suit, to answer the issue in defendant's favor, *is held* erroneous as susceptible to the construction that the burden was on defendant to show by the greater weight of the evidence that its negligence did not contribute as a proximate cause to the injury.

4. Torts § 6—Defendant asking no affirmative relief against codefendant may not object to granting of codefendant's motion to nonsuit.

When a defendant simply denies negligence on its part and alleges that the negligence of its codefendant was the sole proximate cause of the injury, and makes no demand for affirmative relief against its codefendant, such defendant is not in a position to complain of nonsuit granted upon motion of the codefendant, upon its contention that it was entitled to keep the codefendant in the case as a joint tort-feasor, from whom it would be entitled to contribution. C. S., 618.

5. Carriers § 21b: Automobiles § 18g—

Evidence of negligence of driver of taxicab, resulting in injury to passenger therein, *held* sufficient to be submitted to the jury.

APPEAL by plaintiff and defendants from *Olive, Special Judge,* at October Term, 1938, of FORSYTH. Affirmed.

The facts pertinent to a determination of these appeals may be stated as follows:

The plaintiff, with her mother, was riding in a cab of the defendant Blue Bird Cab, Incorporated, in the town of Winston-Salem, on the night of 1 July, 1938, going westward on West First Street. As the cab approached the intersection of that street with Marshall Street, a car driven by the defendant Scholtes approached traveling eastwardly on West First Street. At the same time a car driven by the defendant R. J. Sykes approached, going north on Marshall Street, and entered the intersection. The evidence is conflicting as to the order in which the cars came into the intersection and which car hit the other. The plaintiff testified that the Blue Bird Cab was going 38 to 40 miles an hour at the time it went into the intersection and that it had been traveling at a high rate of speed immediately before, to such an extent that she had been severely jolted and had to hang on to the strap. She testified that the Sykes car had entered the intersection before the cab and that the driver of the cab did not slow up, or turn away from the impending wreck into Marshall Street, which he might have done and thus have

avoided the crash, but, on the contrary, speeded up. The Sykes car hit the car driven by Scholtes about the middle of the intersection, driving it against the taxicab, and seriously injuring the plaintiff.

There is evidence tending to show that Sykes disregarded the safety or stop sign at the intersection, and drove into the same without keeping due outlook. The driver of the Blue Bird Cab testified that he did not attempt to turn into Marshall Street because he did not think that the crash, which he saw was imminent, would be so severe as to drive the Scholtes car into his own.

On the trial before Judge Efird in the county court, the plaintiff and the defendant Blue Bird Cab Company took numerous exceptions to the admission and exclusion of evidence to the judge's charge and to the orders during the proceeding.

At the conclusion of plaintiff's evidence, the trial judge allowed a motion for judgment of nonsuit as to the defendant Sykes, and the defendant Blue Bird Cab Company excepted.

There was judgment for the plaintiff, from which the defendant Blue Bird Cab Company appealed. On this appeal, the final hearing was had before Judge Olive at October Term, 1938, of Forsyth Superior Court, and a judgment was rendered which sustained the exceptions of the defendant in part, including the exception to the jury instruction above noted, overruled defendant's motion for nonsuit and its objection and exception to the order of the trial judge dismissing Sykes from the case by judgment of nonsuit, set aside the verdict for errors of law committed during the trial, and remanded the case to Forsyth County court for a hearing *de novo*. From this judgment both plaintiff and defendant appealed.

Fred S. Hutchins and H. Bryce Parker for plaintiff.

Hastings & Booe and Peyton B. Abbott for defendant Blue Bird Cab Company, Inc.

SEAWELL, J. Our present procedure by which two appeals on matters of law or legal inference may be made with respect to cases tried in the county court—first to the Superior Court and thence to the Supreme Court—complicates the business of final decision. If there were three such appeals this court would have much the same difficulty as was presented in Newton's problem to determine the behavior of three moving bodies under the influence of mutual gravitation.

It has been the practice of this Court to deal with the more important features of appeal cases on which the decisions may be grounded, without unnecessary attention to matters which may not recur upon a second trial. The court is intended to be a fountain of justice but not of

expository law. On appeals of this kind we will not undertake to pass upon the exceptions in detail and the affirmation or reversal of the judgment of the Superior Court must not be understood as necessarily carrying approval or disapproval of rulings on exceptions not considered here on the final appeal.

PLAINTIFF'S APPEAL.

Judge Olive, of the Superior Court, was correct in ordering a new trial in the county court.

The trial judge charged the jury:

"The court further instructs you that a common carrier is held to exercise the greatest practicable care, the highest degree of prudence, and the utmost human skill and foresight which has been demonstrated by experience to be practicable. They are so held upon the grounds of public policy, reason, and safety to their patrons."

We think this enhances the duty required of the defendant beyond the measure recognized by well considered opinions of this Court as being sufficient in the transportation of passengers.

This instruction, practically identical with that in *Daniel v. R. R.*, 117 N. C., 592, 23 S. E., 327, is disapproved in *Hollingsworth v. Skelding*, 142 N. C., 246, 248, 55 S. E., 212.

The rule given in *Hollingsworth v. Skelding, supra,* is somewhat less exacting, and goes as far as the present development of the law of negligence seems to demand:

"We doubt if any better definition of the duty of a carrier owes the passenger can be found than that of *Lord Mansfield* in *Christie v. Griggs*, 2 Camp., 29: 'As far as human care and foresight could go, he must provide for their safe conveyance.' In commenting upon this case, Mr. Barrow says: 'It must not be supposed, however, that the law requires the carrier to exercise every device that the ingenuity of man can conceive.' Such an interpretation would act as an effectual bar to the business of transporting people for hire."

Again, the trial judge instructed the jury as follows:

"And the court further instructs you, gentlemen of the jury, if you should find from the evidence, and by its greater weight that any one of these other parties who were involved in this collision was negligent and should further find from the evidence and by its greater weight that that negligence, if you find there was such negligence, was a proximate cause of the collision, *and should further find from the evidence and by its greater weight that the negligence on the part of the defendant,* if you find that there was such negligence, *did not concur with the negligence of any one of these other parties,* the court instructs you under those conditions you would answer this issue 'No.'"

This is open to the objection that the jury may have construed it to mean that the burden was on the defendant to show by the greater weight of the evidence that its negligence did not contribute as a proximate cause to plaintiff's injury.

On plaintiff's appeal the judgment of Judge Olive in ordering a new trial is

Affirmed.

DEFENDANT'S APPEAL.

There are two exceptions of the defendant Blue Bird Cab, Inc., which demand attention:

The first is to the judgment of nonsuit dismissing the defendant R. J. Sykes from the case at the close of plaintiff's testimony. Without considering its propriety in the abstract, we do not think the defendant, under its pleading, is in position to resist it.

The defendant does not contend that, ordinarily, a nonsuit cannot be had at the close of plaintiff's evidence, when it is insufficient to go to the jury. A defendant cannot be kept in the case in the mere capacity of a scapegoat, performing no other useful function. But the appealing defendant insists that it had the right to keep Sykes in the case as a joint tort-feasor, from whom it would be entitled to contribution under C. S., 618 (Michie's 1935 Code). The answer simply denies negligence on the part of the Blue Bird Cab Company, and alleges that the negligence of Sykes was the sole proximate cause of the injury. The answer makes no demand for affirmative relief, and is insufficient to support the exception. *Walker v. Loyall,* 210 N. C., 466, 187 S. E., 565; *Ballinger v. Thomas,* 195 N. C., 517, 142 S. E., 761.

On this defendant's exception to the failure of the trial judge to sustain its motion for judgment of nonsuit in its own behalf, and to Judge Olive's judgment sustaining the trial court, we think there was evidence of negligence on the part of defendant, which was properly submitted to the jury.

On defendant's appeal, the judgment of the Superior Court is

Affirmed.

CHARLES R. STRAYHORN v. WYLANTA R. AYCOCK.

(Filed 1 February, 1939.)

1. Insurance § 36a—

A policy payable to insured's estate, nothing else appearing, vests upon delivery in insured, and upon his death, in his personal representative, who may collect same only in her representative capacity.

2. Executors and Administrators § 15a—Claim of funds from insurance policy payable to the estate is a claim against the estate.

Claimant contended that he took out and paid the first premiums on a policy of life insurance on his brother to secure sums advanced for his brother's education, that by mistake his brother's estate was named beneficiary instead of himself, that he surrendered the policy for collection to his brother's executrix. *Held:* The executrix could collect the proceeds of the policy only in her representative capacity, and the claim constitutes a claim against the estate and not against the executrix personally.

3. Executors and Administrators § 19—Action against estate for proceeds of insurance funds held barred by laches.

This action was based upon plaintiff's claim to the proceeds of an insurance policy payable to the estate, plaintiff contending that the policy was taken out by him to secure him for funds advanced testator, and that he turned the policy over to the executrix for collection under an agreement with her to collect same and pay the proceeds of the policy to him. It appeared that the executrix used none of the funds personally, but expended same in payment of debts of the estate, and that this action was not instituted until some fourteen years after testator's death, plaintiff claiming disabilities preventing the bar of the statute. *Held:* The rights of creditors having intervened, the record discloses conduct on the part of the plaintiff barring the action for laches under the maxim that equity aids the vigilant, not those who have slept upon their rights.

4. Trusts § 15—Parol trust fails upon failure of proof that alleged constructive trustee received benefit of funds.

The evidence considered in the light most favorable to plaintiff tended to show that he delivered an insurance policy payable to the estate to the executrix under an agreement that she would collect same and turn the proceeds over to him, plaintiff claiming an equitable right in the proceeds under his contentions that he took out the policy and paid the first premiums thereon to secure him for money advanced to his brother, the insured. The evidence tended to show that the proceeds of the policy were used to pay creditors of the estate, and there was no evidence that the executrix used any of the funds personally. *Held:* Proof of a parol trust fails, and plaintiff may not recover same against the executrix in her individual capacity.

APPEAL by defendant from *Parker, J.*, at May-June Term, 1938, of DURHAM.

Civil action to recover proceeds of life insurance policy on the life of, and payable to the estate of Isaac R. Strayhorn, deceased, allegedly collected upon parol agreement of defendant to collect and pay over same to plaintiff for whose alleged benefit the policy was issued.

Isaac R. Strayhorn, younger brother of plaintiff, and former husband of defendant, died 3 September, 1923, in Nice, France, as result of injuries received in wreck of public bus in which he and his wife were traveling. He left a last will and testament in which, after directing payment

of his debts, he gave all his property to his wife, the defendant, and named her as executrix. At time of his death, Policy No. 31980 of insurance for $1,000, issued by Jefferson Standard Life Insurance Company in 1913, payable to his estate, was in effect.

Evidence introduced by plaintiff tends to show: That he advanced to his brother, Isaac R. Strayhorn, for his college education approximately $2,000; that during Isaac's senior year in college plaintiff had said policy of insurance taken out for his protection; that he received the policy from insurance company and, without reading it, filed it in his safe in the office of clerk of Superior Court of Orange County, N. C., which position he then held; that he paid the premiums for three or four years until Isaac "got on his feet"; that the policy remained in said safe until after the death of Isaac R. Strayhorn; that, upon writing to the insurance company with respect to paying the insurance, he was informed that the policy was payable to the estate of insured and that the company would only make payment to proper representative of the estate; that this was the first information or knowledge he had that he was not named as the beneficiary; that in November, 1923, after the body of his brother was brought home and buried, he told defendant the circumstances under which he had taken out the policy; that he could not collect it; that he was advised that the only way he could collect would be through and by the executor, and that he said to her: "Wylanta, I would like for you to collect this money now, and turn it over to me because I took it out on Ike to help him reimburse me for money spent on him for his education," and that she said: "Charles, I will be glad to do it"; that he went off and had no further conversation with her, but in a few days from Hillsboro, N. C., wrote her a letter in which he said, in part: "I enclose herewith the Jefferson Standard Life Insurance Company policy for $1,000 about which I was speaking to you the other day. Isaac was indebted to me in sum of about $2,000 for his education, for which he had promised to reimburse, however I never took any note from him or had him to secure me in any way, believing that he would some day be financially able to meet all his obligations, inasmuch as I had great faith in his ability and his possibilities as a lawyer. If in your opinion the above is a true statement, and the proceeds of Isaac's estate are sufficient to meet his obligations, I would be glad to talk the matter over with you as I am sure we can come to a satisfactory adjustment of the same"; that he filed no claim with defendant other than this; that in December, 1924, he suffered a nervous breakdown and was confined to his room almost continuously from then until two years ago, except for time he was in Tucker Sanitarium at Richmond; that he didn't get out of doors for eleven years and did no work of any kind during that period until July, 1937; that he made no further demand

upon her for payment until he had his attorney write letter 13 September, 1937, in which there was set forth a rehearsal of plaintiff's contention of the circumstances under which the policy of insurance was issued and of the alleged promise of defendant to collect same for plaintiff, and of her failure to do so, with demand for payment.

On cross-examination plaintiff testified: That he guessed he had changed his tune, and now claims that he has security; that his recollection now, fourteen years later, may be better than it was in 1923; that he is unable to explain statements in his letter of November, 1923; that he does not know why he has waited so long to bring this lawsuit.

Defendant denies that plaintiff claimed the policy of insurance was taken out for his benefit, denies any promise to collect insurance for plaintiff, denies that plaintiff filed any claim against the estate, and pleads the 7-year statute of limitations, C. S., 438, the 12-months statute of limitations, C. S., 101, and the statute of frauds, C. S., 987, in bar of plaintiff's right to recover.

Defendant introduced in evidence, among others, these portions of plaintiff's complaint: "That plaintiff did not file with defendant as administratrix for the amount due him by his brother, the defendant's husband," and "That on August 2, 1925, the defendant filed a final report as executrix of the estate of her deceased husband which showed the total disbursements to be $1,831.02, which left a net deficit after deducting the receipts of $811.02, which she stated in her report had been paid from her own private funds."

Defendant further offered evidence tending to show: That in due course she filed inventory and annual and final accounts and same were duly recorded; that in inventory she listed as an asset of the estate "life insurance policy No. 31980, issued by Jefferson Standard Life Insurance Co. on life of Isaac R. Strayhorn payable to his estate for $1,000"; that in her annual report and final account as executrix she listed as receipts $1,012.80, specifying as part thereof the $1,000 from the said insurance policy, and showed disbursements in approximately the sum of $811.02 more than she had received; that she paid debts of the estate from the estate funds as long as same lasted and then, as a matter of pride and out of respect for her husband, from her own private funds; and that final report was audited and approved by the clerk on 11 August, 1926.

The case was submitted on these issues, which the jury answered as follows:

"1. Did the plaintiff take out a policy of life insurance in the sum of $1,000 with the Jefferson Standard Life Insurance Company on the life of Isaac Strayhorn in November, 1913, to protect himself for advances made to Isaac Strayhorn while in college, with instructions to the agent that it should be made payable to himself, and by mistake it was made

payable to the estate of Isaac Strayhorn, and did the plaintiff pay the annual premiums on said policy for first four or five years only? Answer: 'Yes.'

"2. After Isaac Strayhorn's death and after the defendant had qualified as executrix of his estate, did the plaintiff and the defendant enter into an agreement that the plaintiff would turn over the said life insurance policy on the life of Isaac Strayhorn for $1,000 to the defendant and that the defendant would collect the same and pay it over to the plaintiff? Answer: 'Yes.'

"3. Is the plaintiff's action barred by the statute of limitations? Answer: 'No.'

"4. In what amount, if any, is the defendant indebted to the plaintiff? Answer: '$1,000.00.' "

From judgment thereon defendant appealed to the Supreme Court, and assigns error.

S. M. Gattis, Jr., and R. O. Everett for plaintiff, appellee.
Guthrie & Guthrie for defendant, appellant.

WINBORNE, J. Careful consideration of the entire record on this appeal leads to the conclusion that the court below erred in refusing to allow motions for judgment as in case of nonsuit, made by defendant in apt time, to which exceptions are preserved, and here assigned as error.

While plaintiff states his alleged cause of action against the defendant as an individual, the proof shows that in dealing with her with respect to the alleged agreement to collect on the insurance policy and pay over the proceeds to him, he, of necessity, dealt with her in her representative capacity as executrix of the last will and testament of the insured. The policy, on its face and nothing else appearing, being payable to the estate of the insured, as soon as delivered vested in him and "like any other chose in action became an integral part of his estate, subject to every rule of property known to the law," *Burton v. Farinholt*, 86 N. C., 260, and, upon his death, vested in the executrix, *Price v. Askins*, 212 N. C., 583, 194 S. E., 284; *Linker v. Linker*, 213 N. C., 351, 196 S. E., 329, in which capacity only had she the right to make the collection. When she collected, she received the money as executrix. Rights of creditors then intervened, and if plaintiff had superior rights the way was then open to him to assert them in orderly and legal procedure. Having had years of experience as clerk of Superior Court in supervising and handling of estates and trust funds, he must have known that defendant as an individual had no legal right to collect the proceeds of the insurance policy and pay them over to plaintiff. If she had

agreed to do so, he would have been a party to the wrong, and could not take advantage of it.

If it be conceded that plaintiff had an equitable interest in the policy, and that the conversation between him and defendant transpired as stated by him, and that the policy was delivered to defendant in consequence thereof, taking the evidence in the light most favorable to plaintiff and giving to him the benefit of every reasonable intendment and reasonable inference to be drawn therefrom, the most that appears is that plaintiff appointed the defendant his agent to collect the policy and pay over the money to him. There is no evidence that she, in her individual capacity, collected or received any of the proceeds of the policy. Hence, proof of parol trust fails.

In any event, the conduct of the plaintiff portrayed in this record manifests such laches as would bar the action. Equity aids the vigilant, not those who have slept upon their rights.

The judgment below is

Reversed.

MRS. E. W. WOOTEN, ADMINISTRATRIX OF EDGAR WALLACE WOOTEN, DECEASED, V. SETH L. SMITH AND MRS. SETH L. SMITH.

(Filed 1 February, 1939.)

1. Automobiles § 12c—Statute requires that speed at intersections shall be reduced to speed that is reasonable under the circumstances.

Under the provisions of ch. 311, Public Laws of 1935, which repealed former statutes relating thereto, a person driving a car in a residential district is under duty to reduce his speed below the *prima facie* limit of 25 miles per hour in approaching and crossing an obstructed intersection to such speed as is reasonable under the circumstances, and to keep a proper lookout to avoid a collision.

2. Automobiles § 18g—Evidence held for jury on question of whether driver exercised due care in traversing intersection.

The evidence tended to show that defendant driver was operating the car at a speed of twelve to fifteen miles per hour in a residential district and had entered an obstructed intersection when plaintiff's intestate, who was riding a bicycle along the intersecting street, ran into the side of the car, and died as a result of the collision. *Held:* Viewing the evidence in the light most favorable to plaintiff, the evidence is sufficient to overrule defendant's motions to nonsuit, since whether defendant driver, under all the surrounding circumstances, failed to measure up to the duty of operating the car at a reasonable speed and of keeping a proper lookout to avoid a collision, as required by statute, is for the determination of the jury.

3. Same—Evidence held not to disclose contributory negligence barring recovery as a matter of law.

Plaintiff's intestate was fatally injured in a collision between a bicycle which he was riding and an automobile driven by one of defendants. The evidence tended to show that the collision occurred at an intersection in a residential district, that the automobile was first in the intersection, and that the bicycle hit the left side of the car. The evidence disclosed that the intersection was obstructed by a retaining wall and shrubbery. *Held:* The evidence, considering the fact that intestate's view was obstructed, does not disclose contributory negligence on his part as a matter of law.

4. Automobiles § 18h—

Instruction that statute required motorist to operate car at intersection in residential district at a speed not exceeding 10 miles per hour, *held* error.

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

BARNHILL and WINBORNE, JJ., concur in the opinion of STACY, C. J.

APPEAL by defendants from *Sinclair, J.*, at May Term, 1938, of COLUMBUS. New trial.

Action for damages for injury and death of plaintiff's intestate alleged to have been caused by a collision between a bicycle on which he was riding and defendants' automobile, negligently driven by defendant, Mrs. Seth L. Smith. The collision occurred at the intersection of Madison and Williamson Streets in the town of Whiteville, North Carolina.

Upon issues submitted to the jury, there was verdict for the plaintiff, and from judgment in accord therewith, defendants appealed.

Greer & Greer and Varser, McIntyre & Henry for plaintiff, appellee.

Tucker & Proctor, Irvin B. Tucker, Edward K. Proctor, and I. B. Tucker, Jr., for defendants, appellants.

DEVIN, J. The appellants' principal assignments of error relate to the denial of their motion for judgment of nonsuit, and to exceptions noted to certain instructions given by the trial judge in his charge to the jury.

1. Briefly stated, the evidence offered by the plaintiff tended to show that on 1 March, 1936, about 2:00 o'clock p.m., plaintiff's intestate, a bright boy of fourteen, was riding his bicycle proceeding southward on Madison Street in Whiteville. The boy was on the west side of the street (which was a north and south paved thoroughfare and State Highway thirty feet wide from curb to curb), and was approaching the intersection of Williamson Street (a paved east and west street) when defendants' automobile, driven by defendant, Mrs. Seth L. Smith, came

out of Williamson Street, proceeding eastwardly into the intersection, and a collision between the bicycle and automobile occurred there, resulting in the death of plaintiff's intestate.

It was also in evidence that the lot on the northwest corner of the intersection had a retaining wall on the Madison Street side three and a half feet high, and that the lawn sloped back westwardly to a maximum height of five and a half feet. Williamson Street "goes up-grade" from Madison Street. Between the paved sidewalk and the street curb on Madison Street, in front of this lot, were several large shrubs, three to seven feet tall. Defendants' automobile was being driven at a speed of twelve to fifteen miles per hour. After the collision there were discovered dents on the door and fender on the left side of defendants' automobile. There was no evidence of a town ordinance or any regulation by local authorities or by the State Highway and Public Works Commission with reference to this intersection.

Without undertaking here to recite the evidence in detail, it would seem from the description of the unfortunate occurrence given by the plaintiff's only eye-witness that the automobile was first in the intersection and that the bicycle approaching from the left struck the automobile on its left side, giving rise to the inference that the driver of the automobile had the right of way, under the rule prescribed by Public Laws 1927, ch. 148, sec. 18.

In order to determine what duty, if any, the driver of defendants' automobile, under the circumstances of this case, in approaching the street intersection from Williamson Street, owed to the rider of a bicycle on Madison Street, it is necessary to examine the statutory driving regulations with reference to intersections of highways.

The driving regulations of C. S., 2616, requiring the driver of an automobile approaching an intersecting highway, when the view was obstructed, to give a timely signal and to reduce speed to ten miles per hour, were superseded by the provisions of ch. 272, Public Laws of 1925, wherein the speed limit of automobiles approaching and entering an intersection of highways, when the view was obstructed, was increased to fifteen miles per hour. This provision was substantially reënacted in the Uniform Motor Vehicle Act of 1927, Art. 2, sec. 4, and all laws or clauses of laws in conflict were expressly repealed. Thus the law remained until the amendatory act of 1935.

By ch. 311, Public Laws of 1935, the speed restrictions contained in Art. 2, sec. 4, of the Uniform Motor Vehicle Law of 1927 were repealed, and the following pertinent regulations, in force at the time of the injury here complained of, were substituted in lieu thereof:

"(a) No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions then existing."

"(b) Where no special hazard exists, the following speeds shall be lawful, but any speed in excess of said limits shall be *prima facie* evidence that the speed is not reasonable or prudent and that it is unlawful. . . . 2. Twenty-five miles per hour in any residence district."

"(c) The fact that the speed of a vehicle is lower than the foregoing *prima facie* limits shall not relieve the driver from the duty to decrease speed when approaching and crossing an intersection, when approaching and going around a curve, when approaching a hill crest, when traveling upon any narrow or winding roadway, or when special hazard exists with respect to pedestrians or other traffic or by reason of weather or highway conditions, and speed shall be decreased as may be necessary to avoid colliding with any person, vehicle, or other conveyance on or entering the highway in compliance with legal requirements and the duty of all persons to use due care."

The act of 1935 further provides "that all laws and clauses of laws in conflict with the provisions of this act are hereby modified to conform to this act."

In view of these statutory driving regulations and the duty thereby imposed, considering the evidence in the light most favorable for the plaintiff, as we must do on a motion for nonsuit, we are unable to hold that there was no evidence of negligence on the part of the defendants. The duty to exercise due care in approaching and entering an intersection of highways with the driver's view obscured to some extent by the shrubbery, required that the automobile be operated at a reasonable speed and that a proper lookout be kept to avoid collision with another vehicle approaching the intersection, and whether under all the surrounding circumstances the defendants failed to measure up to that duty, and thereby proximately caused the injury complained of, must at last be referred to the jury for its determination of the facts, under the proper instructions from the court. *Hobbs v. Mann,* 199 N. C., 532, 155 S. E., 163. The evidence of the presence of the shrubbery and the retaining wall, as tending to interfere with the view of plaintiff's intestate, under the rule laid down in *Perry v. R. R.,* 180 N. C., 290, 104 S. E., 673, and *Goff v. R. R.,* 179 N. C., 216, 102 S. E., 320, would seem to prevent the granting of a nonsuit on the ground that contributory negligence on the part of plaintiff's intestate was affirmatively established by plaintiff's evidence. *Lithograph Corp. v. Clark,* 214 N. C., 400; *Cole v. Koonce,* 214 N. C., 188.

2. The defendants duly noted exception to the judge's charge to the jury in that in stating the elements constituting negligence, under the first issue, he charged the jury under C. S., 2616, that the law required the driver of an automobile in approaching and traversing an intersecting highway "to operate it at such speed not to exceed ten miles an hour."

In view of the amendments to statutes hereinbefore fully set out, and considering the law with respect to speed at intersections of highways in force at the time of the injury, and in accord with the decisions of this Court in *Fleeman v. Coal Co.*, 214 N. C., 117; *Woods v. Freeman*, 213 N. C., 314; and *Sebastian v. Motor Lines*, 213 N. C., 770, this instruction must be held for error, entitling the defendants to a new trial. *Williams v. Hunt*, 214 N. C., 572. The decision in *Kelly v. Hunsucker*, 211 N. C., 153, 189 S. E., 664, cited by plaintiff, may not be held as controlling in this case.

Since the case goes back for another trial, we deem it unnecessary to discuss other exceptions noted by the defendants at the trial and brought forward in their assignments of error.

New trial.

STACY, C. J., concurring in part and dissenting in part: With the ruling on the exception to the charge, there is no debate. This is correct under the decisions cited.

Unfortunate and distressing as the accident in this case was, a careful perusal of the record leaves me with the impression that the exception addressed to the refusal of the court to dismiss the action as in case of nonsuit should likewise be sustained, if not upon the principal question of liability, then upon the ground of contributory negligence. *Powers v. Sternberg*, 213 N. C., 41, 195 S. E., 88; *Davis v. Jeffreys*, 197 N. C., 712, 150 S. E., 488. Plaintiff's intestate's negligence, in order to bar a recovery, need not be the sole proximate cause of the injury. It is enough if it contribute to the injury. *Wright v. Grocery Co.*, 210 N. C., 462, 187 S. E., 564.

BARNHILL and WINBORNE, JJ., concur in this opinion.

J. FRANK TESH v. C. D. ROMINGER.

(Filed 1 February, 1939.)

1. Pledges § 2—

A provision in a note that the collateral therewith deposited may be held by the payee to secure other indebtedness of the maker to the payee, due or to become due, is valid.

2. Pledges § 3—

A person claiming that property of another is subject to a pledge in his favor has the burden of establishing that fact.

3. Same—

A person claiming that collateral pledged as security for a note is also security for other obligations of the maker, has the burden not only of establishing such fact, but upon tender by the maker of the amount due on the principal note, has the burden of proving the status of such other obligations, that they are unpaid and the amount due thereon.

4. Same—

Where the pledgee pleads ownership of the stock pledged as security and denies the right of pledgor to redeem, tender of payment by the pledgee is unnecessary and is deemed waived.

5. Pledges § 2—

The pledgee holds the security pledged in trust, first for himself, and then for the pledgor, and the pledgor has the legal right to redeem the security pledged upon payment of the debt.

6. Pledges § 3—Where pledgor offers evidence of ownership of security pledged, and tender is waived, nonsuit is erroneous.

Plaintiff's evidence tended to show that certain stock, subject to the liens of the pledgee bank, was allotted to him in bankruptcy proceedings as a part of his personal property exemption, that defendant obtained the note and security pledged to the bank by assignment, that plaintiff had tendered defendant the amount due on the note and demanded redemption of the stock, which tender defendant refused. Defendant contended that he purchased from the bank other notes executed by plaintiff which other obligations were secured by the stock under the terms of the pledge to the bank, pleaded ownership of the stock and denied plaintiff's right to redeem. *Held:* Even conceding plaintiff's evidence sufficient to establish that the other obligations were outstanding and were secured by the stock pledged, the plea of ownership and denial of the right to redeem waived tender of payment of such other obligations, and it was error to sustain defendant's motion to nonsuit, plaintiff being entitled to redeem the stock upon payment of the debts secured thereby.

APPEAL by plaintiff from *Sink, J.*, at September Term, 1938, of FORSYTH.

Civil action for recovery of corporate stock or for damage for conversion thereof.

Plaintiff alleges that some time in 1936, by assignment by the First National Bank of Winston-Salem, defendant acquired possession of 25 shares of stock in the Rominger Furniture Company, property of plaintiff, which had been previously pledged to said bank as security for his note in the sum of $200; that prior to such assignment the personal obligations of the plaintiff on the said note had been discharged by the bankruptcy court and said stock had been allotted to him by the trustee in bankruptcy as a part of his personal property exemption; and that though on 21 March, 1936, he tendered cash payment of the note, defendant refused to accept same and return the stock, stating that it was useless for the plaintiff to make such tender because he, the defend-

ant, would never surrender the stock to the plaintiff under any circumstances; that plaintiff is entitled to possession thereof; and that the value of same is $5,000.

Defendant admits possession of the stock, tender of $200 and demand for surrender of the stock, and that he did not and does not intend to surrender the stock to plaintiff. Defendant further avers purchase of the stock; that the referee in bankruptcy ordered that the collateral securing the note which had been purchased by him be transferred and assigned to him, free and clear of the claims of the bankrupt or the bankrupt's estate, from which order no appeal was taken; and that the plaintiff is bound thereby and is estopped to assert any claim to the stock.

Plaintiff offered evidence tending to show substantially these facts: On 8 May, 1935, plaintiff executed and delivered to the First National Bank of Winston-Salem, or order, his promissory collateral note in the sum of $200 to mature on 6 August, 1935, to which was attached and pledged as security Certificate No. 23 for 25 shares of Rominger Furniture Company stock. This note provides, among other things, that upon failure of the maker to perform any of the obligations therein set forth the bank is given power and authority to sell, assign and deliver the whole or any part of the collateral at public or private sale, at the option of the bank, and if at private sale, no notice thereof shall be given either of the parties thereto; and it is therein agreed that if the maker "shall incur any other liability or enter into any other engagement with said bank while said bank is holder of either the original or substituted collateral, said collateral shall be held by said bank as security for any and all such liability or engagement with said bank upon the terms and conditions hereinbefore set forth, and in the event of sale, the net proceeds derived therefrom may be applied either on this note or any other of my liabilities to said bank as its officers or any one of them may elect. After deducting all costs and expenses of the sale and delivery of said collaterals or any part thereof, the said bank is hereby authorized to apply the residue of the proceeds of such sale or sales so made to the payment of any or all of the liabilities above mentioned as said bank may elect, returning the surplus, if any, to the undersigned, and the undersigned agrees to be and remain liable for any deficiency."

The note bears this endorsement: "Assigned and endorsed without recourse pursuant to a written contract dated 17 March, 1936," signed First National Bank, by F. G. Wolfe, Cashier.

Plaintiff introduced in evidence the written contract dated 17 March, 1936, by which the bank sold, transferred and assigned to defendant not only the said note secured as aforesaid, but two other notes: One dated 30 June, 1935, executed by J. F. Tesh and Nina E. Tesh for $1,550,

payable thirty days after date; and the other dated 10 July, 1935, executed by J. F. Tesh for $500, secured by 12 shares of Security Bank Building and Loan stock, together with "every right the said bank may have under pledge contracts set forth in the notes above referred to, and do hereby transfer and assign to C. D. Rominger all collateral pledged as security of said notes with all rights of every nature that the said bank may have . . . without recourse . . . of any nature whatever."

On 7 October, 1935, plaintiff was adjudged bankrupt in the District Court of the United States of the Middle District of North Carolina. On 12 November, 1935, there was designated and set apart to him "as his own property under the provisions of the acts of Congress relating to bankruptcy" certain personal property of the value of $499.99, including "25 shares of Rominger Furniture Company stock, subject to various liens in favor of the First National Bank of Winston-Salem" at valuation of $5.00.

On 29 February, 1936, plaintiff received his discharge in bankruptcy.

Plaintiff further offered evidence tending to show that on 21 March, 1936, $207 was due on said note, and that he made tender of $225 in cash to defendant and also to his attorney in payment of the note, but that defendant refused the tender and to surrender the stock and informed plaintiff that "he wasn't going to give up the stock" and "there was not any need to make the tender"; and that at that time the stock had a fair market value of $5,000.

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

Edward F. Butler and Harvey A. Lupton for plaintiff, appellant.
Parrish & Deal for defendant, appellee.

WINBORNE, J. Upon the facts presented in the record, we hold that there is error in allowing motion for judgment as in case of nonsuit.

There is a recognized rule of law, reflected in the decisions of this Court, that a provision in a note that the collateral therewith deposited may be held by the payee to secure other indebtedness of the maker to the payee, due or to become due, is valid. *Norfleet v. Ins. Co.,* 160 N. C., 327, 75 S. E., 937; *Milling Co. v. Stevenson,* 161 N. C., 510, 77 S. E., 676. See, also, annotations, 87 A. L. R., 615.

Where it is admitted, or where there is evidence tending to show, that property is owned by another, one who claims that it is subject to a pledge in his favor has the burden of establishing that fact. 49 C. J., 908, Pledges, sec. 31; *Brimmer v. Brimmer,* 174 N. C., 435, 93 S. E., 984.

Upon application of these principles to the case in hand, there being evidence tending to show that the plaintiff is the owner of the pledged stock subject to the pledge of it as security for the $200 note, if defendant claim that the stock be held by him as collateral security to "other obligation," as described in the collateral note, the burden of proof with respect thereto is upon the defendant.

In the present state of the case, while it appears from plaintiff's evidence that on 17 March, 1936, along with the $200 note of plaintiff and collateral security therefor, Rominger Furniture Company stock, the First National Bank of Winston-Salem also held and assigned to defendant two other notes of which the plaintiff was sole or co-maker, taking the evidence in the light most favorable to plaintiff and giving to him the benefit of every reasonable intendment and reasonable inference to be drawn therefrom, as we must do on motion for nonsuit, C. S., 567, it does not appear that the other notes were in existence and remained unpaid at the date of the institution of the action or at the time of the trial. The burden is upon the defendant to prove the status at that time, that the other notes had not been paid and the amount due thereon. 49 C. J., 1030—Pledges, sec. 316. There being evidence that after the bank assigned the notes to the defendant, plaintiff tendered to defendant payment of the $200 note and demanded surrender of the stock collateral thereto, it may reasonably be inferred that that note was the only obligation for which the stock was security.

But if, after taking the plaintiff's evidence in such light and giving to him such benefit, it be conceded that the evidence is sufficient to establish the fact that "other obligation" by reason of the other notes or either of them remains unpaid, and that defendant is entitled to hold the 25 shares of Rominger Furniture Company stock as security to such "other obligation," we are of opinion that the action should not have been dismissed as in judgment as of nonsuit. Defendant pleads ownership of the stock and denies right of plaintiff to redeem. Tender, therefore, is unnecessary and is deemed to be waived. 49 C. J., 973—Pledges, sec. 185; *Gaylord v. McCoy,* 161 N. C., 685, 77 S. E., 959; *Owens v. Ins. Co.,* 173 N. C., 373, 92 S. E., 168; *Samonds v. Cloninger,* 189 N. C., 610, 127 S. E., 706.

In *Ball-Thrash v. McCormick,* 162 N. C., 471, 78 S. E., 303, it is said:

"If we consider the pledgee as the legal owner of the collateral, he holds it in trust, first, for himself, and then for the pledgor. If the debt for which the property is pledged be less than the value of the latter, the pledgor has not only a technical interest as a beneficiary, but a substantial one, and he is also a beneficiary in the sense that he will be entitled to the thing pledged upon payment of his debt. When he sues to protect

and preserve his interest in the pledge, the court may so proceed or so mould its judgment or decree as to protect all parties concerned. Our present system of pleading and practice is elastic enough for this purpose."

The judgment below is

Reversed.

JOHN R. PATE v. DUKE UNIVERSITY.

(Filed 1 February, 1939.)

1. Specific Performance § 3—

A party furnishing or causing to be furnished false representations procuring the contract is not entitled to enforce specific performance thereof even though he is not guilty of fraud and was ignorant of the falsity of the representations.

2. Colleges and Universities § 3—Where certificate upon which student is admitted contains false representations, he may not compel university to award degrees.

Plaintiff's evidence tended to show that he was admitted to the third-year medical work in defendant university upon his certificate of satisfactory completion of the first two years medical work in another university, that he satisfactorily passed the third and fourth year medical work in defendant university, entitling him to the degree of Doctor of Medicine, and successfully did further extension work entitling him to the degree of Bachelor of Science in Medicine; that the certificate upon which he was admitted to defendant university falsely represented that he had satisfactorily completed all work of the first two years of medicine, while in fact he had failed to pass satisfactorily two courses of such work, but that plaintiff was ignorant of the false representations in said certificate. Held: Plaintiff is not entitled to compel defendant university to award him the degrees under an implied contract to do so upon the completion of the work, since such contract was procured by false representations in the certificate, which bars the right to the relief even though plaintiff was ignorant of such misrepresentations.

3. Same—University's promise that it might reopen case upon student's successfully passing delinquent courses held not to bind it to award degrees.

Defendant university refused to award plaintiff student certain degrees for which he had successfully performed the required work because of misrepresentations in the student's certificate upon which he was admitted to defendant university, said certificate representing that he had successfully completed all required preliminary work, whereas as a matter of fact he had failed to successfully pass two subjects in the preliminary work. The dean of school advised the student to take the delinquent subjects in another university, and that upon the student's successfully passing these courses defendant university might reopen the case. Plaintiff took and successfully passed the delinquent courses in another uni-

versity. *Held:* The evidence fails to show a contract by defendant university to award the degrees even though plaintiff successfully passed the delinquent courses, and plaintiff is not entitled to compel the university to award the degrees.

4. Appeal and Error § 39d—

Exceptions to the admission and exclusion of evidence cannot be held prejudicial when the result would not be altered even though rulings had been made on the exceptions in accordance with appellant's contentions.

APPEAL by plaintiff from *Parker, J.*, at June Term, 1938, of DURHAM. Affirmed.

James R. Patton, Jr., Thomas A. Henry, and Thomas H. Patterson for plaintiff, appellant.

T. D. Bryson for defendant, appellee.

SCHENCK, J. This is an action to require the defendant university to specifically perform a contract to award the plaintiff the degrees of Doctor of Medicine and of Bachelor of Science in Medicine and to issue to him diplomas evidencing same.

The evidence discloses that the defendant university impliedly contracted with the plaintiff that when the plaintiff had furnished the defendant satisfactory evidence of having completed the courses required in the first and second years of a Class A Medical School, he would be admitted as a third-year student in defendant's School of Medicine, and that when he had completed the courses required in the third and fourth years of defendant's School of Medicine the defendant would then award him the degree of Doctor of Medicine, and upon the plaintiff's doing certain extension work the defendant would award him the further degree of Bachelor of Science in Medicine, and would issue diplomas to him evidencing said degrees; that plaintiff furnished, or caused to be furnished, to the defendant what purported to be a certificate from Washington University of St. Louis, Missouri, as to his work in the first and second years of its medical course, upon which purported certificate he was admitted to the School of Medicine of the defendant, and that subsequent to his admission in defendant's school plaintiff completed the work and successfully passed examinations upon all subjects required in the third and fourth years of defendant's School of Medicine, and successfully performed the extension work required for the degree of Bachelor of Science in Medicine. The plaintiff's own evidence, however, discloses that the purported certificate furnished the defendant as to his work in the first and second years of the medical school at Washington University contained the statement that he had successfully passed examinations at Washington University upon the subjects of

bacteriology and physiology and had been recommended by said university for the third-year class and had been granted an honorable discharge from said university, whereas, the truth was that plaintiff had not successfully passed examinations upon the said two subjects, he having been conditioned on the subject of bacteriology and failed on the subject of physiology and had been "dropped under the rules of the school." The evidence of plaintiff is further to the effect that he did not know at the time he furnished, or caused to be furnished, said purported certificate from Washington University to the defendant that it contained false statements, and did not learn of such falsity until after he had completed the work of the third and fourth years in the defendant's School of Medicine. The evidence also discloses that the defendant did not learn that the statements contained in the certificate furnished it were false until after the plaintiff had completed the work of the third and fourth years of its School of Medicine.

There is further evidence that the plaintiff has demanded of the defendant that it award to him the degree of Doctor of Medicine and of Bachelor of Science in Medicine and issue to him diplomas evidencing same, and that the defendant has failed and refused to comply with said demand.

At the close of all the evidence the defendant renewed its motion to dismiss the action and for a judgment as in case of nonsuit theretofore made when the plaintiff had introduced his evidence and rested his case (C. S., 567), which motion was allowed and judgment in accord therewith was entered, to which ruling and judgment the plaintiff reserved exceptions, and appealed to the Supreme Court.

This appeal presents the question: Can a suit be maintained for the specific performance of a contract procured by false representations, by one who furnished or caused to be furnished such representations in ignorance of their falsity? The answer is in the negative.

It seems to be settled law that before specific performance of a contract can be enforced it must be established that the contract was procured fairly and openly, and that any misrepresentation in the procurement thereof will be a bar to such enforcement, and the fact that such misrepresentation was innocently or ignorantly made does not alter the result. The plaintiff admits that the certificate upon which he gained admission into the defendant's School of Medicine contained misrepresentations as to his grades and as to the recommendations made relative to him, but testifies that he did not know said certificate contained such misrepresentations. This testimony on a motion to nonsuit must be taken as true, but even when so taken the fact appears, likewise from plaintiff's evidence, that the certificate, upon which the contract sought to be specifically performed was procured, did actually contain the mis-

representations. These misrepresentations, even if they were innocently or ignorantly furnished, or caused to be furnished, to the defendant by the plaintiff, were a bar to the plaintiff's suit for specific performance of a contract predicated upon them.

Connor, J., in *Rudisill v. Whitener,* 146 N. C., 403 (409), quotes with approval the following from *Baskcomb v. Beckwith,* 8 L. R. Eq. Cas., 100: "Specific performance of a contract will not be enforced when defendant has contracted under a mistake, to which plaintiff has by his acts, even unintentionally, contributed. . . . It is of the greatest importance that it should be understood that the most perfect truth and the fullest disclosure should take place in all cases where the specific performance of a contract is required, and that, if this fails, even without any intentional suppression, the Court will grant relief to the man who has been thereby deceived, provided he has acted reasonably and openly."

"Even an innocent misrepresentation by a party to a contract is a bar to his seeking specific performance." Fry on Specific Performance, 6 Ed., 663.

" 'This right (specific performance), however, is controlled by other equities.' Bispham Eq., sec. 364. It will not be enforced 'where the complainant does not come with clean hands or when equities exist on the other side which would render it unjust to grant the relief' (4 Pom. Eq., sec. 376), 'or it is not clear that the minds of the parties have come together. The contract must be free from *any* fraud or misrepresentation, even though not fraudulent, mistake or illegality. The contract must be perfectly fair, equal, and just in its terms and in its circumstances.' Pom., sec. 1405." *Rudisill v. Whitener, supra.*

There is evidence tending to show that after the degrees sought had been denied the plaintiff by the defendant, the plaintiff studied and successfully passed examinations upon the subject of bacteriology at George Washington University in the District of Columbia and upon the subject of physiology at the University of Michigan, that he did this upon advice of the dean of the School of Medicine of the defendant, thinking that when he had done so the defendant would then grant him said degrees. The plaintiff's own testimony being: "His (the dean of the defendant's School of Medicine) advice was that the Honor Council had charge of the case and he also told me to take the two courses, which I did. He suggested that if I took the two courses that the Honor Council might reopen it. That is as far as it has gone—that if I took the work and it was successful that the Honor Council *might* reopen the case. *That was all he promised me.*" The fact that the plaintiff had successfully passed examinations upon said two subjects was placed before the Honor Council and a reopening of the case refused thereby.

This evidence and all of the evidence fails to establish a contract upon the part of the defendant university to award the degrees sought if the plaintiff subsequently furnished evidence of having satisfactorily passed examinations upon the subjects upon which he had failed at Washington University.

We have considered the exceptions in the record to the court's refusal to receive certain evidence proffered by the plaintiff, and to the receiving of certain evidence objected to by the plaintiff. If the evidence proffered and refused had been received, and the evidence objected to and received had been refused, the conclusion reached by us would not have been changed, and, therefore, if any error was committed in the rulings upon the admissibility of evidence, such error was harmless.

The judgment of the Superior Court is

Affirmed.

MISS KAY SYKES, BY HER NEXT FRIEND, MRS. W. J. SYKES, v. J. J. BLAKEY.

(Filed 1 February, 1939.)

1. Trial § 4—

A motion for a continuance is addressed to the sound discretion of the trial court, and the refusal of the motion under the facts and circumstances of this case *is held* to show no abuse of the discretion.

2. Appeal and Error § 37b—

The discretionary powers of the court are not to be exercised arbitrarily or according to the mere inclination of the court, but according to law to attain even and exact justice, but the exercise of a discretionary power will not be reviewed on appeal in the absence of abuse.

3. Trial §§ 4, 22a—Upon refusal of motion for continuance, court should order plaintiff to proceed to trial.

A nonsuit under C. S., 567, is permissible only on demurrer to the evidence, and when the court refuses plaintiff's motion for a continuance, it is error for the court to enter an involuntary nonsuit, but the court should order plaintiff to proceed to trial, and if plaintiff should refuse to go to trial, the court may then dismiss the cause "as of nonsuit" under C. S., 602(4) or in its inherent power.

APPEAL by plaintiff from *Thompson, J.*, at June Term, 1938, of ALAMANCE. Reversed.

The judgment of the court below is as follows: "This cause coming on to be heard before his Honor, C. E. Thompson, Judge Presiding, and being heard upon motion of counsel for plaintiff for a continuance of the trial of this cause, and it appearing to the court that this cause was

set peremptorily for trial on the first day of this term, beginning May 30, 1938, and upon motion for continuance by counsel for plaintiff on such date was continued and set peremptorily for trial on the second Monday of this term, being June 6, 1938, and upon motion of counsel for plaintiff for a continuance on such date, said cause was again continued and set peremptorily for trial on this date; that on this date counsel for plaintiff announced his unpreparedness to proceed with the trial of this cause and moved for a continuance: It is, therefore, Considered, Ordered and Adjudged, in the discretion of the Court, that this cause be, and the same is hereby dismissed as of nonsuit, and that the plaintiff be taxed with the costs of the action other than the costs of witnesses subpœnaed by the defendant. It is further ordered and adjudged that the order of arrest heretofore issued in this cause be, and the same is hereby vacated and that the bail bond heretofore given by the defendant be, and the same is hereby released and discharged from any further liability thereon. This the 9th day of June, 1938. C. E. Thompson, Judge Presiding."

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

John L. Henderson for plaintiff.

Dameron & Young and Brooks, McLendon & Holderness for defendant.

CLARKSON, J. (1) Did the court below abuse its discretion in denying plaintiff's motion for continuance? We think not under the facts and circumstances of this case.

In *State v. Sauls,* 190 N. C., 810 (813), citing a wealth of authorities, it is written: "It was subsequently held in a number of decisions that the refusal to continue a case rests in the judge's discretion upon matters of fact which this Court has no power to review. . . . In other cases it is held that while the exercise of discretion must be judicial and not arbitrary it is not subject to review unless 'the circumstances prove beyond doubt hardship and injustice' . . . In *Hensley v. Furniture Co.,* 164 N. C., 148 (150), *Mr. Justice Walker* expressed the Court's conclusion in this language: 'Judicial discretion, said Coke, is never exercised to give effect to the mere will of the judge, but to the will of the law. The judge's proper function, when using it, is to discern according to law what is just in the premises. *"Discernere per legum quid sit justum." Osborn v. Bank,* 9 Wheat., 738. When applied to a court of justice, said Lord Mansfield, discretion means sound discretion guided by law. It must be governed by rule, not by humor; it must not be arbitrary, vague, and fanciful, but legal and regular. 4

Burrows, 2539. While the necessity for exercising this discretion, in any given case, is not to be determined by the mere inclination of the judge, but by a sound and enlightened judgment, in an effort to attain the end of all law, namely, the doing of even and exact justice, we will yet not supervise it, except, perhaps in extreme circumstances, not at all likely to arise; and it is therefore practically unlimited. We do not interfere unless the discretion is abused. *Jarret v. Trunk Co.,* 142 N. C., 466'." *State v. Gant,* 201 N. C., 211 (230-231).

In *State v. Rhodes,* 202 N. C., 101 (102-3) it is said: "It is now a familiar axiom that granting or refusing the continuance of a cause is a matter which rests in the discretion of the trial court and in the absence of gross abuse is not subject to review on appeal. *S. v. Sauls,* 190 N. C., 810; *S. v. Riley,* 188 N. C., 72; *Hensley v. Furniture Co.,* 164 N. C., 149; *Armstrong v. Wright,* 8 N. C., 93." *S. v. Lea,* 203 N. C., 13 (24); *S. v. Garner,* 203 N. C., 361; *S. v. Banks,* 204 N. C., 233 (237); *S. v. Whitfield,* 206 N. C., 696 (698).

(2) Under the facts and circumstances of this case, did the court below err in dismissing the cause as of nonsuit? We think so. This is the real question in the case before us.

When the court below denied the motion of plaintiff to continue, plaintiff could have excepted. The court then should have ordered the trial to proceed. There was no motion made by defendant to nonsuit. The court acted *ex mero motu.*

In 9 R. C. L., p. 207, is the following: "It has, however, been held that while a court may dismiss a case called for trial for want of prosecution if the plaintiff does not appear, yet if the parties appear and the defendant insists upon a trial the court cannot dismiss the case for want of prosecution. In such case the plaintiff must elect to take a nonsuit or let the case go to trial."

N. C. Code, 1935 (Michie), sec. 602(4), is as follows: "The court may also dismiss the complaint, with costs in favor of one or more defendants, in case of unreasonable neglect on the part of the plaintiff to serve the summons on other defendants, or to proceed in the cause against the defendant or defendants served."

Nonsuit under C. S., 567 is "permissible only on demurrer to the evidence, and not on demurrer to the complaint or motion for judgment on the pleadings. *Riley v. Stone,* 169 N. C., 421, 86 S. E., 348." *Dix-Downing v. White,* 206 N. C., 567. In the words of *Connor, J.* (the Younger), "The power of the Superior Court to grant an involuntary nonsuit is altogether statutory. *Riley v. Stone,* 169 N. C., 421, 86 S. E., 348. The provisions of the statute must be complied with, strictly, in order that defendant may have the benefit of its provisions." *Penland v. Hospital,* 199 N. C., 314, 317. The judgment in the instant

case was not in accordance with the statute; as was said in *Batson v. Laundry,* 206 N. C., 371, 372, it was "prematurely and inadvertently made."

Under the facts and circumstances of this case we think the court after refusal to continue should have ordered plaintiff to proceed to trial. If plaintiff refused to go to trial, then the court below under the section 602 (4), *supra,* or in its inherent power could have dismissed the cause "as of nonsuit" after plaintiff had been called and failed to prosecute her suit.

For the reasons given, the judgment below is

Reversed.

JOHN C. CATES v. CINCINNATI EXHIBITION COMPANY AND THE CITY OF DURHAM.

(Filed 1 February, 1939.)

Games and Exhibitions § 3—Where patrons are given choice between screened and unscreened seats, patron of bleachers may not recover for injury resulting from foul ball.

The evidence tended to show that plaintiff was a patron at a night baseball game, that he purchased a seat in the bleachers although there were available reserved seats protected by roof and wire at a higher price; that a foul ball was hit which went higher than the arc of the lights so that it could not be seen, and that the ball fell and hit plaintiff in the eye. *Held:* Defendants' motions to nonsuit were properly allowed, since there was no evidence that the lights were negligently constructed, and since the operators of a baseball park fully discharged their duty in providing adequate seats safeguarded by roof and wire from thrown or batted balls, leaving the patrons to their choice between such screened seats and those unscreened.

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

Hedrick & Hall for plaintiff, appellant.

W. C. Purcell and Fuller, Reade, Umstead & Fuller for Cincinnati Exhibition Company, appellee.

Claude V. Jones for City of Durham, appellee.

SCHENCK, J. This is an action to recover damages for personal injury alleged to have been negligently inflicted.

There was evidence tending to show that the City of Durham owned a baseball field known as El Toro Park, and that it leased said park to

the Cincinnati Exhibition Company for the purpose of having games of baseball played therein between the Durham Baseball Club, owned by the Exhibition Company, and other clubs of the Piedmont League, during the season of 1936; that on the night of September 6, the Durham Baseball Club was playing a game of baseball with another baseball club of the Piedmont League upon said El Toro Park; that the plaintiff bought a ticket to and attended said game, having taken a seat in the bleacher seats which were parallel to and in close proximity of third base; that while watching the game from said bleacher seats plaintiff was struck in the eye by a foul ball and was thereby injured.

All of the evidence tends to show that there was no roof over the bleacher seats and no wire in front thereof, but that the reserved seats immediately behind the home plate were covered by roof and protected in front by wire; that the price charged for the bleacher seats was 40 cents and for reserved seats 65 cents; that the plaintiff voluntarily chose the bleacher seats, notwithstanding there were vacant reserved seats that he could have had, had he elected to pay therefor; that the plaintiff was familiar with the game of baseball and knew that foul balls were frequently knocked in most any direction, including the vicinity of third base, and that the plaintiff had often attended baseball games in El Toro Park and was familiar with the seating arrangements thereof, and knew that he could have purchased reserved seats protected by a roof and wire if he elected so to do; that while plaintiff was seated on said bleacher seats a foul ball was knocked by the batter which went above the rays of the lights of the park and out of the sight of the plaintiff, and fell in the area of the bleacher seats, striking the plaintiff.

When the plaintiff had introduced his evidence and rested his case, the defendants and each of them moved to dismiss the action, which motion was allowed, and judgment as in case of nonsuit entered. C. S., 567. To the ruling of the court the plaintiff reserved exception, and appealed.

A determinative question is presented at the outset of this appeal, namely: Is the failure to place a roof over the bleacher seats, or a failure to erect wire in front thereof, or failure to furnish any other protection thereto from thrown or batted balls, when seats so protected are furnished elsewhere and are known to be available by the occupants of the bleacher seats, negligence on the part of those responsible for the operation and maintenance of a baseball field or park? We are constrained to answer in the negative.

"It has been frequently held that one who invites the public to places of amusement, such as theatres, shows, and exhibitions, must exercise a high degree of care for the safety of those invited. As to stairways, platforms, walks, and other structures, it may be said that the duty is

somewhat similar in degree and nature to that owing from a common carrier to its passengers. (Citing authority.) But this rule must be modified when applied to an exhibition or game which is necessarily accompanied with some risk to the spectators. Baseball is not free from danger to those witnessing the game. But the perils are not so imminent that due care on the part of the management requires all the spectators to be screened in. In fact, a large part of those who attend prefer to sit where no screen obscures the view. The defendant has a right to cater to their desires. We believe that as to all who, with full knowledge of the danger from thrown or batted balls, attend a baseball game the management cannot be held negligent when it provides a choice between a screened in and an open seat; the screen being reasonably sufficient as to extent and substance." *Wells v. Minneapolis Baseball & Athletic Association,* 122 Minn., 327, 142 N. W., 706.

In *Brisson v. Minneapolis Baseball & Athletic Association* (1932), 185 Minn., 507, 240 N. W., 903, the court held that the management was not obliged to furnish screened seats for all who might possibly apply for them, but was only obligated to screen the most dangerous part of the grandstand and for those who might reasonably be anticipated to desire protected seats, and that they need not provide such screened seats for unusually large crowds.

". . . we think the duty of defendants towards their patrons included that of providing seats protected by screening from wildly thrown or foul balls, for the use of patrons who desired such protection. Defendants fully performed that duty when they provided screened seats in the grandstand, and gave plaintiff the opportunity of occupying one of those seats." *Crane v. Kansas City Baseball & Exhibition Co.* (Mo.), 153 S. W., 1076.

Those operating baseball parks or grounds are held to have discharged their full duty to spectators in safeguarding them from the danger of being struck by thrown or batted balls by providing adequately screened seats for patrons who desire them, and leaving the patrons to their choice between such screened seats and those unscreened. *Quinn v. Recreation Park Assn. et al.* (Cal., 1935), 46 P. (2d), 144; *Grimes v. American League Baseball Co.* (Mo., 1935), 78 S. W. (2d), 520; *Lorino v. New Orleans Baseball Amusement Co.* (1931), 16 La. App., 95, 133 So., 408; *Blackhall v. Albany Baseball & Amusement Co.* (N. Y., 1936), 285 N. Y. S., 695; *Ingersoll v. Onondaga Hockey Club* (N. Y.), 281 N. Y. S., 505; *Kavafian v. Seattle Baseball Club Assn.* (Wash., 1919), 181 P., 679.

It is well to note that there is no evidence in the record of negligence in the construction of the lighting system. All of the evidence tends to show that the lights were at the top of poles 65 or 70 feet above the

ground, and that the entire playing area of the field was lighted to that elevation. There is no evidence that such elevation was too low, or that the lights should have been higher, or that the elevation of the lights failed to correspond to that of the lights in general and customary use in similar parks. There is no evidence that the lights blinded the plaintiff, but only that a foul ball, outside of the playing area, went beyond the radius of the lights. The purpose of the lights was to light the playing area and there is no evidence that they failed to adequately fulfill this purpose.

Judgment below is

Affirmed.

ANNA PEARL BUIE, ADMINISTRATRIX OF R. B. BUIE, DECEASED, v. L. R. POWELL, JR., AND HENRY W. ANDERSON, RECEIVERS OF SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 1 February, 1939.)

1. **Master and Servant § 29—Plaintiff may not recover for death of intestate when intestate's own acts are the basis for the doctrine of respondeat superior under which recovery is sought.**

Plaintiff's intestate was section master in charge of a crew of workmen engaged in repairing and maintaining a section of defendant railroad company's track, and died as a result of injuries received when the dump car was derailed, jerking the connecting rod loose from the motor car, causing the motor car, released from the load of the dump car, to throw intestate therefrom and strike him. Plaintiff did not contend that the dump car and motor car were defective, but that the equipment was too light and was inadequate for the quantity of angle-bars hauled, and that the condition of the track aggravated the danger. *Held:* Intestate was in charge of the maintenance of the track, and the loading of the cars, and therefore plaintiff cannot hold defendant liable under the doctrine of *respondeat superior* when the very acts upon which the application of the doctrine is based were those of intestate.

2. **Master and Servant § 27: Negligence § 19c—**

In an action to recover for the death of a railroad employee in charge of track maintenance, resulting when a dump car under his supervision derailed, the doctrine of *res ipsa loquitur* does not apply, since intestate himself was responsible for the condition of the track and the equipment under his control.

3. **Master and Servant § 27—**

The scintilla rule of evidence is not recognized in actions under the Federal Employers' Liability Act.

APPEAL by plaintiff from *Sinclair, J.*, at August Term, 1938, of BLADEN. Affirmed.

This is a civil action to recover damages for the alleged wrongful death of plaintiff's intestate. The deceased was section master of the defendants and as such supervised a crew of workmen engaged in repairing and maintaining a section of defendants' trackage between Hamlet and Wilmington. Shortly prior to 12 April, 1937, the defendants had removed old crossties and old rail and replaced them with new ones. The major portion of the old crossties, angle-bars, rails and other discarded material was removed by a special crew. The superior officer of the deceased then directed the deceased to take his section crew, motor car and dump car and remove the remaining angle-bars. On 12 April, 1937, the deceased was engaged in this work. He had the dump car loaded and was proceeding along the track when the dump car was derailed. This jerked the connecting rod loose from the motor car. The deceased, who was operating the motor car, was thrown forward on one of the rails and the motor car, being freed from the load of the dump car, struck the deceased, inflicting fatal injuries.

At the conclusion of all the evidence the defendants renewed their motion to dismiss as of nonsuit first entered when the plaintiff rested. The motion was allowed and judgment was entered accordingly. The plaintiff excepted and appealed.

Clark & Clark for plaintiff, appellant.
Varser, McIntyre & Henry for defendants, appellees.

BARNHILL, J. The following statement appears in the appellant's brief: "We do not contend that the motor and dump cars were inadequate, defective or unusually dangerous equipment with which to perform the duties and do the work ordinarily incident to employment as a section master. But we do allege and contend that this equipment was inadequate, defective and dangerous when used for hauling angle-bars in quantity, as hauling, because:

"1. It was too light and fragile and the motive power too small for such heavy duty.

"2. There were no sides, standards, uprights or guards of any kind or any means by which the same could be attached so as to reasonably safeguard against the angle-bars falling off.

"3. The coupling was wholly insufficient for carrying such a load.

"4. This was not the equipment approved and in use by railroads generally for doing this work.

"5. These dangers were aggravated by the condition of the track at the point of derailment."

It affirmatively appears in the record that the deceased was section master and that it was his duty to repair and maintain the track in good

condition. It further appears that he was furnished with a motor car and dump car to be used in connection with his work in hauling material to be used in the repair of the tracks and old material discarded in making such repairs; that it was the kind in general use; that he was in complete control of the motor car and dump car and possessed the right to call for and obtain such additional material or labor as was necessary to keep it in good repair; and that the dump car was loaded under his immediate supervision and direction.

If the derailment of the dump car and motor car was not purely accidental, but was caused by negligence, then it appears that it resulted from overloading, or defective coupling between the dump car and motor car, or a defective condition of the track, it appearing in evidence that there was a bad joint at or near the place of derailment, at which point the measurement between the rails was 1½ inches wider than the standard. If the defendants are chargeable with negligence in any of the respects indicated, such negligence on their part arose out of the conduct of their vice principal and agent, the deceased. If the motor car and dump car were too light and fragile to bear the load placed upon it the deceased was responsible for the overloading. He had notice that the dump car had no standards or uprights or guards of any kind. Notwithstanding this he directed the loading in the manner now complained of. If the coupling was insufficient for carrying such a load he disregarded this fact and placed weight upon the dump car beyond its capacity. Likewise, it was his duty to keep the track in a condition of good repair. There is no evidence that the equipment furnished is not such as is approved and in use by railroads generally for doing this type of work. The plaintiff cannot be permitted to recover for the wrongful death of her intestate due to the negligent conduct of the defendants when the deceased himself was the person whose conduct tends to impose liability upon the defendants under the doctrine of *respondeat superior*. His estate would thus be benefiting through his wrong.

It becomes unnecessary, therefore, for us to discuss the question raised as to whether the derailment itself is evidence of negligence under the doctrine of *res ipsa loquitur*. We may call attention, however, to the fact that the cases cited and relied on by the plaintiff are not in point. In neither of these cases was the employee injured responsible for the condition of the track or the equipment. *Lynch v. New York, N. H. & H. R. R.* (Mass.), 200 N. E., 877, is very similar to the instant case, and is in point. It is there said: "The doctrine of *res ipsa loquitur* is not applicable to the case at bar because of the fact that the car and the tools upon it were under the exclusive control and management of Lynch at the time of the accident. . . . The maxim *res ipsa loquitur* does not apply where the accident might have been due to improper handling

as well as to improper furnishing the thing causing the accident. In cases decided by this Court where *res ipsa loquitur* has been held to apply, the thing which caused the injury was controlled by the defendant and not by the injured party."

There was no evidence of previous trouble in the operation of the motor car, none of defect in condition or adjustment, none of lack of proper inspection. If it is to be assumed that there was negligence in the lack of proper inspection or defect in condition the deceased was the active agency of such negligence.

Some contention is made here that it does not appear that the accident occurred on the section of trackage within the supervision of the deceased. Members of the crew testified that it was on this section. In any event, the burden was on the plaintiff and this action was instituted and is being maintained under the Federal Employers' Liability Act, under which the scintilla rule of evidence is not recognized. If there is a scintilla of evidence that this accident did not occur within the section of the deceased it is nothing more.

The judgment below is

Affirmed.

MARVIN ALLEN v. NATIONAL ACCIDENT & HEALTH INSURANCE COMPANY.

(Filed 1 February, 1939.)

1. Insurance § 30a—Policy in suit held to have lapsed for nonpayment of premiums.

Under the terms of the policy in suit, premiums were due on the first of each month with a seven-day grace period, with provision that the policy should lapse as of the due date if premiums were not paid within the grace period, with further provision that acceptance of premiums by the company after that time should reinstate the policy only as to accidental injuries thereafter sustained and such sickness as might begin more than ten days after such acceptance. *Held:* Under the terms of the contract the policy lapsed as of the due date of the premiums upon failure to pay the premium prior to the expiration of the grace period, and tender or payment on the twentieth of the month does not put the policy in force as to illness beginning on the seventh of the month, the acceptance of premiums after the expiration of the grace period, if in fact insurer did accept same, having the effect under the terms of the contract of reinstating the policy prospectively only.

2. Insurance § 13—

An insurance contract is of the making of the parties, and they agree upon its terms, provisions and limitations.

3. Insurance § 30a—

Insurance companies are dependent upon the collection of premiums for successful operation and existence, and failure of insured to pay premiums when due or within the grace period allowed automatically avoids the policy in the absence of waiver.

Appeal by defendant from *Sink, J.*, at September Term, 1938, of FORSYTH.

Civil action to recover on a policy of accident and health insurance.

Upon the payment of the first monthly premium of $1.73, the defendant, on 21 October, 1936, issued and delivered to the plaintiff a monthly term policy of accident and health insurance, which provides for benefits of $40 a month under certain conditions therein stipulated.

The policy also provides for monthly premiums as follows:

"Renewal premiums hereon are due in advance on the first day of each renewal period, but the insured shall have seven days in which to pay any premium after the first. If not paid before the expiration of the grace period, the policy will lapse and become void as of the due date, but may, at the option of the company, be reinstated in accordance with the terms of standard provision three."

Standard provision three follows: "3. If default is made in the payment of the agreed premium for this policy, the subsequent acceptance of a premium by the company, or by any of its duly authorized agents shall reinstate the policy but only to cover accidental injury thereafter sustained and such sickness as may begin more than ten days after such acceptance."

The monthly premiums were paid and the policy kept in force from its date until midnight, 31 August, 1937. The premium due on the first day of September was not paid or tendered until 20 September, after the seven days of grace had expired, and after the disability for which indemnity is here sought had begun.

In plaintiff's notice of claim filed with the defendant on 25 September, 1937, he states that he was taken ill on 7 September, 1937, and called a physician on 10 September. The attending physician certified that he visited the plaintiff three times, 10, 17 and 19 September, and on his last visit, plaintiff was sent to the hospital.

This action was instituted 21 January, 1938, to recover disability benefits for 3½ months, amounting to $130.00.

Upon denial of liability and issue joined, the jury responded in favor of the plaintiff. From judgment on the verdict, the defendant appeals, relying chiefly upon its exception to the refusal of the court to dismiss the action as in case of nonsuit.

W. H. Boyer and Richmond Rucker for plaintiff, appellee.
C. B. Poindexter and William Porter for defendant, appellant.

STACY, C. J. Conceding without deciding that the policy was in force during the grace period of seven days from 1 September to 7 September, the failure to pay the monthly premium before the expiration of this period caused the policy to lapse, according to its terms, and to become void as of the due date. The acceptance of premiums thereafter, if any were accepted, had the effect of reinstating the policy prospectively, but not retroactively. Such is the language of the policy. *Sanderlin v. Ins. Co.*, 214 N. C., 362; *Gilmore v. Ins. Co.*, 214 N. C., 674; *Hayworth v. Ins. Co.*, 190 N. C., 757, 130 S. E., 612.

The contract is of the making of the parties. They have agreed upon its terms, provisions and limitations. *Gorham v. Ins. Co.*, 214 N. C., 526; *Whitaker v. Ins. Co.*, 213 N. C., 376, 196 S. E., 338; *Mills v. Ins. Co.*, 210 N. C., 439, 187 S. E., 581; *McCabe v. Casualty Co.*, 209 N. C., 577, 183 S. E., 743. The payment of premiums is of the essence of the undertaking and upon its compliance depends the life and success of the insurance company. *Clifton v. Ins. Co.*, 168 N. C., 499, 84 S. E., 817.

It is generally understood that the nonpayment of premiums when due, or within the period of grace thereafter, in the absence of waiver, automatically avoids a policy of insurance. *Moore v. Accident Assurance Corp.*, 173 N. C., 532, 92 S. E., 362; *Knight v. Ins. Co.*, 211 N. C., 108, 189 S. E., 121; *Trust Co. v. Ins. Co.*, 199 N. C., 465, 154 S. E., 743; *Melvin v. Ins. Co.*, 150 N. C., 398, 64 S. E., 180.

The language of *Clark, C. J.*, in *Hay v. Association*, 143 N. C., 256, 55 S. E., 623, would seem to be appropriate here: "It is always sad when one who has made payments on his policy deprives his family of expected protection by failure to pay at a critical time. But insurance is a business proposition, and no company could survive if the insured could default while in good health, but retain a right to pay up when impaired health gives warning. It is a warning of which the company also has a right to take notice when asked to waive a forfeiture. It is the insured's own fault when he does not make a payment as he contracted."

Having allowed the policy to lapse for nonpayment of premiums, the plaintiff is not entitled to recover. *Brady v. Benefit Assn.*, 205 N. C., 5, 169 S. E., 823.

Reversed.

NICHOLAS LAVECCHIA, RECEIVER FOR PAINE STATISTICAL CORPORATION, A CORPORATION OF NEW JERSEY, v. THE NORTH CAROLINA JOINT STOCK LAND BANK OF DURHAM.

(Filed 1 February, 1939.)

Money Received § 1—Person accepting payment must have actual or constructive notice that the funds were misappropriated in order to be responsible.

While one who knowingly participates in the fruits of misappropriation is responsible therefor to the person owning the funds misappropriated, the person accepting the funds must have actual or constructive notice that the funds are misappropriated, and the acceptance of a check against funds of a corporation, executed for the corporation by its president, in payment of an obligation owed by the president of the corporation individually, is insufficient to put the payee on notice, and the receiver of the corporation is not entitled to recover such funds from the payee.

APPEAL by plaintiff from *Cowper, Special Judge,* at November Civil Term, 1938, of DURHAM. Affirmed.

This was a civil action instituted by the plaintiff, receiver for Paine Statistical Corporation, a corporation of New Jersey, to recover certain funds expended by J. O. Paine, president of Paine Statistical Corporation, in payment of certain alleged individual debts owed by J. O. Paine to the defendant, North Carolina Joint Stock Land Bank of Durham, totaling $7,325, under certain contracts entered into by J. O. Paine individually with the defendant North Carolina Joint Stock Land Bank. These payments were made by checks drawn on Paine Statistical Corporation.

The following is a copy of one of the checks given:

"PAINE STATISTICAL CORPORATION No. 3708
Newark, N. J., March 3rd, 1937.

"Pay to the order of
N. C. Joint Stock Land Bank $5500.00

FIFTY-FIVE HUNDRED AND 00/100.....DOLLARS

PAINE STATISTICAL CORPORATION
J. O. PAINE, President.

"UNION NATIONAL BANK
in Newark, New Jersey."

(Endorsement on Check No. 3708)

"Deposit to the credit of North
Carolina Joint Stock Land Bank of Durham."

The judgment of the court below was as follows: "This cause coming on to be heard upon the motion of the plaintiff for a judgment on the pleadings, and the court being of the opinion that such motion should not be allowed: Now, therefore, it is hereby ordered, considered and adjudged that the motion of the plaintiff for judgment on the pleadings is denied. C. V. Cowper, Judge, etc."

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

W. A. Leland McKeithen, John D. McConnell, and Victor S. Bryant for plaintiff.

S. C. Brawley and J. S. Patterson for defendant.

CLARKSON, J. The complaint (paragraph 5) alleges, in part: "That in giving said checks of Paine Statistical Corporation as payments for his individual transactions, John Overton Paine misappropriated wrongfully and unlawfully used funds of Paine Statistical Corporation, of which misappropriation and wrongful use of funds defendant had notice in that defendant accepted the said checks drawn on Paine Statistical Corporation, by John Overton Paine, in his capacity as an officer of said corporation, which fully appears from the face of said checks, and that defendant thereby participated in the said misappropriation and wrongful use of said corporate funds and wrongfully received and now unlawfully holds the said funds of Paine Statistical Corporation, although demands for their return have been made by plaintiff."

The defendant in answer to the above allegation says: "It is admitted that the defendant accepted the checks of the Paine Statistical Corporation signed by John Overton Paine, president, and except as herein admitted all of the other allegations contained in paragraph 5 of the complaint are untrue and are denied."

The principle of law in *Dancy v. Duncan,* 96 N. C., 111 (117), is thus stated: "The case of *Smith v. Fortescue,* Busb. Eq., 127, fully warrants the present proceeding, and is almost a direct decision in favor of the judgment. The conduct of Whitaker in his voluntary participation in the wrongful disposal of the note, and appropriation of it to the executor's own debt, renders him equally liable to be called on to restore the money to those thus defrauded. He will not be permitted thus to use trust funds when he is fully aware of their nature, or there are circumstances to awaken suspicion and put him on inquiry. The authorities upon this point are numerous, and we refer to a few. *Exum v. Bowden,* 2 Ired. Eq., 281; *Wilson v. Doster,* 7 Ired. Eq., 231; *Lemly v. Atwood,* 65 N. C., 46." *Ruffin v. Harrison,* 90 N. C., 569; see *Mfg. Co. v. Bell,* 193 N. C., 367.

It is well settled that he who knowingly participated in the fruits of the misappropriation is responsible. The complaint alleges that the only notice plaintiff had was the fact that the checks were signed "Paine Statistical Corporation, J. O. Paine, Prest." We do not think that this was sufficient to put defendant on notice that the checks were not *bona fide*. Any other rule would hamper seriously business transactions of this kind which are carried on every day. There must be actual or constructive notice before liability would attach to one who takes a check of the kind given in this case. *Bank v. Crowder,* 194 N. C., 312.

In *R. R. v. Kitchin,* 91 N. C., 39 (44), it is said: "Where one of two persons must suffer loss by fraud or misconduct of a third person, he who first reposes the confidence or by his negligent conduct made it possible for the loss to occur, must bear the loss." *Bank v. Liles,* 197 N. C., 413; *Lightner v. Knights of King Solomon,* 199 N. C., 525; *Shuford v. Brown,* 201 N. C., 17 (24); *White v. Johnson & Sons Co.,* 205 N. C., 773; *R. R. v. Lassiter & Co.,* 207 N. C., 408 (415).

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

Affirmed.

CITY OF DURHAM v. M. V. LAWRENCE AND WIFE, NETTIE M. LAWRENCE.

(Filed 1 February, 1939.)

1. Trial § 49: Damages § 14: Appeal and Error § 37b—

In proceedings in condemnation, the trial court's refusal of motions to set aside the verdict for failure to allow a jury view and on the ground that the amount awarded was excessive, is in the exercise of his sound discretion, and his refusal of the motions is not reviewable in the absence of abuse of discretion.

2. Eminent Domain § 8—Charge held not to instruct jury that anticipated injury from negligent operation of easement condemned might be allowed.

In this proceeding by a municipality to condemn an easement over defendants' land for an outfall sewer line having five manholes on defendants' property, plaintiff's witness, the city engineer, testified that sewer lines would sometimes become stopped up between manholes, causing the manholes to overflow. In the charge, the court referred to overflows from the sewer line and to odors emanating therefrom in stating defendants' contentions. *Held:* The charge, in referring to overflows and odors from the sewer line, referred to such elements of damage in stating defendants' contention as to results reasonably to be apprehended from and incident to the proper construction and maintenance of the sewer line, and is not erroneous as including as an element of damages those that might be expected from the negligent construction or operation of the sewer line.

DURHAM *v.* LAWRENCE.

APPEAL by plaintiff from *Olive, Special Judge,* at April Term, 1938, of DURHAM. No error.

This was a proceeding instituted by the city of Durham for the purpose of condemning a permanent easement consisting of a right of way across defendants' land for a sewer outfall and pipe line. Defendants' tract of land contained 75 acres, and (according to defendants' evidence) extended to within 150 yards of the corporate limits of the city. The right of way sought to be acquired was 25 feet in width and extended a distance of 2,161.7 feet across defendants' land. On the sewer line as constructed through defendants' land there were five manholes.

The petition in the condemnation proceeding was filed 25 October, 1935. In due time answer was filed and appraisers appointed. Upon the coming in of the appraisers' report, exceptions were filed, and the cause transferred to the civil issue docket. It was stipulated of record that the proceedings were in all respects regular, and "that the taking of the land in controversy was necessary to public interest." In 1936 defendants had the tract of land surveyed and platted for subdivision into lots. The map and plats were submitted to and approved by the city engineer, in compliance with the requirements of the city for subdivisions within a mile of the corporate limits. The purpose of this requirement was to insure conformity with the city streets and plans.

The following issue was submitted to the jury:

"What compensation are the defendants entitled to recover of the petitioner, city of Durham, on account of the condemnation of the easement and right of way over the land described in the petition for an outfall sewer line and pipe line as described in the petition?"

The jury having answered the issue $3,000, judgment was entered accordingly, and plaintiff appealed.

Claude V. Jones for plaintiff, appellant.

Fuller, Reade, Umstead & Fuller for defendants, appellees.

DEVIN, J. The power of the city of Durham to condemn a right of way over the defendants' land, for the purpose of constructing and permanently maintaining a sewer pipe line and outfall, having been admitted, and the proceedings for the exercise of that power being in all respects regular, the only question at issue was the amount of the compensation to be awarded the defendants for the easement thus acquired by the city over and through their lands.

In due course, a jury of the county, after hearing all the evidence relating thereto, has determined the amount of compensation due the defendants to be three thousand dollars. The trial judge, who also heard

all the evidence, has declined to set aside the verdict, either on the ground of the failure of the court to allow a jury view, or on the ground that the amount awarded was excessive. These were matters within the sound discretion of the court (*Freeman v. Bell,* 150 N. C., 146, 63 S. E., 682; *Harvey v. R. R.,* 153 N. C., 567, 69 S. E., 627). No abuse of discretion is suggested. We may not test in the balances of judicial review the weight and sufficiency of the evidence.

The appellant's assignments of error based on exceptions noted to the rulings of the court in the reception of evidence are without merit. Appellant also excepted to certain portions of the judge's charge to the jury, but upon examination we find none of these can be sustained. *Rogers v. Freeman,* 211 N. C., 468, 190 S. E., 728.

The reference by the court in the charge to overflows from the sewer line and to odors emanating therefrom was made in stating the defendants' contentions, and this was based in part upon the testimony of plaintiff's witness, the city engineer, that sewer lines would sometimes become stopped up between manholes, causing the manholes to overflow. No exception to this statement of defendants' contention was noted at the time (*S. v. Herndon,* 211 N. C., 123, 189 S. E., 173). The reference by the court to this testimony, in this connection, may not properly be understood as allowing the jury to consider damages caused by negligent operation of the sewer lines in determining the compensation to be awarded for the easement condemned, but rather as the statement of defendants' contention of results reasonably to be apprehended from and incident to proper construction and maintenance of the sewer lines. Viewed in this light, the charge of the court affords the plaintiff no just ground of complaint. *Lambeth v. Power Co.,* 152 N. C., 371, 67 S. E., 921; *Moser v. Burlington,* 162 N. C., 141, 78 S. E., 74; *R. R. v. Armfield,* 167 N. C., 464 (467), 83 S. E., 809; *Moses v. Morganton,* 195 N. C., 92, 141 S. E., 484.

The case seems to have been properly and fairly submitted to the triers of the facts and they have fixed the amount of compensation which they found from the evidence to be justly due the defendants. We have discovered no ruling or action on the part of the trial court which we apprehend should be held for reversible error.

In the trial we find

No error.

JOHN L. BRIGGS v. JULIA INEZ BRIGGS.

(Filed 1 February, 1939.)

1. Divorce § 11—

In the husband's suit for divorce on the ground of two years separation, the wife, setting up a valid defense, is entitled to be heard thereon, and an allowance of counsel fees and funds for her support pending the litigation to enable her to present her defense, is proper upon supporting findings, the fact that she seeks no affirmative relief in her answer being immaterial.

2. Same—

A judgment in a criminal action for abandonment is not *res judicata* as to the wife's right to counsel fees and support pending litigation of a suit for divorce thereafter instituted by the husband, the defendant in the criminal action.

3. Abatement and Revival § 16—

When defendant dies pending plaintiff's appeal from an order allowing defendant counsel fees and support pending litigation of plaintiff's suit for divorce, defendant's administrator will be made a party upon motion aptly made in the Supreme Court, and upon affirmance of the order, plaintiff will be required to pay the allowance for counsel fees and such installments of alimony allowed as were due at the time of defendant's death.

APPEAL by plaintiff from *Williams, J.*, at March Term, 1938, of DURHAM. Modified and affirmed.

Action for divorce instituted by the plaintiff against the defendant, his wife, on the grounds of abandonment and two years separation.

The defendant, answering, admitted that the plaintiff and defendant had lived separate and apart for more than two years, denied that she had abandoned the plaintiff, and alleged by way of further defense: That plaintiff abandoned defendant, and that plaintiff's own wrongful conduct brought about and caused the separation between plaintiff and defendant. She further alleges that in 1932 the plaintiff was arrested under a warrant charging him with the abandonment and non-support of the defendant and her child and that at the trial he entered a plea of *nolo contendere* and was required to make contributions to her support; that thereafter for a period of about two years he made the payments as required; that after the expiration of two years he made intermittent contributions; that another warrant was issued in 1938; that on the hearing upon this warrant the plaintiff made the contention that he had made no contribution to the support of his wife for a period of more than two years and that, therefore, the criminal action was barred by the statute of limitations. She likewise alleges that she is in ill health, has no property and is without adequate means to employ counsel or for her own support during the pendency of the action.

The plaintiff, replying, alleges that the defendant abandoned him; pleads and sets out the warrant and judgment of 1932 and the warrant and judgment of 1938.

Motion by the defendant for support *pendente lite* and counsel fees, after due notice to the plaintiff, came on to be heard before the court below. Upon said hearing the Judge found the facts fully, substantially as alleged by defendant, and entered an order requiring the plaintiff to make certain payments set out in the order for the support of the defendant pending the litigation and for counsel fees. The plaintiff excepted and appealed.

Brawley & Gantt for plaintiff, appellant.
Victor S. Bryant and John D. McConnell for defendant, appellee.

BARNHILL, J. The plaintiff's contention that defendant is not entitled to support and counsel fees pending the litigation for the reason that she seeks no affirmative relief in her answer cannot be sustained. *Medlin v. Medlin,* 175 N. C., 529, 95 S. E., 857; *Holloway v. Holloway,* 214 N. C., 662. The plaintiff by his suit seeks to deprive the defendant of her legal right to support from him. He must furnish her with the necessary funds with which to defend the action and to support herself pending the litigation.

The plaintiff's contention that the judgment in the criminal action charging the plaintiff with abandonment of the defendant instituted in February, 1938, bars the defendant's rights herein is equally untenable. The judgment in a criminal action is not *res judicata* as to the rights of the defendant to support pending this litigation and to counsel fees.

The plea in bar interposed by the defendant that the separation between the plaintiff and the defendant was brought about and caused by the unlawful and wrongful conduct of the plaintiff is a valid defense, and if established, is sufficient to defeat the plaintiff's cause of action. *Brown v. Brown,* 213 N. C., 347, and cases there cited. The defendant is entitled to be heard thereon, and pending the hearing, upon the facts found by the court, the plaintiff was properly required to furnish defendant with counsel fees and support pending the litigation.

Upon the hearing here the death of the defendant was suggested to the court and motion was made that the administrator of the defendant's estate be made a party defendant. This motion is allowed. The defendant's administrator is entitled to recover only such payments as had matured and were due at the time of the death of the defendant. The plaintiff must be required to pay the allowance for counsel fees and such installments of alimony allowed the defendant as were due at the time of her death. Judgment will be entered accordingly.

Modified and affirmed.

STATE v. J. T. NICHOLS.

(Filed 1 February, 1939.)

1. **Criminal Law § 68a: Courts § 2a—**

When defendant charged with a misdemeanor is found not guilty in the municipal court on "a special verdict" without the intervention of a jury, it amounts to an acquittal, and, the municipal court having jurisdiction, this ends the matter, the State having no right of appeal to the Superior Court.

2. **Criminal Law § 68a—**

The right of the State to appeal upon a special verdict, a demurrer, a motion to quash, or a motion in arrest of judgment, C. S., 4649, applies only to judgments rendered in the Superior Court.

3. **Cleaners, Dyers and Pressers § 1—Warrant held insufficient to charge violation of ch. 30, Public Laws of 1937.**

This prosecution was instituted to test the validity of ch. 30, Public Laws of 1937. The warrant charged that defendant "did unlawfully . . . operate a press shop" without obtaining a license. *Held:* The act sought to be challenged applies only to those who "engage in the business" or "who shall continue to do the business" defined in the act, and does not perforce apply to those who operate the business.

4. **Appeal and Error § 40g—Constitutionality of statute will not be decided unless the question is properly presented.**

The constitutionality of a statute will not be determined unless the question is properly presented, and when on appeal from a conviction in the Superior Court for violation of a statute, it appears that the State had no right to appeal to the Superior Court from acquittal in the municipal court, and that the warrant was insufficient to charge a violation of the statute, the judgment of the Superior Court will be vacated and the appeal dismissed.

APPEAL by defendant from *Sink, J.*, at September Term, 1938, of FORSYTH.

Criminal prosecution tried upon warrant charging the defendant with operating a press shop without first making application for a press-shop license and paying the annual license fee of $10, in violation of ch. 30, Public Laws 1937.

The case was originally tried in the municipal court of the city of Winston-Salem, where the court made certain findings, and upon such findings rendered "a special verdict to the effect that the defendant, J. T. Nichols, is not guilty of the crime charged in the warrant."

From this "special verdict and judgment," the State, in open court, gave notice of appeal to the Superior Court of Forsyth County.

In the Superior Court, the case was tried *de novo*. The jury returned a special verdict, upon which the court directed a verdict of guilty to be entered, and taxed the defendant with the costs.

Defendant appeals, assigning errors.

Attorney-General McMullan for the State, appellee.
Brooks, McLendon & Holderness and John W. Caffey, amici curiæ.
Ira Julian and John D. Bellamy & Sons for defendant, appellant.

STACY, C. J. The purpose of this appeal is to test the constitutionality of chap. 30, Public Laws 1937, being "An Act to Regulate the Business of Cleaning, Dyeing and/or Pressing."

The effort must fail on the instant record. *S. v. Lueders,* 214 N. C., 558.

In the first place, the defendant is charged with a misdemeanor (if, indeed, he be charged with any offense), and he was found not guilty in the municipal court on "a special verdict" without the intervention of a jury, which amounted to an acquittal. *S. v. Camby,* 209 N. C., 50, 182 S. E., 715. This put an end to the matter, as the court had jurisdiction of the alleged offense, and no appeal to the Superior Court is vouchsafed to the State in such cases. *S. v. Jones,* 5 N. C., 257; *S. v. Savery,* 126 N. C., 1083, 36 S. E., 22; *S. v. Ostwalt,* 118 N. C., 1208, 24 S. E., 660; McIntosh N. C. Prac. & Proc., 818, *et seq. Cf. S. v. Lane,* 78 N. C., 547.

Speaking to the subject in *S. v. Powell,* 86 N. C., 640, *Smith, C. J.,* delivering the opinion of the Court, said: "And when authority is conferred upon the Legislature to commit to inferior officers the trial of *'petty misdemeanors'* with the subsequent restriction upon the punishment to be awarded, and then only 'with the right of appeal' to a court where the trial is to be *de novo* and before a jury, it must be understood that this restraint is imposed upon the Legislature, and this declared right reserved for the benefit of the accused and for his security alone. The preëxisting law and practice recognized and enforced in numerous adjudications had settled the principle that when a party charged with any offense before a tribunal of competent jurisdiction has been tried and acquitted, the result is final and conclusive, and no appeal is allowed the State to correct any error committed by the court, and this has been uniformly maintained since the adoption of the new Constitution, as before. *S. v. Jones, supra; S. v. Taylor,* 8 N. C., 462; *S. v. Martin,* 10 N. C., 381; *S. v. Credle,* 63 N. C., 506; *S. v. Phillips,* 66 N. C., 646; *S. v. West,* 71 N. C., 263; *S. v. Armstrong,* 72 N. C., 193."

Secondly, the right of the State to appeal to the Supreme Court, where judgment has been given for the defendant upon (1) a special verdict, (2) a demurrer, (3) a motion to quash, or (4) a motion in arrest of judgment, as provided by C. S., 4649, applies only to judgments rendered in the Superior Court. *Rhyne v. Lipscombe,* 122 N. C., 650, 29 S. E., 57.

Moreover, it is observed that the act here sought to be challenged, applies only to those who "engage in the business" or "who shall continue to do the business" of dry cleaning, dyeing, and/or pressing, and does not perforce apply to those who operate the business, unless they also "engage in the business," or "continue to do the business," as defined in the act. *S. v. Julian,* 214 N. C., 575; *S. v. Crayton, ibid.,* 579. The warrant here charges that the defendant "did unlawfully . . . operate a press shop." *S. v. Smith,* 211 N. C., 206, 189 S. E., 509.

These defects, though observed *sua sponte,* preclude a consideration of the constitutional question. *S. v. Lueders, supra; S. v. Smith, supra; S. v. Shipman,* 203 N. C., 325, 166 S. E., 298; *S. v. Beasley,* 196 N. C., 797, 147 S. E., 301.

The judgment of the Superior Court will be vacated and the appeal dismissed.

Judgment vacated. Appeal dismissed.

MRS. BERTIE T. GOWER AND HER HUSBAND, F. G. GOWER, v. TOWN OF CLAYTON AND R. U. BARBER, SHERIFF OF JOHNSTON COUNTY.

(Filed 1 February, 1939.)

1. Taxation § 41—In action against taxing unit to redeem land, plaintiffs must pay all taxes due to date.

In an action against a municipality to redeem land which had been purchased by the municipality upon foreclosure in its tax action, plaintiffs must pay the amount of taxes, penalties and interest, charged against the land to date, C. S., 8037, and tender of taxes, penalties and interest for the years for which tax foreclosure was instituted, without tender of taxes levied in years subsequent thereto, is insufficient to entitle plaintiffs to enjoin the issuance of a writ of assistance in favor of the municipality for possession of the property under its tax deed.

2. Appeal and Error § 43—

Petition to rehear this case, reported in 214 N. C., 309, is allowed, it appearing that the action was one to redeem land from tax foreclosure, and so much of the former opinion not necessary to this decision is declared *dicta.*

GOWER *v.* CLAYTON.

PETITION by defendant town of Clayton to rehear this case, reported in 214 N. C., 309.

J. A. Narron, J. M. Broughton, and Wm. H. Yarborough, Jr., for plaintiffs, appellants.

Ed. F. Ward and Abell & Shepard for defendants, appellees.

WINBORNE, J. Defendant town of Clayton, in petition filed, among other things, contends, in substance: That the purpose of plaintiffs in this action is for redemption of the land in question upon the payment of taxes for the years 1928 to 1932, both inclusive, to which the tax foreclosure suit relates by requiring the town to accept same in lieu of payment of all taxes due on said land for the years 1928 to 1937, both inclusive, which the town demands; and that the injunction against the writ is auxiliary to that purpose.

Thereupon the town contends that under C. S., 8037, as amended, after the institution of the tax foreclosure action by the town, the plaintiffs have no right of redemption, except upon the payment of the "full tax, interest and other sums and all cost and allowances."

Referring to the complaint: after alleging that *feme* plaintiff is the owner of the land in question, it is alleged: That under date of 30 September, 1935, defendant town of Clayton instituted an action in the Superior Court of Johnston County against the Ashley Horne estate and others, to which plaintiffs were not parties, for the collection of taxes on said land alleged to be due said town for the years 1928 to 1932, both inclusive, in the total amount of $1,054.58, plus interest and penalties; that plaintiffs have tendered to town of Clayton $1,288.70 in full payment of taxes, penalties and interest against the said property for the years referred to, in accordance with statement furnished by town of Clayton, and have tendered payment of costs of the tax suit upon receipt of statement therefor; that tender was refused by the town; and that notwithstanding the tender, and in pursuance of said proceeding and by virtue of order by the clerk of the Superior Court, on 12 May, 1938, the town is threatening to evict the plaintiffs from possession of the premises on which they have made valuable improvements, and if evicted they will suffer irreparable loss. Thereupon, plaintiffs pray that a restraining order issue against writ for their eviction and "that it be further adjudged herein that the defendant shall accept the said amount heretofore tendered by the plaintiff, which tender is herewith renewed, in settlement of the taxes for the years herein referred to and involved in the said suit."

In the judgment below the court, after making certain findings with respect to title and to the tax foreclosure proceeding, not here necessary

to be stated, finds that the plaintiffs renewed their tender and requested judgment of the court that the town be required to accept payment of the same, and upon such payment to cancel the liens of the taxes for the years 1928 to 1932, both inclusive, and to cancel the deed obtained by said town under the foreclosure in the tax action, in so far as the property in this action is involved; and that the town in open court agreed, upon payment of all taxes, penalties and costs due the town on said property, to execute a deed to plaintiffs therefor, or to consent to order of the court to set aside and cancel the judgment and deed had in the tax foreclosure suit in so far as it may affect plaintiffs' title thereto, but refused to accept the tender of plaintiffs. "The court being of the opinion that all taxes due the town of Clayton as aforesaid to date, plus penalties and costs, should be paid, and the plaintiffs having refused to pay the same," adjudged that the town of Clayton is the owner of the land in question and dissolved the injunction to the end that writ might be executed.

Further consideration and review of the complaint and the judgment of the court below lead us to the conclusion that the only question in dispute between the parties, and which was decided by the court below, relates to the amount plaintiff should be required to pay to defendant town of Clayton to redeem the land in question, that is, that the action is one for redemption.

C. S., 8037, as amended, provides: ". . . After the institution of the action by counties or municipalities, the taxpayer shall have no right of redemption except upon payment of the full tax, interest and other sums, and all costs and allowances . . ." Public Laws 1927, ch. 221.

This Court has, in considering judgments in tax foreclosure suits, approved the inclusion of taxes levied in years subsequent to the years to which the actions specifically relate. *New Hanover County v. Whiteman,* 190 N. C., 332, 129 S. E., 808; *Orange County v. Adkins,* 207 N. C., 593, 178 S. E., 91.

The ruling that plaintiff should pay all taxes due to town of Clayton on the land in question to date is proper. Hence, as a condition precedent to invoking the equitable relief of injunction against the writ of assistance, it is incumbent upon the plaintiffs to pay the taxes in accordance with that ruling. The plaintiff having failed to do so, the temporary injunction should have been dissolved.

The opinion here expressed reduces to *dicta* so much of the former opinion as is not necessary to this decision.

Petition is allowed and judgment below is

Affirmed.

CHARLES McLAUGHLIN, BY HIS NEXT FRIEND, CARSON McLAUGHLIN, v. JOHN M. BLACK.

(Filed 1 February, 1939.)

Master and Servant § 16—Evidence of negligence in failing to warn young, inexperienced employee held for jury.

Plaintiff, at the time of his injuries, was sixteen years old, and was injured on the second day of his employment at defendant's sawmill when he was caught in the unguarded saw. It appeared that plaintiff had had no previous experience in this work, and that defendant failed to warn and instruct him in regard to the dangers and hazards. *Held:* The evidence was sufficient to overrule defendant's motion to nonsuit, and should have been submitted to the jury on the question of whether defendant was negligent in failing to warn and instruct his young and inexperienced employee as to the dangers and hazards.

APPEAL by plaintiff from *Bivens, J.,* at September Term, 1938, of MOORE. Reversed.

The plaintiff in his complaint alleges, in part: "That on the 12th day of November, 1936, defendant ordered plaintiff to report for work at a certain sawmill, which was owned and operated by defendant in the aforesaid county and State; that plaintiff had never engaged in sawmill work, or as an employee in such a capacity, until the said 12th day of November, 1936. That about 7:45 o'clock on the morning of November 13, 1936, while engaged in the employ of defendant at defendant's sawmill, as aforesaid, and while conducting himself in a careful and prudent manner, plaintiff was struck and caught up by the saw at the said sawmill of defendant; that as a direct result thereof, plaintiff suffered severe and painful and lasting injury, to wit: the left leg of plaintiff was so deeply cut and lacerated that it became necessary to amputate the said leg. . . . That the said injuries and great bodily and mental pain incidental thereto were proximately caused by, and were the proximate and direct results of, the culpable and unlawful negligence and carelessness of defendant; that defendant negligently and carelessly and imprudently failed to erect and maintain guards, or any protection whatever, around the said saw, but allowed it to run open and naked; that the said open saw created a condition dangerous to plaintiff in his capacity as an employee at the said sawmill, which dangerous condition was known to, or in the exercise of reasonable care should have been known to the defendant; that defendant negligently and carelessly failed at any time to warn plaintiff of the dangers inherent in the sawmill work which plaintiff was performing for defendant, even though plaintiff was at that time only sixteen years of age and had been engaged

in such work for only one day prior to the date of said injury, which said facts were within the knowledge, or by the exercise of reasonable care should have been within the knowledge of defendant." Prayer for damage.

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

W. A. Leland McKeithan for plaintiff.
Seawell & Seawell for defendant.

CLARKSON, J. At the close of plaintiff's evidence the defendant made a motion in the court below for judgment as in case of nonsuit. C. S., 567. The court below overruled the motion. Exception by defendant. The motion was renewed by defendant at the conclusion of all the evidence and the court below granted the motion. In this we think there was error. We think the evidence sufficient to be submitted to the jury.

In Vol. 1, Sherman & Redfield on Law of Negligence (6th Ed.), part sec. 219, it is stated: "It is the duty of one who employs young persons in his service to take notice of their apparent age and ability, and to use ordinary care to protect them from risks which they cannot properly appreciate, and to which they ought not to be exposed. This is a duty which cannot be delegated; and any failure to perform it leaves the master subject to the same liability, with respect to such risks, as if the child were not a servant. For this purpose, the master must instruct such young servants in their work and warn them against the dangers to which it exposes them, and he must put this warning in such plain language as to be sure that they understand it and appreciate the danger. . . . But the master is not required to point out dangers which are known or must be obvious to and fully appreciated by the servant, after making due allowance for his youth. Generally, this question is for the jury. . . . (Part sec. 219a): When the master has notice of such ignorance or inexperience on the part of the servant as would make the ordinary risks of the business especially perilous to that servant, he must give the servant explicit warning of the danger, and not allow him to undertake the work without a full explanation of its perils." *Fitzgerald v. Furniture Co.*, 131 N. C., 636 (639); *Holton v. Lumber Co.*, 152 N. C., 68; *Walters v. Sash and Blind Co.*, 154 N. C., 323; *Ensley v. Lumber Co.*, 165 N. C., 687 (692-3); *Holt v. Mfg. Co.*, 177 N. C., 170 (175).

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

Reversed.

HAROLD PARKER v. SAM BELOTTA ET AL.

(Filed 1 February, 1939.)

1. Infants § 11—In infant's action for personal injuries, his father's right of action being preserved, evidence of hospital bill is incompetent.

In an action by an infant to recover damages for negligent personal injury, any right of action which plaintiff's father may have to recover for loss of time, diminished earning capacity, and hospital bills being preserved, it is error to admit evidence of the amount of the hospital bills incurred, even as tending to show the extent of the injuries, especially when the hospital expenses incurred include expenses for another separate injury.

2. Appeal and Error § 47b—

A general new trial is awarded in this action to recover for negligent personal injuries for error in the admission of evidence on the issue of damages. Whether defendants were prejudiced by the setting aside of the issue of damages for inadequacy and having this issue tried separately before a different jury, *quære*.

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

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

On 6 June, 1936, Harold Parker was injured while riding in defendants' automobile. The tibia in his left leg was broken. Defendants' car was being driven at the time by one Olin Bankhead. They were going from Rockingham to Asheboro to attend a ball game. Plaintiff was a member of the Richmond County Junior Team. The accident occurred between Rockingham and Ellerbe as a result of a blowout and the manner in which the car was being driven at the time.

Plaintiff was taken to the Hamlet Hospital for treatment and incurred a hospital bill of $245.

About five months later, the plaintiff broke both bones in the same leg when he undertook to kick a football on the playground at the Rockingham High School.

The case was tried at the February Term, 1938, Richmond Superior Court, on the usual issues of negligence and damages, and resulted in a verdict for plaintiff, the jury assessing his damages at $500.

The court set aside the verdict on the issue of damages as inadequate, and this issue was again tried at the March Term when the jury fixed the damages at $3,750.

On the second trial, over objection of defendants, plaintiff's father was allowed to testify that hospital bills amounting to $488 had been

incurred "for the treatment of Harold on account of his broken leg." This evidence was admitted "not to show the amount of damages the plaintiff is entitled to recover, but to be considered only as tending to show the extent of the plaintiff's injuries."

From judgment on the verdicts, the defendants appeal, assigning error.

J. C. Sedberry for plaintiff, appellee.
Fred W. Bynum for defendants, appellants.

STACY, C. J. The case was tried upon the theory that plaintiff was not entitled to recover for loss of time or diminished earning capacity during his minority, nor for hospital bills. *Shipp v. Stage Lines,* 192 N. C., 475, 135 S. E., 339. Any right of action which plaintiff's father may have was carefully preserved. *Floyd v. R. R.,* 167 N. C., 55, 83 S. E., 12; *Williams v. R. R.,* 121 N. C., 512, 28 S. E., 367.

In this view of the matter, we think it was error to admit evidence of what hospital bills had been incurred "for the treatment of Harold on account of his broken leg," especially as these bills were for two separate injuries. In this respect the case is not unlike *Blaine v. Lyle,* 213 N. C., 529, 196 S. E., 833, and *Pemberton v. Greensboro,* 208 N. C., 466, 181 S. E., 258.

Moreover, it is not altogether certain that defendants were not prejudiced by having the issue of liability and the issue of damages tried separately or before different juries. *Gregg v. Wilmington,* 155 N. C., 18, 70 S. E., 1070; *Jarrett v. Trunk Co.,* 144 N. C., 299, 56 S. E., 937; McIntosh, N. C. Prac. & Proc., 679.

A general new trial will be awarded. It is so ordered.

New trial.

THURMOND CHATHAM, E. L. DAVIS, HOME REAL ESTATE LOAN & INSURANCE COMPANY, AND C. T. LEINBACH v. C. C. DISHER CHEVROLET COMPANY, J. D. ALLEN, JR., A. C. GLENN, SR., DISHER CHEVROLET COMPANY, TRADING AS C. C. DISHER MOTORS, INC., AND C. C. DISHER MOTORS, INC.

(Filed 1 February, 1939.)

Evidence § 37—

In an action between lessor and the alleged assignee of lessee to recover on the written assignment of the lease, the admission of parol evidence as to the substance of the alleged written assignment of the lease, without the laying of proper foundation for the admission of the secondary evidence, is error.

CHATHAM *v.* CHEVROLET CO.

APPEAL by defendant C. C. Disher Chevrolet Company from *Hill, Special Judge,* at May Term, 1938, of FORSYTH.

Civil action for recovery of rentals under lease allegedly assumed by appealing defendant.

The plaintiffs, being the owners of certain property located at 143-145 North Main Street in Winston-Salem, N. C., on 21 February, 1936, leased the same to Glenn Allen Motors, Inc., J. D. Allen, Jr., and A. C. Glenn, Sr., for a term ending 1 November, 1937, at fixed monthly rental.

While the lease was in effect Glenn Allen Motors, Inc., was placed in receivership, and Tom Gough was appointed its receiver.

Plaintiffs allege that thereafter the lease was assigned by the receiver to Disher Chevrolet Company and that at the time of the assignment it assumed and agreed, beginning 1 October, 1936, to pay for the use and occupancy of the premises the rent reserved in accordance with the terms of said lease; that Disher Chevrolet Company, by virtue of the assignment, took possession of the premises and paid the rent while occupying the same, but failed to pay for the full term; and that by reason thereof it is indebted to plaintiff in net sum of $925.

Defendant C. C. Disher Chevrolet Company denies the material allegations of plaintiffs, and avers that it rented the premises from month to month at a stipulated monthly rental and occupied the same from 1 October, 1936, to 31 March, 1937, paid the rental in accordance with such agreement, and surrendered the premises on the latter date.

At the trial below the parties introduced evidence tending to show their respective contentions. There was verdict for plaintiff. From judgment thereon, defendant C. C. Disher Chevrolet Company appeals to the Supreme Court, and assigns error.

Ratcliff, Hudson & Ferrell for plaintiffs, appellees.
Hastings & Booe and Peyton B. Abbott for defendant, appellant.

WINBORNE, J. On the trial below plaintiffs were permitted, over objection by defendant, to introduce oral testimony as to the substance of the alleged written assignment of the lease in question, without as preliminary thereto laying sufficient and proper foundation for admission of secondary evidence. Exception by appellant to this ruling is well taken. The admission of the oral testimony is prejudicial error. *Ledford v. Emerson,* 138 N. C., 502, 51 S. E., 42; *Mahoney v. Osborne,* 189 N. C., 445, 127 S. E., 533; *Chair Co. v. Crawford,* 193 N. C., 531, 137 S. E., 577.

"The rule excluding parol evidence as to the contents of a written instrument applies only in actions between parties to the writing and when its enforcement is the substantive cause of action," *Brown, J.,* in *Ledford v. Emerson, supra.*

In the instant case the action is between the lessors and the alleged assignee of lessee, and the question of the assignment and its contents is directly at issue.

Other assignments of error need not be considered, as the matters to which they relate may not recur on another trial.

New trial.

MRS. NANCY M. HOYLE v. D. J. CARTER AND JULIUS C. HUBBARD.

(Filed 1 February, 1939.)

1. Corporations § 10—

A cause of action for alleged dissipation of the assets of a corporation by wrongfully or unlawfully causing the corporation to execute a chattel mortgage on its assets, accrues to the corporation, and ordinarily a stockholder may not maintain the action against the alleged tort-feasor.

2. Bills and Notes § 22: Pleadings § 10—Makers may not set up defense that notes were given for stock which was made worthless by prior wrongful act of payee in causing corporation to execute chattel mortgage.

In this action on two notes executed by defendants, defendants set up the defense that the notes were without consideration in that they were given in payment of stock of a corporation, which stock was made worthless by the wrongful act of the plaintiff in causing the corporation to execute to plaintiff and her husband a chattel mortgage on its assets. It appeared that the corporation executed the chattel mortgage some three months prior to the execution of the notes by defendants. *Held:* Defendants' alleged cause of action in tort did not arise out of the same transaction as the contract sued on by plaintiff, and the alleged cause in tort accrued to the corporation and not to defendants as stockholders, and defendants' defense to the action on the notes was properly stricken from the answer, there being no mutuality of subject matter or of parties to support the alleged counterclaim.

APPEAL by defendants from *Phillips, J.*, at May Term, 1938, of ASHE. No error.

Bowie & Bowie for plaintiff, appellee.

Chas. G. Gilreath and Trivette & Holshouser for defendants, appellants.

SCHENCK, J. This is an action on two notes for $250.00 each, executed and delivered by the defendants to the plaintiff. The defendants admit the execution and delivery of the notes, that they are past due and have not been paid, but set up as a further defense and counterclaim that the notes in suit were given to the plaintiff in payment for certain

stock in "The Wilkes News," a corporation, and that the plaintiff fraudulently and unlawfully caused the execution of a chattel mortgage in the sum of $2,091.40 to herself and her husband on all the property of said corporation, for the purpose of dissipating the assets and destroying the value of the stock of said corporation, and did thereby destroy the value of the stock purchased by them for which the notes in suit were given, and rendered said notes void for want of consideration.

The plaintiff moved to strike from the answer the further defense and counterclaim, which motion was allowed, and defendants reserved exception. This exception is the only one discussed in the appellants' brief and we see no error therein.

If the plaintiff fraudulently or unlawfully executed or caused the corporation to execute a chattel mortgage to herself and her husband upon the corporate property and thereby destroyed the value of the stock of the corporation, no cause of action was given to the individual stockholders against the plaintiff. Any cause of action that may have arisen therefrom arose in favor of the corporation.

"In the nature of the matter it would contravene every principle of intelligent procedure, be impractical and absurd to allow ordinarily one or more of the stockholders of a corporation to bring actions to recover property, or the value of it, that belongs to it, or to recover damages for injuries to it, or its property, or to collect debts due to it. Such actions imply corporate disorganization and the absence of corporate integrity and entity." *Moore v. Mining Co.*, 104 N. C., 534, 542.

"Unless a defendant has some matter existing in his favor and against the plaintiff on which he can maintain an independent action, such claim would not be a counterclaim." *Askew v. Koonce*, 118 N. C., 526, 532.

The delivery of the notes in suit for the stock was not connected with the alleged wrongful and unlawful action of the plaintiff in executing or causing the corporation to execute a chattel mortgage on its property, since the former is alleged to have been done on 2 April, 1935, and the latter on 8 July, 1935. The delivery of the notes for the stock was a transaction between the plaintiff and the defendants individually, and execution of the mortgage was a transaction between the plaintiff and the corporation. There was no mutuality of subject matter or of parties in the two transactions. "Where the debts are not due to and from the same persons in the same capacity the right of set-off does not exist." *In re Bank*, 205 N. C., 333, 335. A demurrer to a counterclaim sounding in tort not arising out of the contract sued upon, and not connected with the same subject matter, is properly sustained under C. S., 521. *Weiner v. Style Shop*, 210 N. C., 705.

In the trial we find

No error.

PILOT LIFE INSURANCE COMPANY v. F. R. GUIN.

(Filed 1 February, 1939.)

Bills and Notes § 22: Evidence § 40—

In an action on a note, parol evidence which tends to show a supplemental agreement between the parties that the note was to be paid only out of commissions due or to become due from the payee to the maker, is competent.

APPEAL by defendant from *Bivens, J.,* and a jury, at 21 March, 1938, Civil Term of GUILFORD. New trial.

This is a civil action tried before his Honor, E. C. Bivens, J., and a jury, at the 14 March, 1938, Term of Superior Court of Guilford County.

Plaintiff brings this action to recover of defendant the sum of $1,241.43, evidenced by an alleged promissory note dated 1 June, 1933. The defendant admitted the execution of said note but denied liability on the following grounds: (1) That said note was conditionally delivered; (2) that there was a failure of consideration; (3) that said note did not contain the terms and conditions of the payment and/or discharge as contemplated by the parties; (4) that said note only contained a part of the contract between the parties; (5) that said note was barred by the statute of limitations. The defendant also set up a counterclaim against the plaintiff, upon which plaintiff denied liability and pleaded the statute of limitations. There was a judgment for the plaintiff and the defendant excepted, assigned error and appealed to the Supreme Court.

Smith, Wharton & Hudgins and E. P. Dameron for plaintiff.
A. C. Davis for defendant.

CLARKSON, J. The defendant introduced the following witness: Charles C. Wimbish testified: "My name is Chas. C. Wimbish and I was in the insurance business on July 1, 1932, being general manager of Pilot Life Insurance Company. I am the person who made this contract between the Pilot Life Insurance Company and Mr. Guin. Q. State whether or not subsequent to the execution of this contract I just asked you about and before the execution of the note sued on in this action, you had an understanding and an agreement with Mr. Guin, the defendant in this action, by the terms of which certain advances were to be made to him by the Pilot Life Insurance Company and charged only against commissions earned by Mr. Guin. A. Yes, sir. . . .

The contract was made with this understanding, that all moneys paid to Mr. Guin were to be an advance against his total commission earnings, and later I wrote him a supplementary letter putting that in writing. In a number of cases he came to my office and discussed with me—it was the same thing at all times, and I have no knowledge of any other arrangements ever being made. The supplemental agreement made with Mr. Guin was shortly after the execution of the original contract, at the time he was in Wilson, N. C. As a part of the consideration for the advancements made to Mr. Guin he was to perform the duties of general agent, which included handling of the company's business in that territory, whatever it might be, collecting, calling on policyholders to see about lapses, various and sundry other things which, of course, he would not receive any compensation from other than through money which we might advance him. Under the terms of that contract Mr. Guin was never required to pay any sum whatever for any part of advances made to him back to the Pilot Life Insurance Company in the event his commissions were insufficient to pay the advances in full so long as I was with the company as agency manager."

The plaintiff objected to the above testimony of Charles C. Wimbish. The objection was sustained and defendant excepted and assigned error. We think this and the testimony of defendant and like evidence which was ruled out on the trial, to which exception and assignment of errors were duly made by defendant, should have been allowed. *Bank v. Rosenstein,* 207 N. C., 529; *Insurance Co. v. Morehead,* 209 N. C., 174.

For the reasons given, in the judgment of the court below there was error.

New trial.

CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM, 1939

ERNEST S. MASON v. P. H. JOHNSTON.

(Filed 1 March, 1939.)

1. Automobiles §§ 13, 18g—Whether defendant observed rule of road in turning across highway into driveway held for jury under the evidence.

Conflicting evidence as to whether defendant, in turning across the highway into the driveway of his residence, observed the rule of the road by ascertaining first if such turn would affect the operation of any other vehicle, and second, by giving the required signal, N. C. Code, 2621 (103) (a), *held* to raise an issue of fact for the jury in this action by a guest riding on a motorcycle to recover for injuries sustained when the motorcycle and defendant's car collided.

2. Automobiles § 21—

A passenger on a motorcycle injured in a collision between the motorcycle and an automobile may not recover of the driver of the car if the driver of the motorcycle was guilty of negligence constituting the sole proximate cause of the accident, but under the evidence in this case the question *is held* one for the jury.

3. Automobiles § 20a—Evidence held to raise issue of fact as to whether passenger was guilty of contributory negligence.

The evidence in this case tended to show that plaintiff was riding on a motorcycle as a guest of the driver, that the motorcycle was being driven at an excessive and dangerous rate of speed within the limits of a city, and that the motorcycle collided with an automobile driven by defendant as defendant was turning the car across the highway to enter the driveway to his residence. *Held:* The evidence, with the other evidence in the case, although insufficient to show contributory negligence as

a matter of law on the part of plaintiff guest, is sufficient to be submitted to the jury on the issue of whether plaintiff was guilty of contributory negligence, under the circumstances, in failing to remonstrate with the driver of the motorcycle, and it was error for the trial court to refuse to submit the issue of contributory negligence tendered by defendant.

4. Same—

A guest or passenger in a vehicle may be guilty of contributory negligence by failing to remonstrate with the driver of the vehicle when the circumstances are such that a man of ordinary prudence would make such remonstrance, and such negligence is active negligence on the part of the guest and is distinct from the doctrine of imputed negligence.

APPEAL by defendant from *Bone, J.*, and a jury, at November Term, 1938, of NASH. New trial.

This is an action for actionable negligence brought by plaintiff against the defendant. The plaintiff alleged that he was injured in an automobile collision which was caused by the negligence of the defendant. The defendant denied negligence and alleged that the driver of the motorcycle on which plaintiff was riding was guilty of negligence which was the sole proximate cause of the accident and/or plaintiff himself was guilty of contributory negligence.

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

"1. Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? Ans.: 'Yes.'

"2. What amount, if any, is the plaintiff, Ernest S. Mason, entitled to recover of the defendant? Ans.: '$2,500.'"

The exceptions and assignments of error and necessary facts will be considered in the opinion.

F. S. Spruill (now deceased), Harold D. Cooley, and J. M. Alexander for plaintiff.

Wilkinson & King and Pearsall & Barnhill for defendant.

CLARKSON, J. At the close of plaintiff's evidence and at the conclusion 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 refused these motions and in this we can see no error.

The evidence on the first issue on the part of the defendant was to the effect that before he turned across the public highway to enter the driveway to his home, he extended his hand and in other respects complied with the rule of the road, as follows:

N. C. Code (Michie), 1937, Suppl. Sec. 2621(301): "(a) The driver of any vehicle upon a highway before starting, stopping, or turning from

a direct line shall first see that such movement can be made in safety, and if any pedestrian may be affected by such movement shall give a clearly audible signal by sounding the horn, and whenever the operation of any other 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. (b) . . . Whenever the signal is given the driver shall indicate his intention to start, stop, or turn by extending the hand and arm from and beyond the left side of the vehicle as hereinafter set forth. Left turn—Hand and arm horizontal, forefinger pointing; Right turn—hand and arm pointed upward; Stop—hand and arm pointing downward. All signals to be given from left side of vehicle during last fifty feet traveled."

The plaintiff denied that defendant complied with the rule of the road above set forth. This was a question for the jury. *Storall v. Ragland,* 211 N. C., 536.

It is well settled that if the negligence of Clyde Evans, the driver of the motorcycle on which plaintiff was riding in the rear as his guest, was the sole and only proximate cause of the injury, the plaintiff could not recover. *White v. Realty Co.,* 182 N. C., 536; *Sanders v. R. R.,* 201 N. C., 672 (676); *Keller v. R. R.,* 205 N. C., 269 (278-9). On the evidence in this case this was a question for the jury to determine. The defendant tendered the same issues that were tendered by plaintiff and also tendered the additional issue: "Did the plaintiff by his own negligence contribute to his injury as alleged in the answer?" To the refusal of the court below to submit this issue, the defendant excepted and assigned error. On the evidence in the present record, we think this issue should have been submitted to the jury.

In *Harper v. R. R.,* 211 N. C., 398 (402), citing a wealth of authorities, it is written: "It is well settled in this jurisdiction that negligence on the part of a driver of a car will not ordinarily be imputed to another occupant unless such other occupant is the owner of the car or has some kind of control over the driver. They must be engaged in a joint enterprise or joint venture. Automobile driver's negligence is not, as a general rule, imputable to a passenger or guest." *Pusey v. R. R.,* 181 N. C., 137; *Campbell v. R. R.,* 201 N. C., 102; *York v. York,* 212 N. C., 695 (699).

In *Norfleet v. Hall,* 204 N. C., 573 (577-8), we find: "It is conceded that there are circumstances under which even an invited guest riding in an automobile driven by his host, owes the duty to himself to remonstrate against the excessive speed at which his host is driving his automobile, and to request him to lessen his speed, and that a failure on the part of such guest to discharge this duty bars his recovery of damages

caused by the negligence of his host. *King v. Pope,* 202 N. C., 554, 163 S. E., 447; *Nettles v. Rea,* 200 N. C., 44, 156 S. E., 159."

In the present case the evidence on the part of defendant as to contributory negligence was to the effect that the collision occurred about dusk or about 8:00 to 8:30 o'clock on 12 July, 1937. Clyde Evans was driving the motorcycle, which was headed west on Sunset Avenue. Plaintiff was riding behind as his guest. They were going swimming in Stoney Creek, at the Old Country Club. R. O. Huntley, witness for defendant, testified, in part, that he saw them about one quarter of a mile from the scene of the accident "coming at a very high rate of speed, around 45 or 50 miles an hour," within the city limits of Rocky Mount. There were two motorcycles. "After these two motorcycles passed . . . heading west on Sunset Avenue, I heard them open wide as soon as they straightened that curve and then I heard the collision in a few minutes."

C. C. Thorne, witness for defendant, testified, in part: "I live on Sunset Avenue in Rocky Mount in the bend of the highway at the intersection . . . I live on the curve there. I remember that on the night of July 12, 1937, those two motorcycles passed the house. I was sitting out in the yard. I noticed they were speeding, it looked like. I heard something immediately after the two motorcycles passed my home. I heard a crash a few seconds after they passed."

P. H. Johnston, the defendant, testified, in part: "I had closed the day's work at the office and I had started home on the night of July 12th, or evening of July 12, 1937. I went out down Sunset Avenue across the river, approached my driveway. Before getting to my driveway there was nobody on the road in front of me. There were no lights showing in my rear mirror to my rear nearer than approximately 300 yards down the river bridge. When I approached my driveway I slowed my car down to approximately 15 to 18 miles, put my hand out the left window, made my turn to my driveway. As my car, I should say about the time the front wheel got near the edge of the left hand concrete, I heard a screeching of brakes, and by the time my wheel got on the bridge a motorcycle crashed into me. It knocked my car practically straight up the road heading towards Nashville. The motorcycle flew over the edge of my radiator into a ditch on the opposite side, heading towards Nashville approximately 12 feet before it hit the ground. There were two young men on the motorcycle that were thrown off; one of them, the driver, I don't know how far he went, but young Mason was thrown approximately 60 feet through the air before ever touching the ground. . . . My front wheels were on my bridge at the time of the collision or impact. Approximately 18 to 19 feet of the highway

was then available for travel, clear and unobstructed. That includes the dirt shoulder. Around 11 to 12 feet of the hard surface. . . . That scar (shown on the car in the picture) is where the running board was crushed in. The first place of the motorcycle hitting the car must have been around that running board and crushed in here where the left hand fender and running board join."

T. R. Burdette, a State Highway Patrolman, testified, in part: "On the morning of July 13, 1937, Sheriff Johnston reported to me an accident involving him and Ernest Mason, which had occurred the night before. The report was made sometime after I went to my office that morning. I went with the sheriff to the scene of the accident and saw skid marks on the highway and torn-up place in the bank of the road, little bank, and on the side of the road. Those skid marks were on the left side of the highway going west. I measured the skid marks, stepped it off, and it was approximately 90 feet. It started off a couple of feet over from the center line and kept bearing a little to the left."

In the Law of Automobiles (N. C. Michie, 1938 Ed.), part sec. 27, page 55, is the following: "As the rules in regard to the care which must be exercised by a guest, that is whether he is guilty of contributory negligence, are the same in actions by the guest against his host and in actions by the guests against third persons, . . . The general rule established may be stated to be that while the driver's negligence may not ordinarily be imputed to the guest or passenger riding with him so as to bar such guest's or passenger's right of recovery against the other driver, yet, when danger arising out of the operation of a vehicle by another is manifest to a passenger or a guest who has adequate opportunity to control the situation, if he sits without protest and permits himself to be driven to his injury, his negligence will bar a recovery—such negligence is not the negligence of the driver imputed to him as a passenger, but his own negligence in joining with the driver and facing manifest danger. In such case the passenger becomes coadventurer in the risk. In other words, if the plaintiff, in the exercise of due and ordinary care, such as would be exercised by a reasonably prudent and cautious man, saw or should have seen the driver was conducting himself in a negligent manner, and if, under those circumstances, a reasonably prudent and cautious man would have warned or cautioned or attempted to persuade the driver from his reckless conduct, and to drive his car in a careful and prudent manner, and failed to give such warning or caution or to make such attempt, and such failure caused or contributed to the collision, then the occupant would be guilty of contributory negligence which would bar his recovery."

On the above evidence of defendant and other evidence in the case, plaintiff the guest could not be declared guilty of contributory negligence, but we think the evidence should have been submitted to the jury on this aspect. We give the material aspects of defendant's evidence, but plaintiff and his witnesses give another version. It is for the jury to determine the true facts. The arguments and briefs for defendant were not only persuasive but convincing.

For the reasons given, there must be a

New trial.

THE FEDERAL LAND BANK OF COLUMBIA v. T. E. DAVIS, WIDOWER, W. H. DAVIS AND WIFE, MARGARET DAVIS, L. E. DAVIS AND WIFE, FLETA DAVIS, MILDRED PRIDDY AND HUSBAND, P. P. PRIDDY, VIRGINIA JOHNSON AND HUSBAND, BERNICE JOHNSON, D. J. EASLEY AND WIFE, CLAUDIA EASLEY, JAMES EASLEY, IRENE MARANVILLE AND HUSBAND, JAMES W. MARANVILLE, BLANCHE BOLES AND HUSBAND, D. H. BOLES, ROSS HAMPTON EASLEY, RUTH EASLEY, CARLTON EASLEY, MARGARET EASLEY, FIRST NATIONAL BANK, SUCCESSOR OF FARMERS NATIONAL BANK & TRUST COMPANY, GURNEY P. HOOD, COMMISSIONER OF BANKS, ASSIGNEE OF WACHOVIA BANK & TRUST COMPANY, GURNEY P. HOOD, COMMISSIONER OF BANKS, EX REL. BANK OF STOKES COUNTY, TRUSTEE, CHASE NATIONAL BANK OF NEW YORK, STOKES LUMBER COMPANY, INC., ASSIGNEE OF DAN RIVER LUMBER COMPANY, INC., BANKRUPT, AND THE UNITED STATES OF AMERICA.

(Filed 1 March, 1939.)

1. Judgments § 25c—

The rule that after adjournment of the term a judgment rendered during the term is no longer *in fieri* and may not be altered, relates to the merits of the controversy, and until the judgment is satisfied it is still pending for certain purposes, including correction for apparent and proved clerical errors upon motion in the cause.

2. Judgments § 24—

A judgment by default final for want of an answer does not deprive defendant of the right to move for a correction of the judgment by motion in the cause to have the judgment conform to the relief to which plaintiff is entitled upon the facts alleged in the complaint.

3. Judgments § 9—

The failure to file answer admits the allegations of fact set out in the complaint and entitles plaintiff to the relief justified by the facts alleged, but the judgment by default final may not grant relief in excess of, or different from the case stated in the complaint. C. S., 606.

4. Judgments § 24: Mortgages § 31d—Decree of foreclosure by default should be limited to foreclosure of interests conveyed by the mortgage.

The mortgage in question, after the particular description of the land conveyed therein as security, recited that it comprised lands conveyed to the mortgagor by two separate deeds, and referred to the deeds and the books and pages at which they were recorded. One of the deeds referred to expressly exempted therefrom mineral interests in the land. Thereafter the mortgagor conveyed the tract in which the mineral interests were reserved to movant. Suit to foreclose the mortgage was instituted, and decree of foreclosure by default final was entered describing the land in the identical language of the mortgage, with further provision that all right, title and interest therein of defendants or those claiming under them should be sold, and that upon consummation of the sale the commissioner should make deed to the purchaser in fee. Movant made a motion in the cause for correction of the decree, and for adjudication that the mineral interests were excepted from the foreclosure. *Held:* Movant is entitled to correction of the decree to order foreclosure of the land described in the mortgage as therein described, but whether that description included the mineral interest in the land purchased by movant was not in issue in the foreclosure suit, and may not be litigated upon motion in the cause, and the decree of foreclosure is conclusive as to the interests embraced in the mortgage description, but does not preclude movant from litigating any claim to interests which may not be included therein.

APPEAL by defendants W. H. Davis and wife, Margaret Davis, from *Clement, J.*, at October Term, 1938, of STOKES. Error and remanded.

This is a motion in the cause after judgment in the original action, which was an action instituted for the foreclosure of a mortgage.

The defendant T. E. Davis on 19 December, 1925, executed to the plaintiff a mortgage to secure the payment of $6,000. To the particular description of the land conveyed by said mortgage the following clause was added: "And being the identical land conveyed to T. E. Davis by two deeds, one of which is from J. E. Marshall and others, recorded in the office of the Register of Deeds of Stokes County, North Carolina, in book 48, page 348, dated April 2, 1906; and the other is from D. P. Mast, Commissioner, dated July 1, 1893, recorded in the above named office in Book 34, pages 591-2-3, to which reference is hereunto made." The said Marshall deed to Davis on its face expressly excepts therefrom "the coal and mineral interests in said land." After execution and recordation of the mortgage, T. E. Davis, the mortgagor, conveyed the Marshall tract containing 122½ acres to the defendants W. H. Davis and wife for life, with remainder to their three named children, by deed dated 26 March, 1932.

The defendants failed to answer the complaint filed in the original action and there was a judgment by default final decreeing foreclosure. This judgment describes the lands to be sold in the identical language

of the description contained in the mortgage. It contains the further provision "that upon the sale of the said premises all the right, title, interest and equity of redemption of the defendants (naming all defendants) as well as all persons whomsoever claiming by, through, or under the same in and to the premises, or any part thereof, herein ordered to be sold, be, and the same hereby are forever barred and foreclosed." There is likewise a provision in the judgment that upon the consummation of the sale the commissioner shall make deed to the purchaser in fee.

After the issuance of a writ of possession or writ of assistance the defendant W. H. Davis, who now claims to own the coal and mineral rights in said land which were excepted by Marshall and others in their deed to T. E. Davis, appeared and moved the court that the description contained in the judgment of foreclosure be amended so as to expressly except the coal and mineral interests contained in that portion of the land ordered sold which was acquired under the Marshall deed. Said defendant likewise filed an affidavit and motion to correct the judgment by striking out the clause providing that all right, title and interest of equity of redemption should be forever foreclosed or by so amending the same as to clearly indicate that the defendants are foreclosed as to the Marshall tract only as to the interest in said land acquired by T. E. Davis under the Marshall deed, which excepted the coal and mineral interests. The defendant bases his motion upon the contention that the alleged defects in the judgment are matters of clerical error arising out of the fact that in tendering judgment the plaintiff used a printed form, not adapted to the particular facts in this case, without striking out the provisions thereof which were inapplicable.

The motion came on to be heard before the court below. After hearing the same the judge denied the motion of the defendant and entered decree adjudging as a matter of law, upon the facts found, that the description contained in the mortgage and in the judgment of foreclosure includes all mineral and surface rights in the lands in question. He further adjudged that the movant is estopped and precluded by said judgment from asserting any claim in or to mineral or other rights in said lands, and that there was no clerical error in entering said judgment. The court likewise dismissed said defendant's appeal from the clerk's order allowing plaintiff's application and motion for a writ of assistance, which appeal was then pending. The movants excepted and appealed.

Ingle, Rucker & Ingle for plaintiff, appellee.
S. E. Hall and Parrish & Deal for defendants, appellants.

BARNHILL, J. This appeal presents three questions for determination: (1) May a defendant against whom there has been a judgment by default final thereafter by motion in the cause have clerical errors in the judgment corrected? (2) May such defendant by motion after judgment by default final require the judgment to be modified by striking out provisions therein which are in excess of the relief to which the plaintiff is entitled upon the facts alleged? And (3), may it be adjudicated on a motion filed after judgment by default final that the description contained in the mortgage and in the judgment of foreclosure, is or is not sufficient to embrace and convey all interest in the land, including mineral rights.

The rule that a judgment is *in fieri* during the term only and cannot be altered after adjournment relates to judicial and not to clerical errors therein. After rendition of final judgment the cause is still pending in certain respects until the judgment is satisfied. Motions affecting the judgment, but not the merits of the original controversy, may be made in the cause. *Finance Co. v. Trust Co.*, 213 N. C., 369, and cases there cited. Parties to the action may, by motion in the cause, have clerical errors therein corrected. McIntosh N. C. Prac. & Proc., page 733; *Strickland v. Strickland*, 95 N. C., 471; 10 A. L. R., 526 (notes); *Lindsay v. Lindsay*, 67 A. L. R., 824 and annotations; *Drainage Dist. v. Fremont County*, 114 A. L. R., 1093. On motion made the court has the power and it is its duty to correct apparent or proved clerical mistakes in judgments and cause them to speak the truth.

The fact that the defendant did not file an answer, thereby admitting the allegations of fact in the complaint, which entitled the plaintiff to a judgment by default final, does not deprive him of the right which he would otherwise have to move in the cause for a correction of the judgment.

The error in the original judgment arises out of the fact that the judgment is one by default final and is due to the provisions therein, which are in excess of the relief to which the plaintiff is entitled upon the facts alleged. It is expressly provided by C. S., 606, that where there is no answer filed the relief granted to the plaintiff cannot exceed that demanded in his complaint. While in an action where an answer is filed the court may grant the plaintiff any relief consistent with the case made by the complaint and embraced within the issue, if there is no answer the judgment by default must be drawn strictly in accordance with the case stated in the complaint. The defendant is concluded by the decree only so far as it is supported by the allegations in the complaint. If it gives relief in excess of, or different from, that which the plaintiff is entitled to under the complaint it should be set aside or

modified so as to conform to the allegations. McIntosh N. C. Prac. & Proc., 714; *Currie v. Mining Co.*, 157 N. C., 209, 72 S. E., 980; *Junge v. MacKnight*, 137 N. C., 285, 49 S. E., 474; *Jones v. Mial*, 82 N. C., 252. Where a judgment by default final grants relief in excess of that to which the plaintiff is entitled a motion in the cause is the remedy available to the defendant for the correction thereof. It follows that the defendant is within his rights and is pursuing the proper remedy in lodging a motion in the cause for a correction of the judgment by striking out such provisions thereof as are not consistent with the case made by the complaint.

The plaintiff by its complaint seeks the foreclosure of a mortgage to which reference is made in the complaint. The complaint specifically describes the land conveyed in the mortgage. The description makes specific reference to a deed in the mortgagor's chain of title which expressly excepts the coal and mineral rights. The movant took title under a deed from the mortgagor which was executed and delivered subsequent to the mortgage. Whether the description contained in the mortgage and in the decree of foreclosure, by reason of the reference to the Marshall deed, does or does not embrace coal and mineral rights is a question which is not raised by the complaint. There are no allegations in the complaint upon which this question may be adjudicated. On the complaint the plaintiff was entitled to a decree of foreclosure of the land described in the mortgage as therein described. The foreclosure deed would thus convey whatever interest the mortgage conveyed. We are of the opinion, therefore, that the provision of the judgment that upon sale of the land all the right, title and interest of the movant should be thereupon forever foreclosed, as the provision relates to that portion of the tract sold which was acquired under the Marshall deed, extends beyond the relief to which the plaintiff was entitled and which the court was authorized by law to grant in a judgment by default final. Only the interest conveyed by the mortgage could be forever foreclosed.

In his motion the defendant seeks to have the description contained in the decree of foreclosure enlarged so as to expressly except the coal and mineral interests. This goes beyond the relief to which he is entitled. He only has the right to have the judgment so modified as to show that the interests conveyed by the mortgage are ordered foreclosed and that as to such interests he and the other defendants are forever foreclosed. He has no right to have inserted in the judgment an additional clause, which in fact would declare that the mortgage description was not such as to convey the coal and mineral interests. If the movant insists upon this right it must be litigated in another action.

The court below undertook to adjudicate on the motion of the defendant made after final judgment that the description contained in the mortgage was sufficient to convey the coal and mineral rights. The defendants' motion was to correct the judgment. The plaintiff in its complaint did not seek an adjudication of its right to the coal and mineral interests under the mortgage, and the motion of the defendant was allowable only to the extent that it sought to have provisions of the judgment in excess of the relief demanded stricken from the judgment. The court below inadvertently sought to determine issues not raised upon the pleadings and which could not be raised by motion in the cause after judgment. Therefore, the judgment entered on the motion undertaking to adjudicate the force and effect of the description in the mortgage was without warrant in law. The plaintiff had no more right to have the judgment enlarged to this effect in its favor than did the defendant to have it enlarged or modified to contrary effect in his behalf.

The judgment of the court below cannot be sustained. The cause is remanded for a judgment reforming the decree of foreclosure in accordance with this opinion. The plaintiff will then be entitled to a writ of assistance directing the sheriff to dispossess the defendant and place the purchaser in possession of the interest in the lands foreclosed, which it is admitted at least includes all surface rights. Thus, the defendant will not be precluded from asserting any interest in the land which he now owns or claims to own which were not embraced within the mortgage. As to the interest in the land which was conveyed by the mortgage and sold under the decree of foreclosure the defendant is forever foreclosed and estopped to assert any title thereto. What this interest was or is cannot be litigated by a motion in the cause.

Error and remanded.

COMMERCE INSURANCE COMPANY v. HASTEN McCRAW.

(Filed 1 March, 1939.)

1. Pleadings § 15—

The sufficiency of the facts alleged in the answer to constitute a defense may be tested by demurrer *ore tenus*.

2. Pleadings § 20—

A demurrer to the answer on the ground that it fails to allege facts constituting a defense admits the allegations of fact therein contained and, ordinarily, relevant inferences of fact necessarily deducible therefrom, and the answer will be liberally construed upon demurrer, and must be fatally defective before it will be rejected as insufficient. C. S., 535.

3. Bills and Notes §§ 9c, 22, 24—Answer held sufficient to raise issue of whether plaintiff purchased note or paid and extinguished it.

Plaintiff instituted this action on a note against the endorser thereon, alleging that plaintiff was a purchaser for value before maturity. Defendant alleged that the note was given for the purchase price of an automobile, that he did not endorse the note until fire insurance on the car was issued by plaintiff, that the car was damaged by fire, that the maker of the note or the automobile dealer was entitled to a sum equal to the amount of the note out of the proceeds of the insurance, and that plaintiff, as insurer, paid the dealer the amount of the note and had the note transferred to it without recourse, and that the transaction constituted payment, and discharged the note. *Held:* The facts alleged in the answer are sufficient to raise the issue of whether plaintiff bought the note, or paid and discharged it, and plaintiff's demurrer to the answer on the ground that it failed to state facts constituting a defense was properly overruled.

4. Bills and Notes § 9c—

Whether a stranger paying the amount of a negotiable note to the payee or holder, purchases the note or pays and discharges it depends, ordinarily, on the circumstances surrounding the transaction.

APPEAL by plaintiff from *Clement, J.*, at September Term, 1938, of SURRY.

Civil action to recover on promissory note. Demurrer of plaintiff to answer of defendant is overruled.

Plaintiff alleges in substance that on 3 March, 1934, Roy E. Hanks executed and delivered to Surry Sales Company a certain promissory note in the sum of $724.96, payable in monthly installments of $60.41, beginning one month after date and bearing interest at highest legal rate from maturity; that the note was endorsed by defendant; that from time to time certain payments were made on the note so that on 25 October, 1934, there was due thereon a balance of $500; that on 7 December, 1934, the Surry Sales Company, for value received, transferred the note to the plaintiff, and the plaintiff is now the owner thereof "for value and before maturity"; that default has been made in the payment thereof; and that defendant, by reason of his endorsement of same, is indebted to the plaintiff in the sum of $500 with interest thereon from 25 October, 1934.

Defendant admits the execution and delivery of the note by Roy E. Hanks; that defendant endorsed the same and that by reason of payments thereon the note had been reduced to $500 as alleged, but defendant denies that any amount is now due on said note and denies that the plaintiff is the owner of the note "for value and before maturity." Defendant avers that the note was given for the purchase price of an automobile to which by conditional sales agreement the Surry Sales Company retained the title as security for said note; that the defendant

refused to endorse the note unless and until the automobile was insured against loss and damage by fire and by theft; that an insurance policy in the sum of $500 was issued by the plaintiff covering such loss and damage, with loss payable to Surry Sales Company; that under these conditions and circumstances and on account thereof the defendant endorsed the note. Defendant further avers that on .... June, 1934, the automobile was destroyed, totally or partially, by fire, causing damage sufficiently in excess of the amount of insurance to entitle the "Surry Sales Company and/or Roy E. Hanks" to the full amount of the $500 policy; that the Surry Sales Company "duly filed a proof of loss as required by said policy of insurance; that the note and mortgage or conditional sales agreement had been endorsed by the Surry Sales Company to Surry County Loan & Trust Company of Mt. Airy, North Carolina, and that while Surry County Loan & Trust Company held said note and lien, this defendant was informed by an officer of said Surry County Loan & Trust Company prior to one year from the date of the loss and damage to said automobile by fire, that the insurance company issuing said policy . . . had paid off and settled the loss and damage by payment of the $500 with interest, and that the note which this defendant had endorsed had been paid." The defendant further avers in substance that the local agent of plaintiff procured the Surry Sales Company "to take plaintiff's draft and pay off and discharge said note and mortgage, and had the officers of said Surry Sales Company transfer and assign said note to plaintiff without recourse, as this defendant is informed and believes; that this defendant avers that the said acts were done by the plaintiff through its agents in purposed secrecy as to this defendant so far as procuring a transfer of the note to the plaintiff and with intent then and there to cheat and defraud the defendant, the said plaintiff, in reality, doing nothing more than discharging its obligation under the insurance policy aforesaid in payment of the amount which it had contracted to pay in event of loss or damage to said automobile; . . . that, therefore, the plaintiff is not the holder in due course or for value of the note sued on in this action, and is not entitled to any moneys thereon . . .

In reply plaintiff sets up certain provisions of the policy with respect to the notice and proof of loss.

Plaintiff demurred *ore tenus* to the answer of defendant for insufficient allegations to constitute a legal defense.

From judgment overruling demurrer, the plaintiff appeals to the Supreme Court and assigns error.

Carter & Carter for plaintiff, appellant.
Folger & Folger for defendant, appellee.

WINBORNE, J. We are of opinion and hold that the demurrer *ore tenus* was properly overruled.

"As to matters set up as defense the usual ground of demurrer is its insufficiency, and this may be taken by a formal demurrer or demurrer *ore tenus.*" McIntosh, N. C. Prac. & Proc., 507, sec. 475.

"The office of demurrer is to test the sufficiency of a pleading, admitting for the purpose, the truth of the allegations of the facts contained therein, and ordinarily relevant inferences of fact, necessarily deducible therefrom, are also admitted . . ." *Stacy, C. J.*, in *Ballinger v. Thomas,* 195 N. C., 517, 142 S. E., 761; *Andrews v. Oil Co.,* 204 N. C., 268, 168 S. E., 228; *Toler v. French,* 213 N. C., 360, 196 S. E., 32; *Pearce v. Privette,* 213 N. C., 501, 196 S. E., 843.

Both the statute and decisions of this Court require that the answer be liberally construed, and every reasonable intendment and presumption must be in favor of the pleader. It must be fatally defective before it will be rejected as insufficient. C. S., 535. *Blackmore v. Winders,* 144 N. C., 212, 56 S. E., 874; *Brewer v. Wynne,* 154 N. C., 467, 70 S. E., 947; *Public Service Co. v. Power Co.,* 179 N. C., 18, 101 S. E., 593; *Anthony v. Knight,* 211 N. C., 637, 191 S. E., 323; *Toler v. French, supra; Pearce v. Privette, supra.*

Whether a stranger to a note, who takes it up, buys it or extinguishes it, depends, ordinarily, on the circumstances surrounding the transaction. *Wilcoxon v. Logan,* 91 N. C., 449.

Applying these principles, and under liberal interpretation, the allegations of the answer and further defense sufficiently raise issues of fact.

The judgment below, which counsel for plaintiff state was prepared by them, taxes plaintiff with the costs of the action. In this there is error.

The judgment below is

Modified and affirmed.

CORNELIA CARTWRIGHT v. PAUL W. JONES.

(Filed 1 March, 1939.)

1. Wills § 10—Failure of proof that instrument was found among valuable papers held fatal to establishment of holographic alteration in joint, statutory will as a holograph codicil thereto.

Husband and wife executed a joint will with subscribing witnesses disposing of all their property, which will contained a provision devising the home place to a son. Thereafter the husband, without the knowledge of

the wife, added in his own handwriting after this devise, a provision that as he had sold the home place he wanted the son to have the store house in lieu thereof. The store house was owned by the wife in fee simple. Upon the death of the husband the statutory will was properly probated, and the husband's handwriting in making the alteration and signature was proved by three witnesses and admitted to probate as a holograph codicil to the statutory will. *Held:* The failure of proper proof that the purported holograph codicil was found among deceased's valuable papers is a fatal defect, C. S., 4131, 4144, and the surviving wife has title to the store house and may convey same in fee simple.

2. Estoppel § 1—Under facts of this case plaintiff held not estopped to assert title in fee by recital in deed of trust that she owned life estate.

A wife, executing a deed of trust on property with her husband, is not estopped from asserting her title in fee to the property by a recital in the deed of trust that she owned only a life estate in the property when it appears that she did not know of the recital in the deed of trust, that she paid off the mortgage, and that no one relied on the recital to his injury, or was misled thereby.

APPEAL by defendant from *Cowper, Special Judge,* at October Term, 1938, of PASQUOTANK. Affirmed.

This is a controversy without action submitted upon an agreed statement of facts. C. S., 626, *et seq.*

Plaintiff, 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 declined to accept the deed and refused to make payment of the purchase price on the ground that the title offered was defective.

It was agreed that if in the opinion of the court, under the facts submitted, plaintiff were able to convey a good and indefeasible fee simple title to the land in question, judgment should accordingly be entered for the plaintiff, otherwise for the defendant.

The court, being of the 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 plaintiff, from which the defendant appealed, assigning error.

Worth & Horner for plaintiff, appellee.
John H. Hall for defendant, appellant.

SCHENCK, J. On the hearing the title offered was properly made to depend upon the effectiveness of an attempted change in a portion of Item III of a joint will executed by the plaintiff and her late husband, H. Cartwright, reading:

"Item III. It is our mutual will and desire, that whatever property which belonged to both or either of us and which may be in existence at the death of the survivor of us, shall be divided and distributed after the death of the survivor of us as follows:

"(a) . . .

"(b) . . .

"(c) The home place to go to our son Melick Cartwright in fee simple (As I have sold the Home Place I want Melick have the store house in place of the one I sold. Hilery Cartwright).

"(d) . . ."

According to the agreed facts, the plaintiff, Cornelia Cartwright, owned in fee simple "the store house" property referred to in said Item III prior to and at the time of the execution of the said joint will; the words in parenthesis, "As I have sold the Home Place I want Melick have the store house in place of the one I sold. Hilery Cartwright" were inserted in the joint will in pencil by Hilery Cartwright after the execution thereof by him and his wife, the plaintiff Cornelia Cartwright, and without the knowledge or consent of said Cornelia Cartwright; the joint will, with the exception of the pencil insertion, was typewritten and was proven and ordered to probate on the oath and examination of two subscribing witnesses; the words "As I have sold the Home Place I want Melick have the store house in place of the one I sold. Hilery Cartwright" were proven and ordered to probate as a codicil to the original typewritten will on the oath and examination of three witnesses; the affidavits of the witnesses and the order of probate, being as follows:

"North Carolina—Pasquotank County.

"J. C. Spence, Lloyd S. Sawyer and C. C. Pritchard, being duly sworn each for himself, deposes and says:

"That he is well acquainted with the handwriting of Hilery Cartwright, deceased, having often seen him write and that the codicil to said Will, as appears by pencil notation in the first (third) paragraph of said Will, and every part thereof, is in the genuine handwriting of said Hilery Cartwright, deceased, and that the signature at the end thereof is in his genuine handwriting.

J. C. SPENCE,
LLOYD S. SAWYER,
C. C. PRITCHARD.

"Severally sworn to and subscribed before me, this 4th day of April, 1933.

N. E. AYDLETT,
Clerk Superior Court."

"Upon the foregoing affidavits it is considered and adjudged by the court that the said typewritten paper and every part thereof is the last Will and Testament of H. Cartwright, deceased, and that the said pencil notation or codicil and every part thereof is likewise a part of the last Will and Testament of Hilery Cartwright, deceased. It is, therefore, ordered that the said Will and Codicil, together with the affidavits and this probate, be recorded and filed this 4th day of April, 1933.

N. E. AYDLETT,
Clerk Superior Court."

C. S., 4131, after setting forth the requisites for a valid last will or testament when subscribed by witnesses, provides further in the alternative that no last will or testament shall be good or sufficient in law to convey any estate "unless such last will and testament be found among the valuable papers and effects of any deceased person, or shall have been lodged in the hands of any person for safe-keeping, and the same shall be in the handwriting of such deceased person, with his name subscribed thereto or inserted in some part of such will."

C. S., 4144 reads: "Wills and testaments must be admitted to probate *only* in the following manner:

"1. . . .

"2. In case of a holograph will, on the oath of at least three credible witnesses, who state that they verily believe such will and every part thereof is in the handwriting of the person whose will it purports to be, and whose name must be subscribed thereto, or inserted in some part thereof. It must further appear on the oath of some one of the witnesses, or of some other credible person, that such will was found among the valuable papers and effects of the decedent, or was lodged in the hands of some person for safe-keeping."

The words inserted in the joint will in pencil were not in it at the time of its execution, but were inserted sometime thereafter without the knowledge or consent of the plaintiff. Such words have never been properly or validly proven and probated as the will of anyone, since it does not appear on oath of any of the witnesses or other credible person that such purported holograph codicil was found among the valuable papers and effects of the decedent or was lodged in the hands of any person for safe-keeping. The insertion of these words under the circumstances was ineffective to pass title to the lands of the plaintiff.

It appears from the agreed statement of facts that subsequent to the probate of the joint will the plaintiff joined in the execution of a deed of trust on "the store house" property to secure a debt of A. M. (Melick) Cartwright, wherein it was stated "said Cornelia Cartwright is the

owner of a life estate in the above described property," and the defendant contends that the plaintiff is estopped by this deed of trust to deny that she owns more than a life estate in the land involved in this controversy. This contention is untenable since it appears that the plaintiff did not know that such statement was contained in said deed of trust, and that it does not appear that anyone relied upon said statement, or was misled thereby, and that the debt secured by said deed of trust has been paid by the plaintiff (notwithstanding it was the debt of A. M. Cartwright) and the deed of trust has been cancelled.

The judgment of the Superior Court is

Affirmed.

R. L. CHESSON v. KIECKHEFER CONTAINER COMPANY, A CORPORATION, AND NORTH CAROLINA PULP COMPANY, A CORPORATION.

(Filed 1 March, 1939.)

1. Contracts § 27—

Nonsuit for insufficiency of evidence to support allegations *held* proper upon plaintiff's cause of action to recover for defendant's alleged wrongful interference with plaintiff's contract with a third person.

2. Contracts §§ 16, 22—Evidence held for jury on issue of defendant's breach of contract to furnish equipment for cutting timber.

Evidence *held* sufficient as against nonsuit on plaintiff's cause of action on the contract alleged, under which defendant agreed to purchase pulp wood at a stipulated price per cord and to furnish plaintiff with equipment for cutting and handling the wood, plaintiff contending that defendant breached the contract by failing to furnish the equipment as agreed, rendering it impossible for plaintiff to deliver the wood.

3. Contracts § 25b—

When a contract is breached by one party, the law imposes the duty on the other party to exercise reasonable diligence to minimize the loss.

4. Same—Instruction held for error in failing to submit to jury question of whether plaintiff could have minimized loss.

This action was instituted on a contract under which defendant agreed to purchase pulp wood from plaintiff at a stipulated price per cord and to furnish plaintiff with equipment for cutting and handling the wood, plaintiff claiming that defendant breached the contract by failing to furnish the equipment as agreed, rendering it impossible for plaintiff to deliver the wood. *Held:* It was error for the court to refuse to submit to the jury in its instructions on the issue of damages defendant's contentions as to whether plaintiff, in the exercise of reasonable diligence, could have minimized the loss by obtaining the necessary equipment elsewhere, in which event any increase in cost of the equipment would be a proper element of damage.

4. Same—Instruction held for error in failing to submit to jury all elements entering into the question of measure of damages.

This action was instituted on a contract under which defendant agreed to purchase pulp wood from plaintiff at a stipulated price per cord and to furnish plaintiff with equipment for cutting and handling the wood, plaintiff contending that defendant breached the contract by failing to furnish the equipment as agreed, rendering it impossible for plaintiff to deliver the wood. *Held:* The court, in its instructions to the jury on the issue of damages, should have permitted the jury to consider, as elements entering into the question of damages, defendant's contentions, supported by evidence, that plaintiff did not own the wood but would have had to purchase it from the owner at a stipulated price, and that under the contract defendant was entitled to charge a certain sum per cord for furnishing the equipment for cutting and handling the wood.

5. Same—Rule for measurement of damages for breach of contract.

The general rule is that a party damaged by breach of contract is entitled, as compensation therefor, to be placed, so far as this can be done with money, in the same position he would have occupied if the contract had been performed, and when the breach prevents performance, this includes profits which the injured party would have realized had the contract not been breached.

APPEAL by plaintiff and defendant Kieckhefer Container Company from *Thompson, J.*, at December Term, 1938, of CHOWAN.

Plaintiff's appeal, affirmed.

Defendant's appeal, new trial.

Plaintiff instituted his action against the defendants upon two causes of action, (1) for damages for breach of contract to purchase certain pulp wood, and (2) for damages for wrongful interference with plaintiff's contract with another relative to the cutting of pulp wood.

At the close of the evidence judgment of nonsuit was entered as to plaintiff's second cause of action, and he excepted and appealed. Nonsuit was also entered as to the defendant North Carolina Pulp Company.

Issues were submitted to the jury as to plaintiff's first cause of action and answered in favor of the plaintiff. From judgment on the verdict, defendant Kieckhefer Container Company appealed.

J. Henry LeRoy and J. H. Hall for plaintiff.

Z. V. Norman and W. D. Pruden for defendants.

PLAINTIFF'S APPEAL.

DEVIN, J. Plaintiff's appeal brings up for review the ruling of the court below in sustaining motion for judgment of nonsuit as to plaintiff's cause of action for an alleged wrongful interference with a contract which plaintiff had entered into with one J. C. Wilson, relative to the cutting of pulp wood on Wilson's land for delivery to defendant. An

examination of the evidence offered in support of this allegation, however, leads us to the conclusion that there was no error in the ruling of the trial court in this respect, and that the judgment of nonsuit as to plaintiff's second cause of action should be affirmed.

DEFENDANT'S APPEAL.

For his first cause of action plaintiff alleged that he had contracted to deliver, and the defendant Kieckhefer Container Company to purchase, all the suitable pulp wood which plaintiff might cut from a described tract of land, at the price of $4.50 per cord, and that to enable plaintiff to perform his part of the contract the defendant had agreed to furnish plaintiff the equipment with which to handle the timber, including "team, wagon, truck and money for cutting and operating expenses," and that his delivery of the pulp wood according to contract was prevented by the breach of defendant's agreement to furnish the equipment specified. He alleged that by reason of defendant's failure to comply with its contract he had been damaged in respect to gains prevented and had lost the profits he would have made if defendant had complied with its agreement.

The evidence whereby plaintiff sought to establish the terms of the contract, including the agreement of defendant to furnish the required equipment, was in some respects indefinite, but considering it in the light most favorable to the plaintiff, we are unable to say that it was insufficient to warrant submission to the jury. There was some evidence tending to show the contract as alleged and its breach by the defendant.

The defendant, however, challenges the correctness of the result reached, on the ground that there was error in the trial court's instructions to the jury as to the measure of damages, and we think its assignment of error based on this exception must be sustained and a new trial awarded.

The plaintiff delivered no pulp wood (save one car load which was paid for), but he contends his failure to do so was caused by defendant's breach of its agreement to furnish him equipment and advances to enable him to cut and deliver the wood. Hence the damages recoverable, in the sense of gains prevented, were only those proximately flowing from defendant's breach of this agreement. If the defendant breached its contract in this respect, the law imposed upon the plaintiff the duty of exercising reasonable diligence to minimize the loss (*Hassard-Short v. Hardison*, 114 N. C., 482, 19 S. E., 728) by procuring such equipment and advances as he could from other sources, and, if he could have done so, the increased cost thereof would have been a proper element of damage. *Coles v. Lumber Co.*, 150 N. C., 183, 63

S. E., 736. This view, upon proper request, the court declined to present to the jury.

The court charged the jury that the measure of damages was the difference between the contract price which the defendant was to pay the plaintiff for the pulp wood delivered under its contract and the cost of cutting and loading the wood on the railroad siding. The evidence, however, disclosed that the plaintiff did not own the land or the timber from which the wood was to be cut, but that he had a contract with the owner by which upon the payment of $1.50 per cord he would be permitted to cut the wood on the described land. There was also evidence tending to show that the compensation to the defendant for furnishing the equipment specified was to be fifty cents per cord.

It is apparent, therefore, that in submitting the issue of damages to the jury the court inadvertently failed to permit the jury to consider all the elements entering into the question of damage which were presented by the evidence and which were necessary to a proper finding thereon.

The general rule is that a party to a contract, who has been injured by the breach, is entitled as compensation therefor to be placed, in so far as this can be done by money, in the same position he would have occupied if the contract had been performed, and where the breach of contract consists in preventing its performance, the party injured, on proper proof, may recover the profits he would have realized had the contract not been breached.

"The amount that would have been received if the contract had been kept and which will completely indemnify the injured party is the true measure of damages for its breach. Where one violates his contract he is liable for such damages, including gains prevented as well as losses sustained, which may fairly be supposed to have entered into the contemplation of the parties when they made the contract, that is, such as might naturally be expected to follow its violation, and they must be certain, both in their nature and in respect to the cause from which they proceed." *Machine Co. v. Tobacco Co.*, 141 N. C., 284, 53 S. E., 885.

We think the omission of the court below to call the attention of the jury to matters material to a proper finding on the issue of damages is sufficiently prejudicial to entitle the appealing defendant to a new trial, and it is so ordered.

This disposition of the appeal renders unnecessary the consideration of the other exceptions noted at the trial and brought forward in the assignments of error.

On plaintiff's appeal, affirmed.

On defendant Kieckhefer Container Company's appeal, new trial.

S. M. CAHOON, J. A. PLEDGER AND W. A. HOWETT, ON BEHALF OF THEMSELVES AND ALL OTHER CITIZENS WHO WISH TO MAKE THEMSELVES PARTIES, v. J. R. ROUGHTON.

(Filed 1 March, 1939.)

1. Highways § 12—Plaintiffs' allegations and evidence held to show abandonment of public highway.

Plaintiffs claimed a public way over the lands of defendant to an old wharf on defendant's land. Plaintiffs' allegations and evidence, if sufficient to show that the asserted right of way was ever a public highway, tended to show that when the State Highway Commission took over the county roads, ch. 145, Public Laws of 1931, amending ch. 2, Public Laws of 1921, it built a highway to the water's edge to a new and more accessible pier, and did not include therein the asserted public way to the old wharf. *Held:* The allegations and evidence disclosed an abandonment of the roadway claimed as a public highway, and the subsequent maintenance of the roadway by members of the community upon their own responsibility and initiative, is not a "maintenance by the public" such as to constitute it a public road.

2. Highways § 13—Held: Plaintiffs failed to establish that public way asserted was a neighborhood public road.

Plaintiffs' allegations and evidence tended to show that the alleged public way to an old wharf had been abandoned by the Highway Commission when it took over the county roads, and that plaintiffs did not reside along the alleged public road, and that it was not necessary to them as a way of egress and ingress to their homes, but that they used same in getting to the old wharf to their boats for hunting and fishing parties. *Held:* Plaintiffs failed to establish their right to the use of the passway as a neighborhood public road.

3. Highways § 18—Held: Plaintiffs failed to show right to restrain defendant from blocking passway on his land.

Plaintiffs instituted this action to restrain defendant from blocking a passway across his land to an old wharf at which plaintiffs kept their boats. Plaintiffs' allegations and evidence established that if the passway had ever been a public highway, it had been abandoned, and failed to establish same as a neighborhood public road, and failed to establish a public easement over defendant's lands. *Held:* Defendant's motion to nonsuit should have been granted.

4. Easements § 3—In order to establish public right of way over private lands by prescription, asserted right of way must be definite.

In order for the public to establish a right of way across private lands by prescription, it is necessary that the right of way be established by definite and specific lines, although slight deviations in the line of travel are not fatal, but evidence that the pathway used by the public shifted, as erosion caused by rain and tides made it necessary, is insufficient to establish a public easement.

CAHOON *v.* ROUGHTON.

APPEAL by defendant from *Thompson, J.,* at October Term, 1938, of TYRRELL.

Civil action to enjoin the defendant from blocking an alleged public road leading from Highway No. 64 to a wharf in Alligator Creek.

Issues were submitted to and answered by the jury as follows:

"1. Is the defendant the owner of the lands described in the answer: A. 'Yes.'

"2. Has the strip of land referred to in the complaint become a public highway by the continued and uninterrupted use or enjoyment of it by the public, and work and control over it by the public authorities for twenty years under claim of right adverse to the owner, known to and acquiesced in by him? A. 'Yes.'"

From judgment thereon, restraining the defendant from obstructing in any manner plaintiffs' easement in the use of said old road as the same existed at the time of the institution of this action, the defendant appealed.

H. L. Swain for plaintiffs, appellees.
W. L. Whitley for defendant, appellant.

BARNHILL, J. The plaintiff alleges that more than fifty years ago citizens of Alligator Township, Tyrrell County, constructed a wharf in Alligator Creek for the use of citizens of that community; that a public road about 100 yards long was built from the then existing public road to the wharf, and that said road has been used continuously as a public road since its construction.

The wharf is constructed from the lands belonging to the defendant to deep water in Alligator Creek. There is no evidence to sustain the allegation that it was originally built by citizens of the township. It does appear that in 1912, the wharf having become dilapidated to the extent that it was not usable, citizens of the community, including the defendant, and with his permission, repaired the wharf and put it in usable condition. Wharfage was thereafter charged and the amounts so received went into a fund to be used to keep the wharf in good condition. Later, after the construction of Highway No. 64 and a new and more accessible pier at the end of said highway, known as the ferry pier, citizens discontinued the use of the wharf and the funds on hand from wharfage fees were paid to the defendant.

The evidence considered in the light most favorable to the plaintiffs tends to show that the roadway in controversy was an extension of the county public road system, and that while the wharf was in usable condition persons having need thereof traveled to and from the wharf over

said road, which crosses the defendant's land. Lately certain citizens of that community have been using the old wharf for the purpose of anchoring their boats and to take on and discharge hunting and fishing parties until the defendant blocked the road and this action was instituted.

The plaintiffs allege "that after the State Highway Commission took over the roads of the State it built a highway to the water's edge, but did not include this roadway to the wharf tramway." Under the law, as it now exists, this would seem to be an allegation that the alleged road has been abandoned as a public highway. It is true that it is further alleged in the complaint that the public has continued to use the roadway as it has had the need and still uses the wharf for shipping purposes. This is not sufficient to constitute the passway a public road. The term "maintained by the public" as used in relation to public highways means "maintained under public authority by those officials whose duty it is to maintain public roads." Maintenance of a road by members of a community upon their own responsibility and initiative is not within the meaning of the term.

The State assumed entire control of all the roads of the State in 1931 under the terms of ch. 145, Public Laws 1931, which is amendatory of ch. 2, Public Laws 1921. The 1931 act provides that from and after July 1, 1931, the exclusive control and management of, and responsibility for, all public roads in the several counties shall be vested in the State Highway Commission. When the Highway Commission constructed Highway No. 64, extending the same in a direct line to the water's edge on Alligator Creek and to a new pier, it thereby abandoned the road in controversy as a part of the public road system, if it be conceded that the evidence discloses that it ever existed as such.

The said roadway does not now exist as a public road and the plaintiffs have failed to bring themselves within the decision in *Davis v. Alexander,* 202 N. C., 130, 162 S. E., 372. None of them live on the alleged road or use the same as a method of ingress and egress to their homes. There is no evidence that the county authorities have done any work on the road since February, 1931, at which time plaintiffs' witness Norman, as section road foreman, under the direction of the county road engineer, bridged a part of the road. In respect to the work done on that date he testified: "That occasion I referred to in February, 1931, was the only time I ever went down there. I don't know of any work that has been done on that passway by the State or the county before or since that time." Furthermore, the evidence tends to show that the alleged road, due to erosion, is under water and that high tide covers much of it; that it has grown up in bulrushes, sage and the like. Like-

wise, plaintiffs' testimony tends to show that during past years, since the wharf became dilapidated and citizens ceased to keep it maintained, the pathway has been used only on infrequent occasions. The allegation in the complaint and the evidence of the plaintiffs establish the fact that the road has been abandoned as a public road if it ever existed as such. Plaintiffs do not seek to establish the existence of the same as a neighborhood road maintained for the convenience of those using the old wharf. We must conclude, therefore, that it was error for the court below to deny the motion of the defendant for judgment of nonsuit at the conclusion of the evidence of the plaintiffs.

There is a further reason why this ruling was erroneous. The plaintiffs' evidence failed to establish the situs of the road. It establishes one terminus at the old wharf and the other terminus at some unidentified point on Highway 64. Witnesses testified that it led from the old public road to the wharf. Some said that as it now exists it is partly under water and partly on land. Others testified that it followed the edge of the water. Still another stated that at some places the road is not over ten feet from the water and at others twenty feet. Another testified that the only way to get to it (the wharf) is "to go through Captain Roughton's lot or go around the edge of the creek where the old road used to be. Part of the old road is in the creek now. The water is now from two to six inches deep." Thus it appears that the plaintiffs failed to offer evidence tending to establish the identity of the pathway used. It is not sufficient to show that the public used a pathway that shifted, as erosion caused by the rains and the tides made it necessary, to establish the highway by prescription. It must appear that the general public used the same under a claim of right adverse to the owner and the travel must be confined to a definite and specific line, although slight deviations in the line of travel so long as the road remains substantially the same, do not destroy the rights of the public. *Hemphill v. Board of Aldermen,* 212 N. C., 185, 193 S. E., 153, and cases there cited.

It may be noted that while the plaintiffs sought to establish the existence of a public road across the defendant's land the court entered judgment upon the theory that plaintiffs had established an easement in the use of the old road.

The judgment below is

Reversed.

R. L. JOHNSON v. PILOT LIFE INSURANCE COMPANY.

(Filed 1 March, 1939.)

Appeal and Error § 2—Appeal from denial of motion to dismiss on ground that action was barred by statute of limitations held premature and fragmentary.

In this action to set aside a release signed by insured and to recover on the policy of insurance, defendant insurer pleaded the release, and moved to dismiss the action on the ground that "it appears from the record, including the stipulations, that the action" to set aside the release for fraud was barred by the three-year statute of limitations, C. S., 441. Defendant insurer appealed from the order denying its motion to dismiss. *Held:* The appeal is premature and fragmentary, it appearing that the motion to dismiss was not treated as a request for a separate trial on the issue of the bar of the statute, and the appeal is not authorized by the statute, C. S., 638, and is dismissed. The distinction is pointed out between this appeal and those involving a question of jurisdiction, those in which some fatal defect appears on the face of the record, and those from the denial of a motion to strike.

APPEAL by defendant from *Ervin, Special Judge,* at September Term, 1938, of NASH.

Civil action to recover disability benefits under policy of insurance issued by defendant to plaintiff and to set aside settlement or release given by plaintiff to defendant.

The complaint alleges that a $15,000-policy of life insurance was issued to the plaintiff by the defendant on 17 March, 1926, containing provision for total and permanent disability benefits, etc.; that the plaintiff was totally and permanently disabled 20 May, 1929, as a result of an injury, broken neck, which rendered him incapable of attending to his business affairs; that in October, 1929, the defendant took advantage of plaintiff's mental condition and procured from him "by means of persuasion and undue influence" the policy in suit and undertook to settle its liability thereunder by the payment of $5,000; that the said attempted settlement and surrender of the policy in suit, under the circumstances alleged, is void and of no effect; wherefore, plaintiff prays for its reinstatement and recovery thereunder.

The defendant answering, denied any liability under the policy; pleaded the settlement of 16 October, 1929, as a complete release and discharge; and further, that the plaintiff's action to set aside the release on the ground of fraud is barred by the three-years statute of limitations.

The plea of the statute of limitations is based upon allegations to the effect that even if the plaintiff were of unsound mind on 16 October,

1929 (which is expressly denied) and continued in that condition, nevertheless in March, 1933, a general guardian was appointed for the plaintiff, who, with his counsel, made an investigation "relative to the fairness and adequacy of the settlement," completing the investigation in April, 1933; that the said guardian was discharged upon a finding of plaintiff's sanity on 12 December, 1933; and that this action was not begun until 28 November, 1936.

"For the purpose of motion," plaintiff's counsel filed a written stipulation to the effect that a guardian was appointed in March, 1933; that shortly thereafter certain information was requested of defendant "for the purpose of ascertaining whether any undue advantage was taken of the said R. L. Johnson at the time of settlement"; that the information requested was furnished in April, 1933; that in December following, the plaintiff was adjudged competent to manage his own affairs.

"Thereupon the defendant made an oral motion in open court that the action be dismissed on the ground that it appears from the record, including the stipulations, that the action is barred by the statute of limitations."

There is a reference in the judgment to "the stipulations filed by the parties," but the only stipulation appearing on the record is the one filed by counsel for plaintiff.

The motion was denied and defendant appeals, assigning as error "that the court erred in denying its motion to dismiss."

Dan B. Bryan, Harold D. Cooley and I. T. Valentine for plaintiff, appellee.

Smith, Wharton & Hudgins and Battle & Winslow for defendant, appellant.

STACY, C. J. It appears that in the Superior Court an effort was made to have the issue raised by defendant's plea of the statute of limitations, C. S., 441, "finally determined in advance of the trial" upon the complaint, answer, and "stipulations filed by the parties." To this end, the defendant sought to terminate the action by motion to dismiss, *Batson v. Laundry,* 206 N. C., 371, 174 S. E., 90, albeit the burden was on the plaintiff to show that he had brought a live claim to court. *Allsbrook v. Walston,* 212 N. C., 225, 193 S. E., 151. From a denial of the motion, the defendant appeals.

It is not clear upon what theory the motion was ruled, *i.e.,* whether the issue was finally determined or the "evidence" merely held sufficient to preclude a nonsuit. See *Dix-Downing v. White,* 206 N. C., 567, 174 S. E., 451; *Rogers v. Bailey,* 209 N. C., 849, 184 S. E., 48. Without

this knowledge, any expression of opinion might prove unwise. *Richardson v. Express Co.*, 151 N. C., 60, 65 S. E., 616. Perhaps neither side would want to risk the issue upon the record as it now stands. However this may be, it is manifest that the appeal is fragmentary or premature and must be dismissed under the uniform decisions on the subject. *Capps v. R. R.*, 182 N. C., 758, 108 S. E., 300; *Yates v. Ins. Co.*, 176 N. C., 401, 97 S. E., 209. There are other issues yet to be determined. *Joyner v. Reflector Co.*, 176 N. C., 274, 97 S. E., 44. A fragmentary appeal is one which seeks to bring up only a part of the case, leaving other parts of it unsettled. *Hinton v. Ins. Co.*, 116 N. C., 22, 21 S. E., 201; McIntosh N. C. Prac. & Proc., 776.

No appeal lies from a refusal to dismiss an action. *Goldsboro v. Holmes*, 183 N. C., 203, 111 S. E., 1; *Farr v. Lumber Co.*, 182 N. C., 725, 109 S. E., 383; *Goode v. Rogers*, 126 N. C., 62, 35 S. E., 185. In such case there is no judgment—only the refusal of a judgment. *Bradshaw v. Bank*, 172 N. C., 632, 90 S. E., 789. Of course, if the motion had been allowed and the action dismissed, the plaintiff could not have proceeded in the court below, and in that event an appeal by the plaintiff would have been in order. *Royster v. Wright*, 118 N. C., 152, 24 S. E., 746. Such a ruling would have been just the reverse of the one we are now considering. *Batson v. Laundry, supra.*

The reason no appeal lies from a refusal to dismiss is that it does not come within the purview of the statute, C. S., 638, permitting appeals. *Thomas v. Carteret County*, 180 N. C., 109, 104 S. E., 75; *Chambers v. R. R.*, 172 N. C., 555, 90 S. E., 590; *Corporation Com. v. Mfg. Co.*, 185 N. C., 17, 116 S. E., 178. Moreover, if a departure be allowed in one case, it could be insisted on in another, and each litigant, conceiving himself to be aggrieved, could appeal and thus prolong litigation until it might become intolerably burdensome. *Capps v. R. R., supra; Beck v. Bank*, 157 N. C., 105, 72 S. E., 632; *Pritchard v. Spring Co.*, 151 N. C., 249, 65 S. E., 968; *Martin v. Flippin*, 101 N. C., 452, 8 S. E., 345. See collection of authorities in opinion of *Clark, C. J.*, in *Williams v. Bailey*, 177 N. C., 37, 97 S. E., 721.

"It is only when the judgment or order appealed from in the course of the action puts an end to it, or may put an end to it, or has the effect to deprive the party complaining of some substantial right, or will seriously impair such right if the error shall not be corrected at once, and before the final hearing, that an appeal lies before final judgment." *Merrimon, J.*, in *Leak v. Covington*, 95 N. C., 193.

Again in *Hosiery Mill v. Hosiery Mills*, 198 N. C., 596, 152 S. E., 794, *Connor, J.*, delivering the opinion of the Court, said: "Ordinarily, no appeal lies to this Court from an interlocutory order made in an

action pending therein by the Superior Court. An exception to the order, taken in apt time, will be considered on an appeal from the final judgment in the action, when such exception is duly presented on said appeal. If, however, an interlocutory order affects a substantial right of a party to the action, and is prejudicial to such right, he may appeal therefrom to this Court, and his appeal will be heard, and decided on its merits. *Skinner v. Carter,* 108 N. C., 106, 12 S. E., 908. If the order does not affect a substantial right of the appellant, his appeal therefrom to this Court will be dismissed. *Warren v. Stancil,* 117 N. C., 112, 23 S. E., 216; *Leak v. Covington,* 95 N. C., 194." See *Smith v. Miller,* 155 N. C., 242, 71 S. E., 353; *Cement Co. v. Phillips,* 182 N. C., 437, 109 S. E., 257; *Leroy v. Saliba, ibid.,* 757, 108 S. E., 303.

It may not be amiss to observe that we are not dealing with a jurisdictional question, *Denton v. Vassiliades,* 212 N. C., 513, 193 S. E., 737, nor one of estoppel, *Verys v. Ins. Co.,* 210 N. C., 442, 187 S. E., 583, *Buchanan v. Oglesby,* 207 N. C., 149, 176 S. E., 281, nor one where some fatal defect appears on the face of the record, *Dunn v. Wilson,* 210 N. C., 493, 187 S. E., 802, nor yet with a motion to strike, *Patterson v. R. R.,* 214 N. C., 38, 198 S. E., 364.

We may also add that the motion to dismiss was not treated as a request for a separate trial on the issue raised by the plea in bar. Nor was it so intended. *Bethell v. McKinney,* 164 N. C., 71, 80 S. E., 162; *Royster v. Wright, supra.*

Appeal dismissed.

S. W. CROWDER v. P. T. STIERS.

(Filed 1 March, 1939.)

1. Execution § 25: Libel and Slander § 15—In order to warrant execution against the person in tort actions jury must find actual malice.

In order to warrant execution against the person in an action for slander, as well as in actions for other torts, it is necessary that there be an affirmative finding by the jury upon a separate issue of express or actual malice, as distinguished from the malice implied by law from the utterance of words which are actionable *per se*.

2. Same—Order for execution against the person in the absence of affirmative finding by the jury of actual malice is irregular.

In this action for slander no separate issue of express or actual malice was submitted to the jury. Upon an affirmative finding by the jury on the issue submitted, judgment was rendered that plaintiff recover the amount of damages awarded by the jury, and the court made an additional finding that the words spoken were false and actually malicious, and ordered that execution against the person of the defendant should

issue upon return of execution against the property unsatisfied. *Held:* There being no waiver of a jury trial on the issue of malice, the judgment, even though not appealed from, does not support the order for execution against the person, and the order in this respect is irregular, an affirmative finding by the jury of actual malice being necessary to support such order.

3. Judgments §§ 23c, 25c—

The court, upon proper application, has the power to modify a judgment for irregularity, and to properly define the limits of authority under the judgment.

4. Execution § 11—Motion to recall execution against the person is proper remedy when such execution is not properly authorized by judgment.

A motion in the cause to recall execution against the person is the proper remedy when there is no affirmative finding by the jury of express or actual malice to support the order of execution against the person, and the motion to recall is made in apt time when execution against the person is issued under the judgment, since defendant's rights are threatened by the attempted enforcement of the order and not by the rendition of the judgment.

APPEAL by defendant from *Clement, J.*, at Chambers, 9 November, 1938, of ROCKINGHAM. Reversed.

Sharp & Sharp and Glidewell & Glidewell for plaintiff.
Karl R. Massey for defendant.

DEVIN, J. The question presented by this appeal arose upon a motion in the cause to recall an execution against the person of the defendant. It was contended that the execution was invalid in that it was issued pursuant to a judgment based upon a mere finding by the court as to a material fact not supported by the verdict of the jury.

The facts were substantially these: Plaintiff instituted his action against the defendant for slander. The words spoken were alleged in the complaint to amount to a charge of larceny. Two issues were submitted to the jury and answered as follows: "(1) Did the defendant speak of and concerning the plaintiff the words in substance alleged in the complaint? Answer: 'Yes.' (2) If so, what damage is the plaintiff entitled to recover of the defendant? Answer: '$1,383.'" The trial judge in his judgment, after reciting the issues and verdict, incorporated the finding that the words spoken "were false and actually malicious," and adjudged that plaintiff recover the amount fixed by the verdict, and further ordered that, if execution against the property of defendant be returned unsatisfied, execution issue against the person of the defendant. No appeal from the judgment was entered or perfected.

Thereafter, upon return unsatisfied of execution against the property

of defendant, at the instance of the plaintiff the clerk of the Superior Court issued execution against the person of the defendant and caused his arrest and imprisonment. The defendant then filed his motion to recall the execution, and obtained from the judge of the Superior Court, Judge Clement, a restraining order temporarily restraining the sheriff from taking further steps under the execution, pending a hearing. When the motion came on to be heard, Judge Clement, after finding the facts, dissolved the restraining order, upon the ground that no appeal having been taken from the judgment wherein execution against the person was ordered, he was without authority to modify that judgment. The sheriff was directed to proceed with the execution against the person of defendant. Pending appeal defendant was released on bond.

It is firmly established in this jurisdiction that in order to warrant the arrest and imprisonment of a person in execution in a civil action for slander there must be, upon proper issue submitted, an affirmative finding by the jury of express or actual malice. *Swain v. Oakey,* 190 N. C., 113, 129 S. E., 151. The same rule applies to other torts. *Ledford v. Emerson,* 143 N. C., 527, 55 S. E., 969; *Oakley v. Lasater,* 172 N. C., 96, 89 S. E., 1063; *Coble v. Medley,* 186 N. C., 479, 119 S. E., 892; *Harris v. Singletary,* 193 N. C., 583, 137 S. E., 724; *Foster v. Hyman,* 197 N. C., 189, 148 S. E., 36; *Watson v. Hilton,* 203 N. C., 574, 166 S. E., 589; *Klander v. West,* 205 N. C., 524, 171 S. E., 782; *Ledford v. Smith,* 212 N. C., 447, 193 S. E., 722.

"To warrant an execution against the person of the judgment debtor, after plaintiff has exhausted his remedy against the property of the defendant, when the cause of arrest is set out in the complaint (*Peebles v. Foote,* 83 N. C., 102), the same must be sustained by the evidence and established by the verdict." *Coble v. Medley, supra.*

In order that execution against the person may issue, a distinct and separate issue as to the essential fact upon which the right to the execution is based must be submitted to and affirmatively found by the jury. *McKinney v. Patterson,* 174 N. C., 483, 93 S. E., 967.

In the instant case no issue as to actual malice, as distinguished from the malice in law imported by the utterance of words actionable *per se,* was submitted to the jury, and the trial court was without power, in the absence of an affirmative answer to such an issue, to order the arrest of the defendant in execution against his person. There was no waiver of jury trial on this issue, which was one raised by the pleadings and essential to the determination of right to such an execution.

The finding of the trial judge, without the intervention of the jury, that the words were "actually malicious" could not take the place of trial by jury of an essential issue of fact, nor have the effect of depriving

the defendant of his homestead and personal property exemptions (C. S., 1631), nor sanction an invasion of his right of personal liberty.

While that portion of the judgment of the trial court which adjudged the amount of the recovery for the words spoken, from which no appeal was taken, may not now in that respect be amended or modified, the judgment, on this motion, will not be held to authorize the issue of execution to arrest and imprison the defendant for failure to pay a judgment for money, predicated only upon issues submitted which do not support an execution against the person.

In the latter respect and to that extent the judgment was irregular, and the court has power upon proper application to define the limits of authority thereunder and to modify its effect. As was said in *Carter v. Rountree,* 109 N. C., 29, 13 S. E., 716: "An irregular judgment is one entered contrary to the course of the court, contrary to the method of procedure and practice under it allowed by law in some material respect; as if the court gave judgment without the intervention of a jury in a case where the party complaining was entitled to a jury trial and did not waive his right to the same." *Vass v. Building & Loan Association,* 91 N. C., 55; *Moore v. Packer,* 174 N. C., 665, 94 S. E., 449; *Finger v. Smith,* 191 N. C., 818, 133 S. E., 186.

The motion in the cause to recall the execution on the ground of its invalidity did not come too late. It was only by the attempted enforcement of an execution unauthorized by law, and not by the rendition of the judgment, that the defendant's rights and liberties were threatened. *Harrell v. Welstead,* 206 N. C., 817, 175 S. E., 283; *York v. Texas,* 137 U. S., 15.

There was error in dissolving the temporary restraining order. The defendant was entitled to have the execution against his person recalled, and the judgment of the court below is

Reversed.

J. A. CALHOUN v. P. T. STIERS.

(Filed 1 March, 1939.)

APPEAL by defendant from *Clement, J.,* at Chambers, 9 November, 1938, of ROCKINGHAM. Reversed.

Motion in the cause to recall execution against the person of defendant. It was alleged that the execution was invalid as not having been issued pursuant to an affirmative finding by the jury upon a separate and distinct issue sufficient to justify an execution against the

person. From a judgment dissolving the restraining order and directing the sheriff to proceed with execution against his person, the defendant appealed.

Glidewell & Glidewell and Sharp & Sharp for plaintiff.
Karl R. Massey for defendant.

DEVIN, J. The question presented by this appeal is similar to that decided at this term in the case of *Crowder v. Stiers, ante,* 123. Upon authority of that case we hold there was error in dissolving the temporary restraining order, and that the defendant was entitled to have the execution against his person recalled. The judgment of the court below is

Reversed.

ALEXANDER PERSON v. HUBERT D. TYSON AND AMERICAN FIDELITY & CASUALTY COMPANY, INC.

(Filed 1 March, 1939.)

Insurance § 44—Insurance on taxicab held to limit liability thereunder to loss sustained while cab was being operated within city limits.

Plaintiff instituted this action to recover for injury alleged to have been sustained through the negligent operation of a taxicab by the individual defendant a short distance outside the corporate limits of a municipality. The municipality required all taxicabs operating in the city to carry and file with the city manager policies of insurance, and the corporate defendant issued the insurance policy required by the ordinance on the individual defendant's cab. Construing the policy according to its terms, *it is held* the policy does not cover any loss from injury sustained beyond the territorial limits of the municipality, and defendant insurer's demurrer to the complaint was properly sustained, the provisions of the policy with respect to territorial limitations being valid, and there being no law which, read into the contract, would have the effect of modifying its express provisions.

APPEAL by plaintiff from *Bone, J.,* at October Term, 1938, of EDGECOMBE. Affirmed.

J. M. Alexander and F. S. Spruill (now deceased) for plaintiff, appellant.
Clyde A. Douglass and J. M. Broughton for American Fidelity & Casualty Company, Inc., defendant, appellee.

SEAWELL, J. The plaintiff brought this action against the defendants to recover damages for an injury alleged to have been sustained through the negligent operation of a taxicab by the defendant Hubert D. Tyson, occurring a short distance outside of the corporate limits of the city of Rocky Mount. The defendant, American Fidelity & Casualty Company, Inc., demurred to the complaint as not stating a cause of action, for that on the face of the complaint the alleged injury occurred outside the corporate limits of the city of Rocky Mount, and the insurance policy, out of which liability of defendant is alleged to arise, (which was made a part of the complaint), as a matter of law could be made to apply only to an injury received while the taxicab was being operated within the city limits; and because it further appeared that the plaintiff had no cause of action against the defendant at the time this action was instituted, since the policy was one of indemnity only; and that there was a misjoinder of parties. The plaintiff's appeal is from the judgment sustaining the demurrer.

The defendant Tyson was engaged in the business of operating a taxicab for hire in the city of Rocky Mount and adjacent territory. An ordinance of the city of Rocky Mount required that every operator of a "jitney bus or taxicab, or other motor vehicle engaged in the business of transporting passengers for hire over the public streets of the city of Rocky Mount, shall furnish to the city manager and keep in effect for each such jitney bus, taxicab, or other such motor vehicle so operated, a policy of insurance . . . to insure the payment of damages incurred in any one accident for personal injuries resulting from the negligent operation of said automobile," etc. The ordinance further made it unlawful for any person to operate a motor vehicle for hire within the city of Rocky Mount unless the required policy had been filed. Pursuant to this ordinance, the defendant American Fidelity & Casualty Company, Inc., issued to Tyson, and filed with the city manager of the city of Rocky Mount, a policy of insurance, a copy of which is attached to and by reference became a part of the complaint, which policy contained certain restricting provisions as to the purpose for which the motor vehicle was to be operated and the territorial limitations of such operation. These restrictions are contained in "Statement VIII," partly in print and partly in typewriting, and in the paragraph headed "Exclusions" (C).

In filling in the blank spaces provided for the purpose in "Statement VIII," strict regard was not had for grammatical sequence, but we think the paragraph, by transposition of its terms, (which we find necessary and consider legitimate), is fairly clear as to the intention to be gathered from the instrument:

"Statement VIII. The above described automobiles and motor vehicles are and will be used only for taxi operation within the city of Rocky Mount, N. C., as authorized by the city of Rocky Mount, N. C. (purposes), and will be operated as follows: . . . and this insurance covers no other use or operation."

Awkward as this expression may be, after careful consideration we feel that we must construe it as a limitation upon the territory as to which the Insurance Company undertakes to insure against accident or injury; that is, the insurance contract applies only to accidents or injuries arising out of operation within the territorial limits of the city of Rocky Mount. This intention is made clearer when we examine the other paragraph referred to, "Exclusions" (C): "This policy does not cover any loss resulting or arising from an accident while any of said automobiles are being driven, manipulated or used . . . (6) elsewhere than within the territorial limits as provided." We find nothing in the law which, read into the contract, would have the effect of modifying its express provisions. It must be interpreted according to its terms. *Sanderlin v. Ins. Co.*, 214 N. C., 363; *McCain v. Ins. Co.*, 190 N. C., 549, 130 S. E., 186.

Similar territorial limitations of liability have been sustained. *Smith v. Indemnity Exchange*, 23 P. (2d) (Cal., 1933); *Interstate Casualty Co. v. Martin*, 234 S. W., 710. Policies of insurance covering risks within certain areas and limiting liability thereto are common. *Norris v. China Traders Ins. Co.*, 100 P., 1025 (Wash.); *Youngquist v. L. J. Droese Co.*, 167 N. W., 736 (Wis.); *Indiana & Ohio Livestock Ins. Co. v. Krenek*, 144 S. E., 1181 (Tex.). While the Court is not especially concerned with the reasons leading to such limitations, when the contract is plain, it may be well to observe that the enlargement of the territory may proportionately increase the risk, and the smaller selected territory may, for special reasons, involve less risk. Police supervision and protective ordinances within the territorial limits of Rocky Mount may have been one of the considerations entering into this contract. *Lummus v. Insurance Company*, 167 N. C., 654, 83 S. E., 688.

Since we conclude that the policy does not cover any loss from injury sustained beyond the territorial limits of the city of Rocky Mount, it is unnecessary to consider the other questions raised upon the record.

The demurrer was properly sustained, and the judgment is

Affirmed.

LOUISE W. HOWARD v. T. S. WHITE ET AL.

(Filed 1 March, 1939.)

Limitation of Actions § 2c—Action on note under seal is barred in three years as against endorser, even though endorsement itself is under seal.

An action on a note under seal against an endorser on the note is ordinarily barred after three years from maturity of the note, C. S., 441 (1), even though the endorsement is itself also under seal, an endorser not being a principal to the note so as to come within the provisions of C. S., 437 (2), prescribing a ten-year period "upon a sealed instrument against the principal thereto."

APPEAL by plaintiff from *Thompson, J.*, at October Term, 1938, of PERQUIMANS. No error.

W. D. Pruden for plaintiff, appellant.

C. R. Holmes and McMullan & McMullan for T. S. White, defendant, appellee.

SCHENCK, J. This is an action against the makers and endorsers of a promissory note, which resulted in a verdict and judgment against all of the defendants except T. S. White, one of the endorsers. The plaintiff reserved exception to that portion of the judgment which adjudged that the plaintiff recover nothing from the defendant T. S. White, and appealed to the Supreme Court.

The note sued upon is dated 3 July, 1933, and matured 15 December, 1933, and is signed "Reed & Felton (Seal) by D. F. Reed, Part. (Seal)," and is endorsed on the back thereof "D. F. Reed (Seal), T. S. White (Seal), J. O. Felton (Seal)." This action was commenced 8 December, 1937. The defendant T. S. White answered and pleaded the three-year statute of limitations, C. S., 441(1). The court declined to instruct the jury that such statute was inapplicable, as requested in apt time by the plaintiff, and the jury found that the action as it relates to T. S. White was barred thereby. As stated in appellant's brief, "the only point in the case is whether the three-year statute or the ten-year statute applies to an endorser where the endorsement itself is under seal."

The period prescribed for the commencement of an action "upon a sealed instrument against the principal thereto" is "within ten years." C. S., 437(2). This is an action upon a note, a sealed instrument, but T. S. White is not a "principal thereto," being an accommodation endorser. "The relation of an endorser to the note differs from that of a surety, the liability of the latter being primary, that of the former

secondary. Defenses available to an endorser are not available to a surety, the distinction being founded upon the difference in their liability." *Dillard v. Mercantile Co.*, 190 N. C., 225 (228). An action against T. S. White, as an endorser of the note sued upon, was barred by the three-year statute of limitations, which began to run at the maturity of the note, *Nance v. Hulin*, 192 N. C., 665, and cases there cited; and not being a principal to the note endorsed, the fact that his endorsement was put under seal did not bring the action within the ten-year provision of C. S., 437 (2), and thereby extend the period within which it might have been commenced against him free from the statute, C. S., 441 (1), which prescribes the period of three years for the commencement of an action "upon a contract, obligation or liability arising out of the contract, expressed or implied," with certain exceptions not here applicable.

In the holding of the judge of the Superior Court we find

No error.

MARIE BARRETT v. JOHN T. WILLIAMS ET AL.

(Filed 1 March, 1939.)

1. Adverse Possession § 4g—When devise to heir is void because he was witness to the will, his possession and the possession of those claiming under him may be adverse to contingent remainderman under the will.

The *locus in quo* was devised to defendant's grantor in fee subject to be divested if he died without issue. Defendant's grantor was a witness to the will. Defendant went into possession of the *locus in quo* under claim of right under his deed some thirty-eight years prior to the institution of this action. Defendant's grantor died without issue, and this action in ejectment was instituted by the heir of testator entitled to the land under the will upon defeasance of the fee of defendant's grantor. *Held:* Defendant's grantor did not go into possession under the devise, as this was avoided by the statute, C. S., 4138, and a peremptory instruction on the issue of adverse possession pleaded by defendant was error.

2. Adverse Possession § 6—

The fact that a person claiming by adverse possession suffers the *locus in quo* to be sold for taxes and bought in at the sale by his wife with money furnished by him is not such a break in the continuity of possession as to preclude the submission of the issue to the jury.

APPEAL by defendants from *Thompson, J.*, at November Term, 1938, of PASQUOTANK.

Civil action in ejectment or for redemption and accounting.

The plaintiff claims title under her grandfather's will, which was probated in 1879. In it the testator, J. S. Jones, devised 50 acres of his home place to his youngest daughter, S. Gertie Jones, and the remaining 50 acres to his youngest son, Newton A. Jones, one of the witnesses to the will. Both devises are in severalty and in fee, and followed by the proviso, "that if either Gertie or Newton should die without a lawful heir of their own body, or of the issue of same, the other heirs the whole farm." In 1891, Gertie, who in the meantime had married M. Sweet, joined with her husband in a deed to Newton A. Jones, conveying, with covenants of warranty and seizin, the 50 acres specifically devised to her. Thereafter, by three separate deeds, two executed in 1899 and one in 1900, all with covenants of warranty and seizin, Newton A. Jones conveyed the entire home place to the defendant, John T. Williams, who thereupon entered and has since remained in the possession of said lands claiming full enjoyment thereto.

In 1931, after the death of Newton A. Jones, the defendant defaulted in the payment of the taxes due on said lands, with the consequence of a tax foreclosure proceeding resulting in investure of title in defendant's wife, the defendant advancing the money, etc.

The plaintiff is the only child and heir at law of Mrs. M. Sweet, *nee* S. Gertie Jones, who died approximately 46 years ago. Newton A. Jones died on or about 12 January, 1931, without a lawful heir of his body or the issue of same. The plaintiff claims the 50 acres originally devised to Newton A. Jones by virtue of the proviso contained in her grandfather's will.

This action was instituted 22 June, 1937.

From a directed verdict and judgment thereon, the defendant appeals, assigning errors.

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

STACY, C. J. The appeal has been presented with much learning and industry on the part of counsel.

Conceding without deciding that the plaintiff has made out a *prima facie* showing of title under the terms of her grandfather's will, still it would seem that the case should have been submitted to the jury on the defendant's claim of adverse possession. There is evidence that Newton A. Jones, being a witness to his father's will, did not enter into possession of the *locus in quo* under the devise to him, as this was avoided by the statute, C. S., 4138, *McLean v. Elliott*, 72 N. C., 70, that he later purchased his sister's half of the farm and then sold the entire

tract to the defendant, and that the defendant has been in possession since 1899 or 1900 under claim of right, etc. This evidence would seem to be sufficient to preclude a peremptory instruction on the issue of adverse possession. *Dorman v. Goodman,* 213 N. C., 406, 196 S. E., 352.

The trial court may have concluded that the defendant's claim of adverse possession was defeated by the tax foreclosure proceeding instituted after the death of Newton A. Jones, but on all the evidence we think the issue is one for the jury. *Hayes v. Cotton,* 201 N. C., 369, 160 S. E., 453; *Power Co. v. Taylor,* 194 N. C., 231, 139 S. E., 381.

New trial.

H. B. STEPHENS v. BEN JOHNSON.

(Filed 1 March, 1939.)

1. Automobiles §§ 12e, 18h—Instruction that attempt to cross "through highway" intersection in front of truck driven at excessive speed constituted negligence per se held error.

Plaintiff's truck was traveling along a "through highway." Defendant was driving his car along an intersecting side road. The vehicles collided at the intersection, the front of the truck striking the side of defendant's car. The court instructed the jury that if defendant saw the truck approaching the intersection at a high or improper rate of speed, and notwithstanding this fact continued on into the intersection in an attempt to cross said highway ahead of the truck, such action would constitute negligence. *Held:* The instruction runs counter to the statute, ch. 407, sec. 120, Public Laws of 1937, and is error. *Sebastian v. Motor Lines,* 213 N. C., 770, cited as controlling.

2. Automobiles § 18h: Negligence § 20—

It is error for the charge on the issue of negligence involved in the case to omit any reference to proximate cause.

APPEAL by defendant from *Clement, J.,* at November Term, 1938, of CASWELL.

Civil action to recover damages for injury to plaintiff's truck alleged to have been caused by the negligent operation of defendant's automobile when the two collided at the intersection of a dirt road known as Cobb Memorial School Road and Highway No. 158, the latter being designated as a "Through Highway."

The plaintiff's truck was traveling easterly on Highway No. 158. The defendant approached the intersection from the south, in his Model T coupe, loaded with tobacco. "It looked like he speeded up and tried

to beat me across," according to the testimony of the driver of the truck. The machines collided near the center of the road, the front of the truck striking the side of defendant's car.

There was a verdict and judgment for plaintiff, from which the defendant appeals, assigning errors.

C. L. Pemberton and Emerson T. Sanders for plaintiff, appellee.
Glidewell & Glidewell for defendant, appellant.

STACY, C. J. The following special instruction, given at the request of the plaintiff, forms the basis of one of defendant's exceptive assignments of error:

"That if the driver of the Johnson car saw the Stephens truck approaching the intersection at a high or improper rate of speed, and notwithstanding this fact continued on into the intersection in an attempt to cross said highway ahead of the Stephens truck, such action on the part of the driver of the Johnson car would constitute negligence."

This instruction runs counter to the statute, ch. 407, Public Laws 1937, sec. 120, and is at variance with what was said in *Sebastian v. Motor Lines*, 213 N. C., 770, 197 S. E., 539. Reference to the *Sebastian case* will suffice to make clear the error. It is also observed that the instruction omits any reference to proximate cause. *Hurt v. Power Co.*, 194 N. C., 696, 140 S. E., 730.

For the error as indicated, a new trial must be awarded. It is so ordered.

New trial.

DORA G. NEWBERN, ADMINISTRATRIX OF W. B. NEWBERN, DECEASED, v. J. CLARENCE LEARY AND R. W. LEARY, JR., INDIVIDUALLY, AND TRADING AS LEARY BROS. STORAGE COMPANY.

(Filed 1 March, 1939.)

1. Trial § 22b—

Upon a motion to nonsuit, the evidence tending to support plaintiff's cause of action is to be considered in its most favorable light for plaintiff, and she is entitled to every reasonable intendment thereon and every reasonable inference therefrom. C. S., 567.

2. Automobiles §§ 18a, 18g—Evidence held for jury on issue of negligence on part of driver colliding with car backing on highway.

The driver of the car in which plaintiff's intestate was riding had stopped the car some 50 yards beyond the convergence of two highways, with the right wheels of the car some two feet off the hardsurface on the

right side of the highway, and had prepared to back the car, or had put the car in motion backwards at a speed of 5 or 10 miles per hour, in order to go back to a highway sign it had just passed, when defendant's truck with trailer, approaching from the rear, struck the car. The evidence tended to show that the truck and trailer were unloaded, that such vehicle traveling at a speed of twenty-five miles per hour could have been stopped in approximately twenty-five feet after the brakes were applied, that there were two filling stations at the convergence of the highways with lights that lighted the highway to where the car had stopped, and that the highway along which the truck was traveling was straight for about half a mile, that the car had both rear and front lights burning as required by ordinance, and that the truck was traveling at a speed of 35 or 40 miles per hour, that the driver of the truck did not slacken its speed or turn it to the left, but crashed into the back of the car with great violence, knocking the car about 84 feet down the highway. *Held:* The evidence is sufficient to be submitted to the jury on the issue of negligence. Michie's N. C. Code, 1937 Supp., 2621 (287), (288), (273), (280) (a).

3. Automobiles §§ 8, 18h—

Charge in regard to standard of care required of defendant when faced with sudden emergency in instruction on issue of negligence *held* favorable rather than prejudicial to defendants upon the evidence in this case.

4. Automobiles §§ 13, 18c—Evidence of contributory negligence in stopping without observing statutory provisions held properly submitted to jury.

Plaintiff's evidence was to the effect that the driver of the car in which intestate was riding looked back before stopping the car on the highway with its right wheels some two feet off the hardsurface on the right side of the highway, that both his rear and front lights were burning, and that he saw no vehicle behind him although the highway was straight for about a half mile, that he gave the statutory signal before stopping, that several minutes after he had stopped, and while he was preparing to back his car, or had just put the car in motion backwards, the car was struck from behind by defendant's truck. Defendants contended that the driver of the car violated the statutory provisions applicable, 1937 Supp. to Michie's Code, 2621 (287), (301) (a), (278), (293). *Held:* The evidence was properly submitted to the jury on the issue of contributory negligence under a charge, to which there was no exception, placing the burden of the issue on defendants, and instructing the jury that a violation of the statutes by defendants' driver would constitute negligence *per se*, and if they found from the greater weight of the evidence that such violation was a proximate cause of the injury, to answer the issue in the affirmative.

5. Automobiles § 18a—Evidence held to support the submission of the issue of last clear chance.

The evidence tended to show that the driver of the car in which plaintiff's intestate was riding stopped the car on the highway with its right wheels some two feet off the hardsurface on the right side of the highway, and had put the car in motion backwards at a slow speed when defendants' truck, approaching the car from the rear, collided with the car with great violence. The driver of defendants' truck testified that he saw the

car backing on the highway at a point variously estimated by the witnesses at from 50 to 100 yards from the car. *Held:* The evidence discloses that the driver of the truck was fully conscious of the peril, and had 50 to 100 yards in which to stop the truck or turn it to the left and avoid the accident, and the evidence is therefore plenary to support the submission to the jury of the issue of the last clear chance.

6. Automobiles § 13—It is not negligence per se to back an automobile on the highway.

It is not negligence *per se* to back an automobile on the highway, such action not being prohibited by statute nor by any principle of the law of negligence, and such action being habitual in parking cars in towns and cities and in returning to a point inadvertently passed on the highway, and in backing, it is common practice to use the side of the highway the driver is required to use in going forward.

7. Trial § 24—

If reasonable men can draw different conclusions from the evidence, the issue must be submitted to the jury.

8. Negligence § 10—Application of doctrine of last clear chance.

The doctrine of last clear chance is the humane rule of law that imposes upon a person the duty to exercise ordinary or due care to avoid injury to another who has negligently placed himself in a situation of danger, and who he can reasonably apprehend is unconscious thereof or is unable to avoid the danger.

9. Automobiles § 9—

A motorist is required, in the exercise of due care, to keep a proper lookout to see and avoid pedestrians and vehicles on the highway.

APPEAL by defendants from *Thompson, J.*, at November Term, 1938, of PASQUOTANK. No error.

This is an action for actionable negligence brought by plaintiff against the defendants. The allegations of the complaint, in part, are as follows: "That on or about the 18th day of March, 1938, plaintiff's intestate was riding in a certain Plymouth automobile which was then and there being carefully and prudently driven along the public highway in Bertie County on the road leading from Windsor to Edenton, said plaintiff's intestate being then on his way to his home in Elizabeth City; that the car in which plaintiff's intestate was riding had passed the intersection of N. C. Highway No. 30 with N. C. Highway No. 35, and had gone to the east of said intersection of said highway where it stopped preparatory to backing up to a filling station a short distance to the rear, leaving a clear and unobstructed space of twelve feet or more of the concrete portion of said highway on his left; that, while at this point, a motor truck owned by defendants and operated by one Elton Holley, their employee, then and there acting in the scope of his employment, approached from the west at a high, rapid and dangerous

rate of speed, and crashed into the car in which plaintiff's intestate was riding, practically demolishing the same, seriously injuring the driver thereof, and inflicting serious and painful bodily injuries upon plaintiff's intestate, which resulted in his death within a short time thereafter. That the car in which plaintiff's intestate was riding was being driven on the right side of the said State Highway No. 30, and that the truck and trailer of the defendants, which were then being used in their business, were carelessly and negligently driven in that the driver of the truck towing said trailer was an inexperienced and incompetent one, and in that the said truck and trailer were being moved at a high, dangerous and rapid rate of speed, and in that no lookout was kept upon the said road for traffic moving thereon, and in that the truck was not equipped with proper headlights, and in that the driver of said truck did not have the same under control, and in that the driver of defendants' truck did not operate the same with due care for the safety of pedestrians and vehicles using the highway, and in that he failed to turn out and pass the car in which plaintiff's intestate was riding, when by exercise of reasonable diligence, he could have easily done so, and in that the defendants' truck and trailer were not equipped with proper and sufficient brakes, by reason of which negligence, the death of plaintiff's intestate was proximately caused." Allegation and prayer for damage.

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

The plaintiff in reply said: "It is further expressly denied that plaintiff's intestate was guilty of any negligent act, or omission to act, causing or contributing to his injury and death, as alleged in the answer. And, in this connection, plaintiff further avers that, even had her intestate been guilty of negligence, causing or contributing to his injury or death, as alleged in the answer, which is again denied, the defendants yet, by the exercise of due care, to wit: by refraining from the negligent act and omissions alleged in the complaint, could easily and readily have avoided the injury and death of her intestate—that is to say that, notwithstanding the negligence, if any, on the part of her intestate, which is again denied, the defendants yet had the last clear chance to avoid and by the exercise of ordinary diligence could have avoided his injury and death."

The evidence of plaintiff, in part, was as follows:

Junius Best, a colored boy (having license to drive), about 17 years old at the time, was driving for plaintiff's intestate, who was killed, testified, in part: "I know where there is a filling station on that road between Edenton and Windsor known as 'Mid-Way.' We passed there

just about 7:30 on our trip to Elizabeth City. I was driving at that time. Mr. Newbern was in the car with me; he was sitting beside me—in the front seat. As I was going by the filling station, it was lit up, and two forks come out—of the road—he had not been long woke up—he had been asleep, and he told me to stop to let him see where we were. I was never on the road and I stopped on the road, and looked back. I looked back and started to back and when I started to back this truck was right on the back of me. Before I stopped I had gone on by the filling station. Before I started to back I looked back in the direction from which I had just come. I couldn't see anything. That road, leading both west and east of that filling station, is straight. I would say it is straight on each side of that filling station for about half a mile. I do not know where I had gotten on the highway before I stopped—that is, east of the filling station. I was around 200 feet down the highway from the filling station. I remember a highway sign on the right, on the side of the road, with a number on it. I was right at that sign. . . . I was on the right-hand side of the highway when I drove down the road and made this stop. I was about two feet off the concrete—the right-hand wheels. The rear lights on my car were burning. I know that because we had stopped to get some gas and I looked at my lights. I got the gas between Wilson and Raleigh—on the same afternoon. I had two good front lights. (By the Court: How many rear lights were on that car? Ans.: One.) I had not quite started to back my car at the time the truck struck me; just started to release my clutch. I didn't see that car any more after that collision. At the time I drove up there and stopped there was no car meeting me, coming from the direction of the Chowan River Bridge. No car came from that direction at any time before I was struck; I didn't see one. I don't know exactly how wide the road is along there. . . . When I drove up near that highway sign I gave a signal of stopping—hand down. . . . I held my hand down as a signal in this angle (indicating), then I stopped. Then I looked back down the highway toward the filling station, before I started backing. There was no car between me and the filling station that I could see; and I could see that filling station clearly. After I had started to back I was struck by the truck. . . . I didn't see any car on the road that went out north from this highway. There was no car on the road between me and the filling station when I looked back. It was about two or three minutes from the time I stopped my car and started to back before I was hit."

Mr. Dennis Cobb, who saw the collision, testified, in part: "I was maybe 10 or 15 steps from the highway. I saw the car that was struck first. I was about half way of that approach when I first saw the car,

something like that. I was running along right slow; had just about stopped when the truck hit the car. The car came up there and came to a stop and started to back up a little. I imagine it came to a stop close to 50 yards from the filling station. It was on the right-hand side of the road. I noticed it had lights. I saw the car it was approaching and passing the highway I was on. I saw the rear light. After the car came to a stop it was in a position when I could see its rear light. After the car stopped it started to back up a little. I first saw the truck about the time the car had stopped and started to back and I glanced back behind the car that was hit and looked back up to see if anything else was coming down the road. The truck was coming from towards Windsor—from the west, going east. The car in which Mr. Newbern was riding had stopped on the Edenton side of the filling station. I was facing towards Edenton. My front was facing the car that was going toward Edenton. After the car had stopped I looked back and saw the truck. The truck had a trailer. I should say the truck was doing better than 35; around 40, the best of my estimation. The truck struck the car. I could not see any change in the speed of the truck from the time I first saw it until it struck the car. I could not see that it made any effort to turn to the left. I would say it was around a minute after the automobile in which Mr. Newbern was riding stopped before the truck struck it. I was facing sort of slantingly in the direction of Edenton—that is, towards the car that is stopped. No car was coming down the road from the direction of Edenton at the time, or before this collision. I went to the car after the collision. The truck hit the car, and it kind of got on top of the back wheels of the car and mashed the whole back end of the car in. . . . When the truck struck the car it knocked it straight on down the road about 28 steps. I didn't step it off—I saw it stepped off . . . There are two filling stations there, one on each side. They are pretty brightly lit up and were brightly lit up that night, both inside and out. In my best judgment the car stopped about 50 yards east of the crossing. It was somewhat over 50 yards between the place where the car was stopped and the filling stations. The lights of those filling stations were bright enough so anybody could see easily anything between the place where the car stopped and the filling station. . . . About a minute before, the truck struck this car, the car had stopped, and after it had stopped it had started backing, and had backed about 10 or 15 feet. It was coming back slow, 5 or 10 miles an hour; just about as slow as a car could go and be in motion. Going at that rate of speed, in my opinion, a car could have been stopped pretty near instantly, 5 or 10 feet."

Mr. C. S. Pritchard testified, in part: "I have had about seven years experience in driving trucks. From my experience, it would take approximately 25 feet for a ton and a half truck, with no load in the truck, and a semi-trailer, with no load in there, traveling at 25 miles an hour, to stop when the brakes were applied."

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

"1. Was the plaintiff's intestate injured and killed by the negligence of the defendants as alleged in the complaint? Ans.: 'Yes.'

"2. Did plaintiff's intestate, by his own negligence, contribute to his injury and death as alleged in the answer? Ans.: 'Yes.'

"3. Notwithstanding plaintiff's own contributory negligence, if any, could the defendants, through the exercise of due care, have avoided the injury and death of plaintiff's intestate, as alleged in the complaint? Ans.: 'Yes.'

"4. What damages, if any, is plaintiff entitled to recover? Ans.: '$12,500.00.' "

The court below rendered judgment on the verdict. The defendants excepted and assigned error to the submission of the issues and submitted other issues, and to the refusal of the court below to give the following instruction: "Defendants pray that the court will instruct the jury that if they believe the evidence and find the facts to be as testified to by all the witnesses, they will answer the second issue 'Yes' and the third issue 'No.' "

The defendants 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.

M. B. Simpson, R. Clarence Dozier, and McMullan & McMullan for plaintiff.

J. M. Broughton and W. D. Pruden for defendants.

CLARKSON, J. At the close of plaintiff's evidence and at the conclusion of all the evidence, the defendants in the court below made motions for judgment as in case of nonsuit. C. S., 567. The court below refused the motions and in this we can see no error.

The evidence which makes for plaintiff's claim, or tends to support her cause of action, is to be taken in its most favorable light for plaintiff, and she is entitled to the benefit of every reasonable intendment upon the evidence, and every reasonable inference to be drawn therefrom. We see no error in the court's refusal to give defendants' prayer for instruction.

First issue: As to the negligence of defendants. Plaintiff's evidence principally from a disinterested witness, Dennis Cobb, was to the effect that defendants' driver was driving the truck with trailer, the truck was going "better than 35; around 40, the best of my estimation." It was in evidence that the road was straight for about a half mile. The truck struck the Plymouth automobile which plaintiff's intestate's driver was driving, in the rear. The automobile had on it the rear lights required by the statute. The speed of the truck did not change, the impact was with such force that "it kind of got up on top of the back wheels of the car and mashed the whole back end of the car in. . . . When the truck struck the car it knocked it straight on down the road about 28 steps" (about 84 feet). The driver of the truck made no effort to turn to the left. "No car (in the opposite direction) was coming down the road from the direction of Edenton at the time or before the collision." The defendant's death car struck plaintiff's intestate's car some 50 yards or more below two brightly-lighted filling stations—one on each side of the road. "After the car had stopped I looked back and saw the truck. The truck had a trailer. . . . I could not see any change in the speed of the truck from the time I first saw it until it struck the car." Defendants' driver testified that he was running about 25 miles an hour. The type of truck and semi-trailer that he was driving, with no load, could be stopped within approximately 25 feet.

N. C. Code 1935 (Michie), section 2621 (45), 1937 Suppl., sec. 2621 (287), is as follows: "Any person who drives any vehicle upon a highway carelessly and heedlessly in willful or wanton disregard of the rights or safety of others, or without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property, shall be guilty of reckless driving and upon conviction shall be punished as provided in sec. 2621 (102)."

Section 2621 (46); 1937 Suppl., sec. 2621 (288): "(a) No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions then existing . . . 3. Thirty-five miles per hour for motor vehicles designed, equipped for, or engaged in transporting property, and thirty miles per hour for such vehicle to which a trailer is attached."

1937 Suppl., sec. 2621 (273), "Brakes": "(a) Every motor vehicle when operated upon a highway shall be equipped with brakes adequate to control the movement of and to stop such vehicle or vehicles, and such brakes shall be maintained in good working order and shall conform to regulations provided in this section."

N. C. Code, *supra*, sec. 2621 (91); 1937 Suppl., sec. 2621 (280): "(a) The head lamps of any motor vehicle shall be so constructed, arranged and adjusted that, except as provided in subsection (c) of this section, they will at all times mentioned in sec. 2621 (89) and under normal atmospheric conditions and on a level road produce a driving light sufficient to render clearly discernible a person two hundred feet ahead, but shall not project a glaring or dazzling light to persons in front of such head lamp, etc."

From the charge of the court below on this aspect no exception is taken except to the last portion (which is not considered in defendants' brief), as follows: "They say and contend, further, gentlemen of the jury, that their driver was confronted by a sudden emergency which was caused, as they say, and contend, by the negligence of Mr. Newbern's driver, and that in such case the law does not hold a man, and did not hold their driver, to as high a standard of care as in other cases, and the court charges you that is so, that that is the law in this State. That if the defendants' driver, on this occasion, was confronted by a sudden emergency, which was caused by the negligence of the plaintiff's driver, then our law does not hold the defendants' driver to such a high standard of care as it would in other cases. And so they say and contend that upon the evidence in this case it is your duty to answer that first issue 'No.'" We think the charge complained of, on the evidence, favorable to defendants. *Poplin v. Adickes,* 203 N. C., 726.

In *Powers v. Sternberg,* 213 N. C., 41 (43) is the following: "There are a few physical facts which speak louder than some of the witnesses. The force with which the Bedenbaugh car ran into the truck, with its attendant destruction and death, establishes the negligence of the driver of the car as the proximate cause of the injury," citing authorities.

Second issue: As to the contributory negligence of plaintiff's intestate. Plaintiff's evidence on this aspect is to the effect that the deceased W. B. Newbern asked his driver, Junius Best, to stop, after they had passed the forks of the road. He had been asleep and had just awakened and asked the driver to stop and let him see where they were. The driver stopped. "I held my hand down as a signal in this angle (indicating), (1937 Suppl., *supra,* sec. 2621 [301], [b]), then I stopped." The driver testified that he looked back in the direction from which he had come and could not see anything, so started to back. The road was straight for a half mile. He was on the right-hand side of the road, the right-hand wheel about two feet off the concrete when he stopped. The rear lights were burning. "I had not quite started to back my car at the time the truck struck me, just started to release my clutch." There was no car meeting the driver of the truck coming from the

direction of (Edenton) the Chowan Bridge. "I was around 200 feet down the highway from the filling station." "I gave the signal to stop and looked back. There was no car between me and the filling station when I looked back. It was about two or three minutes from the time I stopped my car and started to back before I was hit." The two filling stations, one on each side of the road, were brightly lighted.

Dennis Cobb testified that the driver of the car had backed 10 or 15 feet and was coming back "just about as slow as a car could go and be in motion." The car could have been stopped "pretty near instantly, 5 or 10 feet."

The defendants contended that the plaintiff's intestate's driver was violating the following motor vehicle laws of our State: N. C. Code, sec. 2621 (45); 1937 Suppl., sec. 2621 (287), *supra.*

1937 Suppl., *supra,* sec. 2621 (301): "(a) The driver of any vehicle upon a highway before starting, stopping or turning from a direct line shall first see that such movement can be made in safety, and if any pedestrian may be affected by such movement shall give a clearly audible signal by sounding the horn, and whenever the operation of any other 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. (b) . . . Whenever the signal is given the driver shall indicate his intention to start, stop, or turn by extending the hand and arm from and beyond the left side of the vehicle as hereinafter set forth. Left turn—hand and arm horizontal, forefinger pointing; Right turn—hand and arm pointed upward; Stop—hand and arm pointed downward. All signals to be given from left side of vehicle during last fifty feet traveled."

Section 2621 (278) provides, in part, that every motor vehicle shall carry at the rear a lamp of the type which has been approved by the Commission and which exhibits a red light, plainly visible, under normal atmospheric conditions, 500 feet to the rear of such vehicle.

Section 2621 (293) provides that upon all highways of sufficient width except one-way streets, the driver of a motor vehicle shall drive the same upon the right half of the highway, except when overtaking and passing another vehicle, subject to the limitations applicable as set forth in this statute.

The court below, on the aspect of contributory negligence, charged the jury: "The court charges you that if the defendants have satisfied you from the evidence, and by its greater weight, that on the occasion in question, the driver of the Newbern car, the one in which Mr. Newbern was riding at the time, violated any of these statutes, which they say and contend he violated, then by that violation, gentlemen of the

jury, he would be guilty of negligence *per se,* and if the defendants have further satisfied you from the evidence and by its greater weight that such negligence, in either of the aspects claimed and contended by them, was the proximate cause of the injury and death of W. B. Newbern, then, gentlemen of the jury, it would be your duty to answer this second issue 'Yes.' But, if the defendants have failed to so satisfy you from this evidence, and by its greater weight, that plaintiff's intestate's driver violated any one of these statutes, which they say and contend he violated, or if they have failed to satisfy you from the evidence and by its greater weight that such violation was the proximate cause, or one of the proximate causes of the injury and death of plaintiff's intestate, then, gentlemen of the jury, it would be your duty to answer that issue 'No.' Or, if the evidence, upon that issue, or either of the elements thereof, is equally balanced so that you cannot tell whether the defendants' evidence, or the plaintiff's evidence, outweighs, then it would be your duty to answer that issue, 'No.'" On this issue there is no exception made to the charge of the court below.

Third issue: As to the doctrine of last clear chance. We think the evidence plenary for the court below to have submitted this issue.

In Michie's "The Law of Automobiles in North Carolina," sec. 31, p. 73, it is said: "The essential principle underlying the doctrine is that, although the plaintiff has been negligent in exposing himself to peril, and although his negligence may have continued until the accident happened, he may nevertheless recover if the defendant, after knowing of plaintiff's danger and having reason to suppose that he may not save himself, could have avoided the injury by the exercise of ordinary care, and failed to do so, and *vice versa.* The party who last has a clear opportunity of avoiding the accident, notwithstanding the negligence of his opponent, is considered solely responsible. In such a case the contributory negligence of the plaintiff is not a defense or bar to a recovery by plaintiff."

In *Clark v. R. R.,* 109 N. C., 430 (449-450), we find: "It makes no difference how short an interval occurs between the negligent act of the plaintiff and that of the defendant, if the latter had time to discover the danger and avert it by the exercise of ordinary care. 4 Am. & Eng. Enc., p. 27; *Needham v. R. R., supra* (37 Cal., 407); *Trow v. R. R.,* 24 Vt., 494. . . . There are two divergent lines of authority upon this subject, but the position assumed by counsel for the defendant finds no support in the decisions of those courts that have, like this, adhered closely to the doctrine of *Davies v. Mann,* 10 M. & W., 545. The negligence of the plaintiff in our case consisted in going upon the trestle when an approaching train was in sight, as it could have been seen a

mile. But if, after he went upon the trestle, the defendant company's servant could, by proper watchfulness, have discovered his danger in time to avert it without jeopardy to the persons or property on defendant's train, and neglected to do so, the negligence of the two was not concurrent nor contemporaneous. That of the defendant was so far subsequent to the plaintiff's wrongful act as to give time to the servant of the former to have discovered the danger, and averted the injury by the proper use of the means at his command. 2 Thompson Neg., 1157; Wharton Neg., 343, 346, 388."

The case of *Sherlin v. R. R.*, 214 N. C., 221, is not contrary to the *Clark case, supra.* In that case, at p. 223, it is stated: "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 case, but it was floored and surfaced with cleats. Outside the ends of the *crossties there was sufficient space for a person to walk or stand there in safety as the train passed.*" (Italics ours.)

In *Pickett v. R. R.*, 117 N. C., 616 (637), we find: "If it is the settled law of North Carolina (as we have shown) that it is the duty of an engineer on a moving train to maintain a reasonably vigilant outlook along the track in his front, then the failure to do so is an omission of a legal duty. If by the performance of that duty an accident might have been averted, notwithstanding the previous negligence of another, then, under the doctrine of *Davies v. Mann* (10 M. & W. [Ex.], 545), and *Gunter v. Wicker* (85 N. C., 310), the breach of duty was the proximate cause of any injury growing out of such accident, and where it is a proximate cause the company is liable to respond in damages. Having adopted the principle that one whose duty it is to see does see, we must follow it to its logical results."

In *Norman v. R. R.*, 167 N. C., 533 (538-9), *Walker, J.*, for the Court, said: "If the motorman, W. N. Turner, saw the plaintiff's car on the western track in front of his car, which was on the same track, and also knew that plaintiff, being forgetful of his duty and inattentive to his surroundings, was not aware of the approach of the car, and, on that account, was making no effort to leave the track, and this knowledge came to him in time to prevent the collision, and he knew that a collision would occur if plaintiff did not leave the track in time to prevent it, unless the street car was itself stopped before reaching the automobile, it was his plain duty, according to our decisions, as soon as a collision became probable, to slow down and bring his car under control, so that he could stop, in order to prevent the catastrophe which would inevitably happen if he proceeded on his way and plaintiff did not move

his automobile away from the track. If the motorman saw that the plaintiff had evidently not looked and listened, and had not heeded his signal, if he gave one, and was, therefore, unconscious of his danger and not likely to leave the track, it was incumbent on him to take reasonable precaution for his safety; and as he had the better opportunity of so acting as to prevent the collision, he is adjudged by the law, under the circumstances, to have had the last clear chance of averting the injury, and the defendant, therefore, is the reasonable author of it. A person on foot or in a vehicle has no right to cross a street in front of an approaching street car and take the doubtful chance of his ability to cross in safety; if a prudent man would not do such a thing under similar circumstances; and if he does so, and is injured by his own carelessness, the fault is all his, and he cannot hold the company to any liability therefor. But the case we have is quite different, as here the plaintiff was seen by the conductor when backing, at a crossing, towards the western track on which the car was moving; he was oblivious of his dangerous surroundings, which might have been seen by the motorman, if he was keeping a proper lookout, and he testified that he was doing so. It would seem to be just and humane to hold that, if such were the situation, and the jury afterwards found it to be so, the defendant should be held responsible, as having the superior chance to avoid the injury, though the plaintiff was also negligent, and grossly so. Such, anyhow, is our law."

In *Caudle v. R. R.*, 202 N. C., 404 (407), is the following: "In *Redmon v. R. R.*, 195 N. C., at p. 766 (*Brogden, J.*), we find the following: 'The last clear chance doctrine is the duty imposed by the humanity of the law upon a party to exercise ordinary care in avoiding injury to another who has negligently placed himself in a situation of danger. The doctrine is said to have sprung from the celebrated case of *Davies v. Mann*, 10 M. & W., 546, decided in 1842, and commonly known as the hobbled ass case. An excerpt from that case is as follows: "The defendant has not denied that the ass was lawfully in the highway, and therefore we must assume it to have been lawfully there; but even were it otherwise, it would have made no difference, for as the defendant might, by proper care, have avoided injuring the animal, and did not, he is liable for the consequences of his negligence, though the animal may have been improperly there." *Deans v. R. R.*, 107 N. C., 686; *Casada v. Ford*, 189 N. C., 744; *Hudson v. R. R.*, 190 N. C., 116; *Hart v. R. R.*, 193 N. C., 317; *Buckner v. R. R.*, 194 N. C., 104; *Redmon v. R. R., supra* (at p. 769).' "

In *Morris v. Transportation Co.*, 208 N. C., 807 (811), speaking to the subject, we find: "The principle announced has been clearly stated

by *Stacy, J.*, in *Haynes v. R. R.*, 182 N. C., 679, 110 S. E., 56, as follows: 'It has been held uniformly with us that, notwithstanding the plaintiff's contributory negligence, if the jury should find from the evidence that the defendant, by the exercise of ordinary and reasonable care, could have avoided the injury, and failed to do so, and had the last clear chance to so avoid it, then the defendant would be liable in damages.' To the same effect is the utterance of *Brown, J.*, in *Cullifer v. R. R.*, 168 N. C., 309, 84 S. E., 400: 'It is well settled in this State that where the plaintiff is guilty of contributory negligence the defendant must exercise ordinary care and diligence to avoid the consequences of the plaintiff's negligence, and if by exercising due care and diligence the defendant can discover the situation of the plaintiff in time to avoid injury, the defendant is liable if it fails to do so.' *Gunter v. Wicker*, 85 N. C., 310; *Wheeler v. Gibbon*, 126 N. C., 811; *Ray v. R. R.*, 141 N. C., 84; *Casada v. Ford*, 189 N. C., 744; *Caudle v. R. R.*, 202 N. C., 404."

In *Arnold v. Owens*, 78 Fed. (2d), 495, 498, the Court said: "It is of course true that the plaintiff would not have been injured had she not been walking unlawfully on the wrong side of the road; but, even if this conduct be considered negligence *per se*, it does not follow that the truck driver could run her down with impunity, for, if he saw that she was in a position of danger, and by the exercise of ordinary care could have avoided the accident, it was his duty to do so. He had, in such event, 'the last clear chance,' and should have taken it. The Supreme Court approved this doctrine in the following language in *Grand Trunk Ry. Co. v. Ives*, 144 U. S., 408, 429, 12 S. Ct., 679, 687, 36 L. Ed., 485: 'Although the defendant's negligence may have been the primary cause of the injury complained of, yet an action for such injury cannot be maintained if the proximate and immediate cause of the injury can be traced to the want of ordinary care and caution in the person injured; subject to this qualification, which has grown up in recent years (having first been enunciated in *Davies v. Mann*, 10 M. & W., 546), that the contributory negligence of the party injured will not defeat the action if it be shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the injured party's negligence.'" And in the same case, at page 499, the Court said: "As a further qualification upon the driver's duty to look out for persons upon the road ahead of him, the defendant invokes the general rule that one is not under a duty of anticipating negligence on the part of others, and, in the absence of anything which should give notice to the contrary, he is entitled to act upon the assumption that others will exercise ordinary care for their own safety. *Shirley v.*

Ayers, 201 N. C., 51, 53, 54, 158 S. E., 840. So it is argued that the driver of the truck, even if he saw the plaintiff walking ahead of him on the shoulder of the road, was entitled to assume that she would turn aside to the right and reach a place of safety before the truck overtook her. But this statement of the situation ignores the important qualification in the rule that a person driving upon the highway has no right to persist in his right of way when he realizes that another person whom he is approaching or overtaking, cannot conform to the rule of the road or is unconscious of his danger. *Standard Oil Co. v. McDaniel,* 42 App. D. C., 19, 280 F., 993; Huddy, Encyc. of Auto Law, Vols. 3-4, sec. 116."

The testimony of the driver of defendants' truck was that he saw the car when he passed the Midway Filling Station, at which time he says it was backing. "I was a good little ways from it when I first saw it." He estimates this distance at 100 yards, while Dennis Cobb puts it close to 50 yards, and Junius Best at 200 feet. It thus appears that after observing the car in a slow backward motion, the driver of the truck had a distance of from 50 yards to 100 yards in which to swing his truck to the left side of the road, or to stop it by the due application of brakes. The truck driver (Holley) by his own evidence indicated that at the time he was fully conscious of the peril attending those riding in the car of plaintiff's intestate.

In *Smith v. Gould* (110 W. Va., 579), 92 A. L. R., p. 28, it is held (1st headnote): "The last clear chance doctrine is properly extended to a case where an automobilist, by reason of failure by him in his plain duty to maintain a lookout for the persons and property of others on the highway, commensurate with the danger indicated by attendant facts and surrounding circumstances known to him, and which are such as to have put him on the alert, causes injury to another (though such other was himself concurrently negligent), where the peril could have been seen and comprehended by the automobilist and the injury avoided in the exercise of reasonable care commensurate with the situation. Such case constitutes an exception to the general rule which precludes recovery by a plaintiff whose negligence has concurred with the defendant's."

On this aspect the court below charged the jury, in which we see no error: "In order for this doctrine to be available to the plaintiff, upon whom is the burden of proof as to this issue, you must find from the evidence, the burden of proof being upon the plaintiff to satisfy you from the evidence, and by its greater weight, that her intestate, that is, that W. B. Newbern, and his car, on the occasion in question, was in obvious and imminent peril; also that the defendants' driver had ac-

tually discovered such peril prior to the collision, or by the exercise of ordinary care could have discovered it, and she must also satisfy you from the evidence, and by its greater weight, that her intestate, W. B. Newbern, and his employee, were totally unaware of the danger and were, therefore, unable to escape. And she must further satisfy you from the evidence and by its greater weight that defendants' driver had time in which, by the exercise of reasonable care, he could, by the use of the means at hand, having due regard to his own safety and the safety of others, have avoided the collision, if he discovered the peril that the plaintiff's intestate was in, or by the exercise of ordinary care could have discovered it. Now, gentlemen of the jury, if the plaintiff has satisfied you from the evidence, and by its greater weight, of the truth of each and every of those elements, that is of the existence of each and every of those elements, then, gentlemen of the jury, it would be your duty to answer this third issue, 'Yes.' But if the plaintiff has failed to so satisfy you of the existence of any one of those elements, or if the evidence in the case is equally balanced upon any one of those elements, then, gentlemen of the jury, it would be your duty to answer the third issue, 'No.'"

It is not negligence *per se* to back a car upon a highway. *Norman v. R. R.*, 167 N. C., 533; The Law of Automobiles, *supra,* sec. 73, p. 158, says: "The general rule is that the backing of vehicles on the highway is not prohibited by law." Such an act is not prohibited by statute nor in itself by any principle of the law of negligence. It is a matter of common observation that the practice is habitual amongst drivers of automobiles and other vehicles—in towns and cities for the purpose of backing into a selected parking place, and in sections more remote for the purpose of returning to a point inadvertently passed by. And it is equally the practice, in so doing, to use that side of the street or highway which the driver is required to use in going forward. In the instant case, the car was backing only to the highway sign almost opposite to where it stopped. It was moving "just about as slow as a car could go and be in motion," and could have been stopped almost instantly. It had backed only about ten to fifteen feet when it was hit by the truck. In the light of the evidence as to the speed and momentum of the truck, it is apparent that the car would have been hit just as hard, and with the same disastrous consequences, though it had not moved backward an inch from the point at which it had been halted.

It is well settled that when the facts are such that reasonable men may fairly differ upon the question involved in the issues, the determination of the matter is for the jury. If different men can draw different conclusions from the evidence, it is a question for the jury.

We think the charge on the question of damages is sustained by the decisions of this Court. The charge is full, clear and explicit on every aspect of the controversy, and on the record we see no reversible or prejudicial error. The exceptions and assignments of error made by the defendants cannot be sustained.

We think the evidence in this case fully warranted the Court below in submitting to the jury the issues of negligence, contributory negligence and the issue of last clear chance. It is said that the last clear chance doctrine is the duty imposed by the humanity of the law upon a party to exercise ordinary or due care to avoid injury to another who has negligently placed himself in a situation of danger.

In the judgment of the court below, we find

No error.

FLETCHER H. BAILEY, MRS. ROSA BAILEY WHITE, MRS. MARY BAILEY WILEY, AND ROBERT SMITH, COLLECTOR OF THE ESTATE OF S. R. SMITH, v. J. L. McLAIN, ADMINISTRATOR OF H. A. SMITH; R. A. COLLIER AND A. B. RAYMER, TRUSTEES; MRS. ELLA S. FOSTER, MRS. MITTIE O. LEE, J. MARTIN SMITH, EFFIE C. SMITH, ROSA SAIN, MRS. ILA ARKINSON, MRS. ALMA MONTGOMERY, MRS. CLARA ALBEA, FRANKLIN WILLIAMS AND MRS. ELVA SHEEK HEDRICK.

(Filed 1 March, 1939.)

1. Wills § 17—Nature of caveat proceedings in general.

One interested person may caveat a will, C. S., 4158, and upon the filing of the caveat all other interested persons must be cited to "see the proceedings," C. S., 4159, and they may come in and align themselves as they will, and there is no basis, either statutory or arising out of interest, that the heirs at law, who are frequently beneficiaries under the will, make a common fight to set the will aside.

2. Same—A caveat is a proceeding in rem.

A caveat to a will is a proceeding *in rem* to determine the validity of the paper writing by probate in solemn form, and the validity of the will cannot be established by common consent of the parties, nor may it be renounced in part and upheld in part, but the proceedings establish either that the paper writing is valid *ab initio* and concludes all heirs and distributees who have been cited, or that it is void, in which event the heirs at law take, not because the will has been vacated, but because there never was a will.

3. Same: Executors and Administrators § 24—Court may not ignore will and compromise estate under agreement of interested parties.

Even though all parties are *sui juris* and before the court, the court may not, ordinarily, ignore the provisions of the will and compromise the

estate in accordance with the agreement of the parties, since the courts may not "make a will" for the decedent. The exception to this rule when the agreement is a family settlement, in which instances the jurisdiction of the court is extended, is pointed out.

4. Wills § 29—An heir may make separate agreement with propounder to withdraw objection to the will.

Since an heir or distributee cited in caveat proceedings may take either side of the controversy or remain neutral, as he will, and since heirs, as a class, do not necessarily make a common fight to have the will vacated, an heir or distributee may withdraw objection to the will by agreement with the propounder either with or without a pecuniary consideration, and any monetary consideration for such agreement passes to him by virtue of the contract between himself and propounder and does not inure to the benefit of the heirs as a class.

5. Same—Heirs not entering into agreement held not entitled to share in sum received by caveating heirs for withdrawing objection to the will.

The will in question bequeathed a note to a stranger to the blood. Some of the heirs at law filed a caveat to the will, and other heirs at law cited to "see the proceedings" advised the caveators that they would take no part in contesting the will. Thereafter the caveating heirs, after negotiations, made an agreement with the legatee to withdraw objections to the will for a monetary consideration. The issue of *devisavit vel non* came on for trial, and was answered in favor of the will by the jury. The heirs who took no part in contesting the will instituted this action against the caveating heirs to recover a proportionate part of the monetary consideration for the agreement. *Held:* The agreement was neither made for the benefit of the heirs as a class, nor was the consent of all the heirs necessary to the validity of the agreement, since the interest of each heir is separate and distinct, and each had opportunity to take whatever action in the proceedings he thought were to his best interest, and since the caveating heirs are entitled to the monetary consideration for the agreement by virtue of their contract with the legatee and not as a part of decedent's estate, nor does equity demand a division among all the heirs.

6. Equity § 3—

Since under our practice both law and equity are administered in the same action in the same court, equity may be considered merely the tool by which the law is enabled to make a finer adjustment of individual rights consonant with commendable human conduct.

CLARKSON, J., dissenting.

APPEAL by defendants from *Warlick, J.*, at January Term, 1938, of IREDELL. Reversed.

On or about the 15th day of October, 1934, H. A. Smith died, leaving a last will and testament, in which he left a legacy of a $35,000.00 note to James F. Brawley, a stranger in blood to the testator. The will was duly probated in common form, and thereafter, the defendants, heirs at law and distributees of the estate of H. A. Smith, who would be entitled

to the estate had Smith died intestate, filed a caveat to the will. The plaintiffs, who also would have been entitled as distributees under the statute in the same manner and form as the defendants, were cited under C. S., 4158 as interested persons.

The defendants (objectors and caveators) communicated with the plaintiffs in the case at bar and were notified by them that they had decided to have nothing to do with the contest of the will—"We have decided not to join in this litigation or caveat."

The plaintiffs contributed nothing, financially or otherwise, to the proceeding by which the will was contested. They were never required, under C. S., 4159, to take sides, and remained aloof. Subsequently, the legatee opened communication with these defendants and a compromise was effected between them, according to which the legatee paid the defendants $15,000.00 in consideration of their withdrawal from the contest. The plaintiffs did not participate in this agreement.

Thereupon, the proceeding, which under the statute took the form of a probate of the will in solemn form, was continued, and issue of *devisavit vel non* was submitted to the jury, and answered in favor of the will, and judgment was entered accordingly.

After this proceeding had terminated, the plaintiffs, conceiving that since they constituted one-third of the heirs at law or distributees of the estate of H. A. Smith under the statutes of descent and distribution, they were entitled to share, brought suit against the defendants to recover $5,000.00, or one-third of the proceeds of the compromise. Trial by a jury was waived by the parties to the controversy. The facts were agreed upon and found by the judge substantially as above related, and, thereupon, the judge concluded, as a matter of law, that the plaintiffs were entitled to one-third of the proceeds of the compromise and rendered judgment in favor of the plaintiffs for recovery thereof. From this judgment the defendants appealed.

B. C. Brock and Land & Sowers for plaintiffs, appellees.
Raymer & Raymer and Grant & Grant for defendants, appellants.

SEAWELL, J. We think the conclusions of law reached by the trial court are not warranted by the facts. These conclusions, with the reasoning by which they were apparently reached, are two: First, that because there was objection to the will by some of the heirs at law of H. A. Smith, and the plaintiffs are also heirs at law, and a compromise was made removing the objections, and the will was thereafter probated in solemn form and was sustained by a verdict of the jury and the judgment of the court cutting off all further objections, they are, by reason

of these facts, entitled to a proportionate share of the money paid for the "cease and desist" agreement made by the caveators; second, that, being fully entitled thereto, they are not guilty of any conduct which would estop them from enforcing that right.

We are not concerned with the second conclusion, since the burden was not on the defendants to show estoppel until the plaintiffs had established the right; and this they have not done. It is to be noted that plaintiffs base this right, not on any actual contract or agreement with the defendants, express or implied, since, admittedly, the facts do not warrant such a claim, but on the mere operation of law. It assumes either that the compromise money was a part of decedent's estate or that, at least, the consent of plaintiffs was necessary to the final determination of the contest over the will, since they are also "heirs at law" and cited in the proceeding; and in either event we come back under the shadow of descent and distribution.

We think these conclusions are based on an erroneous conception of the nature of the original proceeding under which, after caveat, the will was probated in solemn form, and of the relation of the parties concerned to that proceeding, to the legatee and propounder, and to each other. Since there is no evidence of an actual participation by the plaintiffs in the compromise or contract between these defendants and Brawley, the legatee, the trial court was evidently under the impression that consent of all the persons who might have been interested in the estate was necessary to the establishment of the will once objection thereto had been made by caveat, and that any compromise effected must necessarily include all such persons; and that, therefore, the compromise must, as a matter of law, be regarded to have been made for them all alike. Indeed, the principal case cited by plaintiffs in support of their contention, *In re Seip's Estate,* 162 Pa., 423, 30 Atl., 226, is so interpreted by plaintiffs' counsel.

In some jurisdictions the courts are permitted, either by virtue of statutes enacted for that purpose or by long practice of the court, to deal with the estates of decedents in practical disregard of the will when all the parties interested are before the court and are *sui juris. Callaghan v. Corbin,* 255 N. Y., 401, 175 N. E., 109, 81 A. L. R., note 1187 (see page 1190). The laws of Pennsylvania are liberal in this regard. It scarcely needs the authorities which we hereafter cite to remind the practitioner that such is not the case here.

It is claimed that the case at bar is one of first impression by our court. However this may be, we think the matter solvable by the application of simple principles, long recognized here and abundantly established by judicial opinion.

The right of any caveator or objector to make his separate treaty of peace with legatees or propounders upon such terms as may be agreed upon is uniformly recognized, as will appear from citations of authority elsewhere in this opinion. The reason becomes clear when we examine and properly understand the proceeding provided by our laws for the contest of wills and their probate in solemn form.

In this State it takes only one interested person to caveat a will. C. S., 4158; *In re Thompson*, 178 N. C., 540, 542, 101 S. E., 107; *Armstrong v. Baker*, 31 N. C., 109, 114. It becomes the duty of the clerk thereupon to bring in interested persons, C. S., 4159; and, in some instances, it is conceivable that it might be incumbent upon the caveator to see that this duty is performed. When they come in they may align themselves as they will. They are cited only to "see proceedings" and not as parties. *Redmond v. Collins*, 15 N. C., 430; *Mills v. Mills*, 195 N. C., 595. It is the caveator's quarrel until some person interested joins him in the fight; and even then there is nothing in the law to prevent a litigant from making a separate and individual contract to desist from further opposition. There is no law compelling other heirs at law to join him in the fight or prevent their joining his adversaries, or to compel them to abandon their position on top of the fence. As a matter of common occurrence, since usually at least some of those who would be in the line of descent and distribution are beneficiaries under the will, we find a goodly number fighting with the propounders; others may "run with the hounds and hold with the hare," and others may, as did the plaintiffs in this case, stand aloof, or give positive notice to the objectors that they will not join in an attack on the will.

Caveat is, therefore, not a proceeding brought in the interest of the heirs at law as a class. In many instances they would be embarrassed in financial interest and in others in good conscience at the breaking of the will. There is no plane of cleavage in interest that would justify a legal presumption that the heirs at law are making a common fight, and the statute does not contemplate it. *Hutson v. Sawyer*, 104 N. C., 1, 10 S. E., 85, and cases cited; *St. John's Lodge v. Callender*, 26 N. C., 335; *Sawyer v. Dozier*, 27 N. C., 97; *Syme v. Broughton*, 85 N. C., 367; *In re Will of Brown*, 194 N. C., 583, 140 S. E., 192. The fact that the proceeding is *in rem* argues against any solidarity of attack, since the question is whether the paper writing presented is the last will and testament of the decedent. If it is not, it cannot be made so by common consent. *Holt v. Ziglar*, 159 N. C., 272, 74 S. E., 813; *Syme v. Broughton, supra*. The law does not regard the will as a thing to be sustained *sub modo* only after something has been sweated out of it for the heirs at law. Mental capacity and duress are conditions which cannot be

altered *nunc pro tunc* by mere agreement of the parties on an issue of *devisavit vel non.* When attention has been drawn to these principles, so firmly planted in our law, it should be clear that any compromise must be dehors the proceeding and does not necessarily inure to the benefit of the "heirs at law," or, more properly speaking, in this case, distributees. Where the will is set aside, of course, the laws of distribution and inheritance apply; not because the will is vacated, but because there never was a will. In that event, no person entitled through those laws is estopped because of any want of cooperation in the proceeding, or by any act which does not convey his interest in the inherited property.

While the solemn probate of a will upon the issue of *devisavit vel non* concludes all heirs and distributees who have been cited, or who have knowledge of the proceeding, with respect to the property conveyed in the will, *Mills v. Mills, supra,* they have not been deprived of any right by the action of the withdrawing caveators, but only by their own failure to urge it or assert it when opportunity was presented. If the will stands, it must be regarded as valid *ab initio,* and they had no rights to be forestalled or concluded.

This State does not recognize the doctrine of partial renunciation whereby the estate may pass in part by the will and the renounced portion by descent.

It must be conceded that if the title to the money paid in compromise depends upon the contract, it cannot be diverted from those who made that contract by virtue of any power in the laws of descent and distribution, or upon the theory that the contract, to be successful in its purpose, must have been made by them all.

As stated, in some states, when all the parties are *sui juris* and before the Court, jurisdiction is given by statute to settle the controversy in terms which ignore the will, or, rather, under these statutes a compromise of the estate itself may be effected as if only the property rights in the estate were involved. (New York has such a statute in section 19 of the Decedent Estate Law.) The courts of some states have gone further and recognize such a jurisdiction, based on the inherent powers of the court. Neither is true in North Carolina, where the courts still decline to "make a will" for the decedent, agreeable to the desire of the parties interested; *In re Will of Westfeldt,* 188 N. C., 702, 125 S. E., 531; unless the doctrine of family settlement applies, when the jurisdiction is somewhat extended; *In re Will of McLelland,* 207 N. C., 375, 376, 177 S. E., 19. In such cases settlements appeasing family difficulties and promoting harmonious relations have been upheld as within the jurisdiction of the court. *Reynolds v. Reynolds,* 208 N. C., 578,

622, 182 S. E., 341. And it has even been suggested that the family honor may be a consideration to intrigue the jurisdiction. *Price v. Price,* 133 N. C., 494, 504, 41 S. E., 885; *Bohannon v. Trotman,* 214 N. C., 706. None of these considerations were presented or could be presented to the court in the original proceeding, since the legatee is a stranger in blood.

In *English v. Crenshaw,* 120 Tenn., 531, 110 S. W., 210, certain collateral heirs contested a will which left all the property of the testator to the widow. A compromise was effected and it was held that the compromise money passed by virtue of the contract between the parties and not as a part of the estate.

In *Fidelity & C. Trust Company v. Commonwealth of Kentucky,* 78 A. L. R., 710, it is said: "Whilst the legatees could not receive the property under the will until it was duly established, neither could the heirs inherit the property unless the will was set aside." And speaking of the caveator: "While his right to maintain the contest of the will is derived from his relationship to the testator, his title to the money came from the contract with the legatees."

In *Callaghan v. Corbin,* 255 N. Y., 401, 175 N. E., 109, where the legatee or devisee agreed with certain of the heirs at law to pay them to induce others to withdraw objections to the will, and the question of public policy became involved, the court expressed its conclusions as to the rights and relations of the compromising parties amongst themselves, so strongly expressive of the view we take, we are tempted to quote: "So far the defendant has succeeded on the plea that this contract or agreement was illegal as against public policy and good morals . . . the idea being that it is illegal for one, acting for others on a matter of common interest, to secure to himself any profit or advantage over his associates by a secret undisclosed agreement or understanding. We are unable to see the illegality of this contract. Under the will offered for probate the widow had a life interest and the brothers and sisters remainders as next of kin . . . The latter filed objections to the will. *The fact that they all filed objections is a mere incident. They were not obliged to act together and their interests were solely individual. There is no law which prevented the widow from giving any one of them a sum of money to withdraw his or her objection, and there is no law which required them to act as a class, or with equality. One could have withdrawn his objections to the probate, on the payment of money; and the rest could have continued the contest or settled the suit themselves.*" In this opinion, *Cardozo, C. J., Pound, Kellogg, O'Brien, and Hubbs, JJ.,* concurred. See also *Schoonmaker v. Gray,* 208 N. Y., 209, 101 N. E., 886.

In *Grochowski v. Grochowski* (Neb. App.), 109 N. W., 742, in a similar situation, it is said: "The rights of no persons other than the contracting parties were affected nor would the settlement affect the due administration of justice. There is no evidence of a connivance to defeat or defraud the insane sister of any of her rights. She was not a necessary party to the agreement and we find no reason for discharging the decree . . ." See *Seaman v. Coley,* 178 Mass., 478, 59 N. E., 1077. In this case the question of secrecy maintained in the negotiations between propounders and caveators was presented as it is here, and as to that the Court said: "If the matter had been known to everyone it would be absurd to say that the plaintiff was not free to consult his own interest in opposing or withdrawing opposition to the codicil as well for money as without it." Citing *Leach v. Fobes,* 11 Gray, 506, 71 Am. Dec., 732; *St. Mark's Church v. Teed,* 120 N. Y., 583, 24 N. E., 1014.

Quoting from *People v. Kaiser, supra:* "The share of the estate passing to the heirs by virtue of the agreement did not pass by virtue of the statute of descent or by virtue of the will, but under the agreement." See *Baxter v. Treasurer and Receiver-General,* 209 Mass., 459, 95 N. E., 854; *Matter of Cooke's Estate,* 187 N. Y., 253, 79 N. E., 991; *Estate of Graves,* 242 Ill., 212, 89 N. E., 978. Analyzing the decisions in these cases, the opinion in *Fidelity & C. Trust Co. v. Com., supra,* states they hold: "That the compromise of a will contest under which money is paid to a contestant is a matter of contract, and the tax is imposed upon the amount devised by will or received by inheritance, and not upon money collected by virtue of a contract among living persons."

We think the law of this case is aptly expressed by the Court in *Janess v. Ambler,* 62 N. H., 569: "There is no equity in the plaintiff's claim; she declined to join in the appeal, or in the agreement; she opposed both, and she paid no part of the expenses. If the appeal prevailed, she would be entitled to her full distributive share, much larger than her devise. If it failed, she would still receive all that was given her by the will, and in neither event was chargeable with any part of the expenses. Negotiations under the written agreement might be attended with large costs, and whatever the result she was liable for no part of them. It would be inequitable to permit her to enjoy the benefits of proceedings in which she had opportunity but refused to join, and for the charges of which she was not responsible."

It is strongly urged that the equitable jurisdiction of this Court is involved upon the apparent assumption that the distribution demanded by the plaintiffs is required, according to the statutes of descent and distribution; *In re Seip, supra.* We think the case comes under the

law of contract, but whether resting in law or equity, we see no difference between the two in terms of equality and justice.

Perhaps jurisprudence might be richer if we could forget the fictional build-up of repugnance between law and equity which now and then tries to suffuse the law with the pink of shame; if we ceased to regard equity as a beneficent *jus superior* which, on occasion, throws delinquent law out of the temple and installs a new god. Since, in this State, both law and equity are administered in the same action and in the same court, the historical distinction might be reduced to the function of enlightenment, and thus become absorbed in the law. Equity is merely the tool by which the law is enabled more perfectly to trace the finer lines in the pattern of justice. It is neither altruistic nor prodigal, simply just. We do not feel inclined to impose upon the defendants in this case a generosity which these principles, which are after all but an adjustment of individual right to commendable human conduct, do not seem to require.

On the barren outer banks of Eastern North Carolina, the race of "banks ponies" has survived for two hundred years against the forces of nature with little or no help from man. Their tenacity of existence is heroic. They foal their kind upon the stark bosom of nature with a faith that reminds one of Sidney Lanier's "The Marshes of Glynn:"

> "As the marsh-hen secretly builds on the watery sod,
> I will build me a nest on the greatness of God."

These little animals have learned many tricks of survival. It is said that when they are thirsty they gather in groups of three or four and dig until the water filters through in sufficient quantity. If a pony who has not assisted in their labors comes up for a free drink, they turn their heels upon him and drive him away. This is equity on Ocracoke.

Defendants in this case can derive their right to the funds in controversy through a contract, in which the plaintiffs had no part. Counsel whose name appear on the pleadings and judgment do not purport to represent the plaintiffs; the caveators were not either actually or impliedly their agents; and they had directly repudiated the whole proceeding in the positive statement: "After due consideration, we have decided not to join in the litigation or caveat." They are not legally entitled to share the proceeds of the contract.

The judgment is

Reversed.

CLARKSON, J., dissenting: The majority opinion in the instant case permits a part of the heirs of a testator, as caveators, through a secret agreement with propounder and for a cash consideration, to withhold

evidence of the invalidity of a will and thus insure its probate. From such a view of our law, I respectfully dissent.

The plaintiffs here elected not to enter into, and actively contest, the probate of the will. Yet, if the will had not been probated, they would have received a third of the proceeds of a $35,000 secured note. As they were cited to appear in the proceedings, they were bound by the judgment entered therein. Their one-third interest in the note was contingent upon the outcome of the caveat proceeding. When the propounder herein is permitted to buy his peace by trading with the caveators, the propounder and the caveators, by a secret agreement, thereby deprive plaintiffs of their one-third interest in the note.

A general family settlement, of course, would be valid where it is "fair," "equal," and "deliberately assented to as a proper and just family agreement." *Bailey v. Wilson,* 21 N. C., 182, 189. But, the entire theory of defendants' position is a denial that this settlement was a general, family settlement. Further, when plaintiffs now seek to ratify it and thus make it a valid, family settlement, the defendants refuse to let them do so. Accordingly, this was not—and does not purport to be—a general, family settlement.

A careful search of all of the cases heretofore decided by this Court upon the subject of compromise settlement of will controversies indicates that each of these agreements receiving the court's approval was a general, family settlement. This rule, in my opinion, should not be further extended to permit compromise settlements by a part of the heirs. The solemn will of a testator, who is no longer present to defend the disposition of his property, should not be disregarded at the whim of a few of those directly interested who do not favor the terms and conditions of the will. If the wishes of a testator are to be put at naught by those who survive him, it is a salutary rule which requires that all the persons interested shall be parties to the agreement. This, I take it, is one of the fundamental reasons why caveat proceedings are treated as matters *in rem:* "The purpose is to determine the nature of the script for the benefit of all whom it may concern, and not specially for that of any particular person, whether he be before the court or not. The proceeding—the script, the issue—are not of the persons before the court; they cannot control or direct the same as parties—that is the sole province of the court—as to the issue; they are not parties, and hence, whether they take part on one side or the other of it, they cannot take or suffer a judgment of nonsuit, nor can they dismiss the proceeding." *Merrimon, J.,* in *Hutson v. Sawyer,* 104 N. C., 1 (3).

As *Ashe, J.,* pointed out in *Syme v. Broughton,* 85 N. C., 367 (369): "It may be readily seen how easily the intentions of testators could be

frustrated, and the grossest injustice and fraud practiced, if the actors in an issue of *devisavit vel non* should be permitted to exercise unrestricted control over the issue; for instance, the propounders, by collusion with the caveators, might offer the will, prove its execution according to the forms of the law and then defeat it by admitting the insanity of the testator or that the will was made under improper influence; and, on the other hand, a paper writing wanting in the requisites of a good will, having for example only one subscribing witness, might be established by the caveators simply admitting that it was executed according to the requirements of the statute." As a practical matter, the rule of the majority is open to exactly the same objections. Admittedly, the propounder and the caveators here could not do directly (compromise by nonsuit the caveat proceedings) what the majority opinion permits them to do indirectly (compromise the caveat proceedings by withholding evidence in support of their sworn caveat). The quotations above make it abundantly clear that there is a public and general interest in the establishment of the validity of a will which is more extensive than the private interests of the two or three most active protagonists and antagonists in the caveat proceeding. "It is the duty of the court as an obligation resting upon it as a court, as a duty *ex officio,* and for other reasons of public policy, to see to it that the wishes of the one who is no longer in existence as to the lawful disposition of that which was once his shall be fully carried out." *In re Staab's Estate,* 166 N. W., 326 (327), 166 Wis., 587, holding that an agreement for a cash consideration not to contest a will confers no rights which will be enforced by the courts. An "agreement, followed by the withdrawal of the objections, and the willful omission of the objectors to submit to the court the proof as to the facts which had prompted them, in good faith, to raise material issues as to the execution and validity of the proposed will, in the status of which 'the whole world has an interest,' resulted in the wrongful suppression, by collusion between them, of a judicial inquiry." *Taylor v. Hoyt,* 242 N. W., 141 (142), 207 Wis., 520. Accordingly, the *Taylor case, supra,* is authority for the position that such an agreement will be stricken down by the courts to the end that an opportunity will be given the courts to consider the validity of the will without the suppression of any part of the pertinent evidence. For the same reason that private parties are not permitted to compromise criminal cases, in my opinion, the right of the interested parties to compromise a will caveat should be a limited one, so restricted that only a compromise binding upon all of the interested parties will be permitted.

There is a second—and somewhat narrower—ground for challenging the view of the majority. In all the states—even those applying the

most liberal rules permitting compromises of caveat proceedings—that is one condition which is universally enforced: ". . . a contestant cannot compromise anything beyond his own personal interest in the contest. . . ." 68 C. J., "Wills," p. 909. The dominating purpose of the compromise upheld in the instant case was not merely to settle the rights of the parties to it; in express terms, the condition precedent of the contract was that the "will" be probated immediately. Such a result—the very purpose of the secret contract—directly affected the interests of plaintiffs, none of whom were parties to the agreement. Plaintiffs were entitled to assume that the propounder would be required to carry the burden of proof as to the formal execution of the will (*In re Will of Chisman,* 175 N. C., 420), yet, the propounder (through an agreement not known to the plaintiffs), in effect, relieved himself of any real burden in this respect by securing assurance through the agreement that such evidence as he offered would not be contested. When the effect of a particular view in a specific case is to accomplish a result which is *technically* correct but *practically* wrong, this Court should—as it has in the past (*In re Will of Averett,* 206 N. C., 234 [238])—look beyond form to the substance of the case.

As was written in *In re Crawford's Estate,* 182 Atl., 252 (254), 320 Pa. St. Rep., 444: "Where contestants of a will receive money in virtue of a settlement of a contest, they may not exclude from a share therein one who is equally entitled, although not an active contestant of the will and not a party to the settlement."

In my opinion, our decided cases furnish little support for the doctrine of this case which permits caveators to file a solemn caveat, sworn to as to the supporting facts, and thereafter—in return for a cash consideration—to withhold those facts from the court. I would be less than candid if I permitted what I regard as "bad law" to pass without a challenge into our reports.

STATE v. W. J. DIXON.

(Filed 1 March, 1939.)

1. Statutes § 2—Real Estate License Act seeks to "regulate" the trade.

It is apparent from the provisions of the Real Estate License Act, ch. 292, Public Laws of 1937, that its purpose is to provide for the extensive and intensive regulation of the trade, and to provide for the licensing and the revocation of licenses for cause of real estate brokers and salesmen within the territory affected by the act.

2. Same—Real estate brokers and salesmen are engaged in "trade" within the meaning of Art. II, sec. 29, of the State Constitution.

In its broadest sense "trade" includes any employment or business engaged in for gain or profit, and real estate brokers and salesmen, as defined by sec. 2, ch. 292, Public Laws of 1937, are engaged in "trade" within the meaning of that term as used in Art. II, sec. 29, of the State Constitution, prohibiting the General Assembly for passing any local, private, or special act regulating trade.

3. Same—Real Estate License Act is local statute regulating trade in contravention of Art. II, sec. 29, of the State Constitution.

Ch. 292, Public Laws of 1937, providing for the licensing and regulation of real estate brokers and salesmen and imposing a license tax on those engaged in the trade in addition to the tax imposed by the Revenue Act for a State-wide license, is applicable to only a limited territory and specified localities, sixty-four counties being specifically exempted from the act by section 18 thereof, and the act is therefore a local act regulating trade in contravention of Art. II, sec. 29, of the State Constitution, and is void, and a motion in arrest of judgment made by a defendant convicted of engaging in the trade in violation of the provisions of the act, is properly allowed.

4. Same: Statutes § 5c—Distinction between "local, private, or special" acts and "general" acts.

In determining whether a statute relating to matters enumerated in Art. II, sec. 29, of the State Constitution is a "local, private, or special" act inhibited by this section or a "general law" which the General Assembly has the power to enact, the courts will look beyond the form of the act and ascertain whether the statute, in fact, is generally and usually applicable throughout the area comprising the State.

5. Constitutional Law § 6b—

It is the duty and function of the Supreme Court to declare void acts of the General Assembly which plainly violate the basic, organic law of the Constitution.

6. Statutes § 12—Real Estate License Act held void as local act in conflict with the general law embodying State-wide licensing policy.

All acts of the same session of the General Assembly on the same subject are to be construed as one act, and the Revenue Act of 1937, ch. 127, sec. 109, Public Laws of 1937, imposing a tax on real estate brokers and salesmen for a State-wide license, embodies the licensing policy of the State to be applied uniformly throughout the State, and ch. 292, Public Laws of 1937, imposing a further license tax on real estate brokers and salesmen within the restricted area specified in the act, is void as being in derogation of the general licensing policy of the State as expressed in the Revenue Act. *S. v. Warren*, 211 N. C., 75, cited as controlling: *S. v. Lockey*, 198 N. C., 551, cited and distinguished.

7. Constitutional Law § 13—Real Estate License Act held void as discriminating within a class.

The Real Estate License Act, ch. 292, Public Laws of 1937, which imposes an additional license tax on those real estate brokers and salesmen engaging in the profession or trade within the restricted area speci-

fied in the act *is held* void as discriminating within a class, since all real estate brokers and salesmen engaged in the profession or trade within the State are required to obtain a State-wide license, and only those engaged in the business within the counties affected by the local act are required to obtain the additional license. *S. v. Warren*, 211 N. C., 75, cited as controlling.

8. Appeal and Error § 49—

The doctrine of *stare decisis* requires that decided cases should be given great weight when the same points again come up in litigation in the same jurisdiction, and that the Court should not swerve or depart from the prior decisions from any private sentiments or judgment.

9. Same—

The fact that a decision is of recent date does not affect the application of the doctrine of *stare decisis*.

BARNHILL, J., concurring.

DEVIN, J., dissenting.

SCHENCK and SEAWELL, JJ., concur in dissent.

APPEAL by State from *Burgwyn, Special Judge,* at August Regular Term, 1938, of MECKLENBURG. Affirmed.

Defendant, by warrant, was charged with the violation of the N. C. Real Estate License Act (chapter 292, Public Laws of N. C., 1937).

From a conviction in the recorder's court of the city of Charlotte, he appealed to the Superior Court. Upon the return of the jury therein with a verdict of guilty, defendant moved in arrest of judgment on the ground that said N. C. Real Estate License Act is unconstitutional. The judge below allowed the motion and entered an order arresting judgment, to which the State excepted, assigned error and appealed to the Supreme Court. The State is permitted to appeal "upon arrest of judgment." C. S., 4649 (4).

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

Clayton L. Burwell, amicus curiæ.

H. L. Taylor for defendant.

CLARKSON, J. The purpose of chapter 292, Public Laws 1937, is indicated by the title, "An Act to Define Real Estate Brokers and Salesmen; to Provide for the Regulation, Supervision and Licensing Thereof; To Create a Real Estate Commission, and Prescribing the Powers and Duties Thereof; To Provide for the Enforcement of Said Act and Penalties for the Violation Thereof." That the regulation of the trade sought was intended to be both extensive and intensive is apparent from sec. 9 of the Act, in which any one of eight types of misconduct, each

defined in broad terms, is made the basis for the revocation or suspension of a real estate broker's or salesman's license. The limit to which the Act goes in an effort to control the conduct of persons engaged in trading in real estate is shown by the following statement of purpose, taken from sec. 17 of the Act: "It is the purpose of this Act to provide for the regulation and discipline of real estate brokers and salesmen doing business within the State of North Carolina to the end that the interests and welfare of the people of said State shall be safeguarded by such regulations, and the fees herein charged shall be used by the commission for the enforcement of the provisions of this Act, and shall be in addition to any and all other privilege taxes, license fees or levies, whether made by the State of North Carolina or any county, city, or town, when the same are made under authority of law." In sec. 18, sixty-four counties out of the one hundred in the State are specifically exempted from the Act.

First. Is this Act constitutional? We think not.

The Constitution of North Carolina provides: "The General Assembly shall not pass any *local, private, or special act or resolution.* . . . *regulating* labor, *trade*, mining, or manufacturing. . . . *Any local, private or special act or resolution* passed in violation of the provisions of this section shall be void." Art. II, sec. 29 (Italics ours).

The leading legal definition of "trade" is that of *Justice Bradley* in *May v. Sloan*, 101 U. S., 231, 237, as follows: "The word 'trade,' in its broadest signification, includes not only the business of exchanging commodities by barter, but the business of buying and selling for money, or commerce and traffic generally." This is cited as the basic definition in 3 Bouvier, Law Dictionary, 3rd ed., p. 3290; Black's Law Dictionary, 3rd ed., p. 1744; and Ballentine's Law Dictionary, p. 1291. The same definition has been cited with approval by this Court in *S. v. Worth*, 116 N. C., 1007, 1010, and *Lewis v. Murray*, 177 N. C., 17, 19, and a similar definition was followed by *Douglas, J.*, in *S. v. Hunt*, 129 N. C., at p. 690. In *S. v. Worth, supra*, it was said, in part: "The word trade is . . . interpreted as comprehending not only all who are engaged in buying and selling merchandise but all whose occupations or business it is to manufacture and sell the products of their plants. It includes in this sense any employment or business embarked in for gain or profit." The last sentence of this definition is quoted with approval by *Allen, J.*, writing for the Court, in *Smith v. Wilkins*, 164 N. C., 136 (140). When so defined, we think that real estate brokers and salesmen, as defined by sec. 2 of the License Act here considered, are engaged in "trade" within the meaning of Art. II, sec. 29, N. C. Constitution. As was said in *Finnegan v. Noerenberg*, 52 Minn., 239, 245, 53 N. W., 1150, 18

L. R. A., 778: "Giving a reasonably liberal meaning to the word 'trade' in the Act, it would include the buying and selling of real estate. . . ." Accordingly, real estate brokers and salesmen being engaged in "trade," if the present act is a local, private, or special act, it is void.

In the case of *In re Harris,* 183 N. C., 633 (637), *Hoke, J.,* for the Court, declared: "We are of opinion, as stated, and so hold, that on the case we have before us (a recorders' court act exempting forty-four counties), where the Legislature, in the plain endeavor to comply with the constitutional limitation, has passed an act establishing a general statute for the establishment of these courts, applicable to more than one-half the counties in the State, the principle of the New York decision affords a better and wiser rule of interpretation, and must be allowed as controlling on the validity of the present law." The New York rule referred to was there quoted from *People ex rel. v. The Newburgh Plank Road Co., et al.,* 86 N. Y., 117, as follows: "A local act is one operating only in a limited territory or specified locality. It could not be said with propriety that a territory comprising nearly the whole State was merely a place or locality. An act operating upon persons or property in a single city or county, or in two or three counties, would be local. But how far must its operation be extended before it ceases to be local? To determine this, no definite rule can be laid down, but each case must depend upon its own circumstances." Tested by the rule of the *Harris case,* it is apparent that the present act applies to only a "limited territory" (the area occupied by only one-third of the counties) and to only "specified localities" (the geographical limits being limited to that encompassed by the boundaries of only thirty-six counties). The *Harris case* indicated the proper test, not of a public law, but of a "general" public law. That test, there applied, pronounced a law which exempted forty-four out of one hundred counties to be a valid, "general" law; that same test, here applied, pronounces a law which exempted sixty-four out of one hundred counties to be invalid as not constituting a "general" law. 25 R. C. L., "Statutes," secs. 65 and 66; *S. v. Johnson,* 170 N. C., 685 (692). The *Harris case, supra,* properly recognized that as to the particular types of legislation described in Art. II, sec. 29, of our Constitution, all legislative enactments are to be classified in one of the two classes: (1) "Local, private or special" acts which are "void," or (2) "general laws" which the General Assembly has "power to pass." The *Harris case* is likewise authority for looking beyond the mere form of an act to determine whether it is in fact a public, general law; this Court will look beyond such surface superficialities when there has been what *Hoke, J.* (*In re Harris, supra*) describes as "a palpable attempt to evade the constitutional restriction." Since such an act as the present

one can not, accurately, be said to be generally and usually applicable throughout the area comprising the State, necessarily follows that it falls within the class described by the words "local, private or special" acts. The plain, expressed requirement of our Constitution is the laws "regulating . . . trade" shall be "general laws"; the present act contravenes this constitutional mandate, and is, accordingly, "void." This Court would be remiss in discharging its proper function if it did not pronounce unconstitutional those acts of the General Assembly which plainly violate the basic, organic law of the Constitution; if it fails in this primary duty the fundamental guaranties of the Constitution become but vain delusions and that bed-rock charter of rights and duties rapidly disintegrates into, to quote Macaulay, "A thing to be appealed to by everybody and understood by everybody in the sense which suits him best."

Second. Is the N. C. Real Estate License Act, which applies to only thirty-six counties in the State, invalid as conflicting with the general State-wide policy of the current Revenue Act? We think that the act fails in this respect also.

Chapter 127, sec. 109, Public Laws of 1937, provides that real estate brokers and salesmen "shall apply for and obtain from the Commissioner of Revenue a *State-wide license* for the privilege of engaging in such business or profession." This same section of the Revenue Act regulates the license taxes required of attorneys, physicians, dentists, oculists, engineers, and the members of a number of other professions or trades. Chapter 292, Public Laws of 1937, attempts to impose a further license tax on real estate brokers and salesmen, declaring that the practice of the profession or trade without such additional license shall constitute a misdemeanor. It is this latter act which is here declared invalid.

The decision of this Court in *S. v. Warren*, 211 N. C., 75, narrowly limits the range of necessary, judicial inquiry in the instant case. In that case a real estate brokers' licensing act, similar to the present but applicable to only eleven counties, was declared unconstitutional. Although the majority opinion there adverted to the broader question as to whether such a licensing act falls within the permitted range of the police power (which question was expressly reserved for future determination), the real *ratio decidendi* was that the act affected only a portion of the State and was in contravention of rights, granted on a State-wide basis, by the controlling general statute. In the *Warren case, supra*, at p. 79, it was stated: "Real estate dealers who have licenses from the State are not confined to any particular county in the State to do business. Attorneys at law, physicians, etc., are not confined to any par-

ticular county to practice their professions in this State. Suppose certain counties would set up, as the present act does for real estate dealers, that attorneys at law, physicians, etc., could not practice their professions unless complying with the terms of a special act like the one in controversy, we would unhesitatingly say the act was unconstitutional—as we do in this case."

The opinion in the *Warren case* is controlling in the instant case. Decided cases should be regarded as weighty authority, at least within the Courts which decided them. As Broome puts it in that veritable storehouse of legal learning, Legal Maxims, "It is, then, an established rule to abide by former precedents, *stare decisis,* where the same points come up again in litigation, as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion, as also because, the law in that case being solemnly declared and determined what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or swerve from according to his private sentiments; he being sworn to determine, not according to his private judgment, but according to the known laws and customs of the land—not delegated to pronounce a new law, but to maintain and expound the old one—*jus dicere et non jus dare.*" Legal Maxims, 8th ed., p. 147. Nor can it be argued that the *Warren case* is so recent that it may be disregarded without serious disturbance to the body of the law. "The mere lateness of time at which a principle has become established is not a strong argument against its soundness, if nothing has been previously decided inconsistent with it, and it be in itself consistent with legal analogies." *Ibid.*, p. 152. The *Warren case* laid down the proposition that whenever the General Assembly has, by a general act of State-wide application, adopted a specific licensing policy to be applied uniformly throughout the State with respect to a particular occupation, a local act in derogation of the general act must fail. The reason for this rule is apparent; all acts of the same session of the General Assembly on the same subject are to be considered as one act (*Wilson v. Jordan,* 124 N. C., 683) and effect given to all provisions if this can be done upon any fair hypothesis (*State Board v. Drainage District,* 177 N. C., 222; *Bank v. Loven,* 172 N. C., 666) with the use of all reasonable means to arrive at the legislative intent (*S. v. Partlow,* 91 N. C., 550), but subordinate aims where inconsistent must yield to primary intent and local wishes must yield to general, State-wide policies. The soundness of this rule has been indirectly approved by statute sec. 397 (a), N. C. Code of 1935 (Michie); there it is provided that no act, purporting by its caption to be a public-local or private law, which attempts to repeal, alter, or change the pro-

visions of a public law, shall accomplish this purpose unless the very caption of the act expressly refers to the public law which will be affected by its provisions. There, as here, the necessity of safeguarding the field of public law against encroachments through local measures is clearly recognized.

The sound distinction recognized in the *Warren case, supra*—and one which we think determinative in the instant case—is that there is a vast difference between an act which places a like burden upon every member of a trade or profession in every county in the State and one which places a burden upon some members of a trade or profession who have a State-wide license but not upon all of them. This is peculiarly true of dealers in real estate, who, by the very nature of land, are confined largely to small, geographic areas with which they are familiar. The distinction is not merely one between general law and local law; the question is whether discrimination will be permitted among members of a trade or profession when all the members have previously been granted State-wide licenses to practice that trade or profession. A general and State-wide policy has been written into sec. 109 of the Revenue Act. The State has laid down specific requirements for a State-wide license to practice this trade or profession and the defendant has complied therewith and has been granted such license. Now, the General Assembly, by a law effective as to a limited area of the State, in effect revokes that license as to the particular areas involved. All real estate brokers in the State are required to pay the State privilege tax and all are subject to the same general laws in the conduct of their trade; yet, if the provisions of the instant act be upheld, a real estate broker who had paid his State tax would be deprived of the privilege of carrying on his trade in more than one-third of the counties in the State. For example, a broker seeking to sell a farm lying in two counties would be merely an honest business man conducting a legitimate business if the transaction were completed on one corner of the farm, but would be criminal if it were completed at another point on the same farm. The fatal shortcoming of the 1927 Real Estate Brokers' Act was not so much that it was a local act as it was that the act discriminated *within* a class, to wit: the real estate brokers licensed to do business throughout the State. In the words of *Justice Field* in *Soon Hing v. Crowley*, 113 U. S., 703 (709): "The discriminations which are open to objection are those where persons engaged in the same business are subjected to different restrictions, or are held entitled to different privileges under the same conditions. It is only then that the discrimination can be said to impair that equal right which all can claim in the enforcement of laws." This statement, supported by similar views at other times from the

United States Supreme Court and this Court, was cited with approval by *Adams, J.*, in *S. v. Denson*, 189 N. C., 173 (175). This fatal defect of the 1927 act is likewise present in the instant act; accordingly, the 1937 Real Estate Brokers' Licensing Act is found wanting when measured by the constitutional requisites set forth in *S. v. Warren, supra.*

In *S. v. Divine*, 98 N. C., 778 (783), *Chief Justice Smith* wrote: "An Act divested of any peculiar circumstance, and *per se* made indictable, should be so throughout the State, as essential to that equality and uniformity which are fundamental conditions of all just and constitutional legislation." In the same case, in which an act applicable to only twelve counties and making conduct, otherwise innocent, a misdemeanor, was declared unconstitutional. The statement of *Justice Field* that "No greater burdens should be laid upon one than are laid upon others in the same calling and condition" was quoted with approval. See *Barber v. Connelly*, 113 U. S., 31. Likewise, in *S. v. Fowler*, 193 N. C., 290 (293), in which a criminal law changing the punishment in prohibition offenses committed in five counties was declared unconstitutional, *Adams, J.*, wrote: "But the statute under consideration cannot be sustained on the ground that it was enacted in the exercise of the police power. The question is whether it shall supersede 'the law of the land' —the general public law which was designed to operate without exception or partiality throughout the State." When the General Assembly, in a public measure, has laid down a controlling principle to be applied uniformly and generally throughout the length and breadth of the State in solving difficulties arising within a particular field of the law, local measures in contravention of that public measure must yield to the demands of the broader and more fundamental policy when an irreconcilable conflict appears. This principle is applicable with peculiar force when the public law in question indicates in express terms, as here, that the policy of the law involves its application, unimpaired, on a State-wide basis. Sound policy demands that when the General Assembly has adopted a general and uniform plan or policy to be applied consistently throughout the State, local measures which tend to disrupt or destroy that plan must yield to the more basic demands of general, State policy. The policy of the general "law of the land" prevails over that of a contrary, local act.

Cases, such as the instant case, in which the operation of the local measure would seriously impair or partially destroy the uniform and general application of a public law expressly designed for State-wide application, are not to be confused with those cases upholding local acts in those fields of the law in which no general, State-wide policy to the

contrary has been expressly adopted. Notable among the cases of the latter type are the cases of an earlier period dealing with the regulation of intoxicating liquors, such as *S. v. Joyner,* 81 N. C., 534; *S. v. Stovall,* 103 N. C., 416; *S. v. Barringer,* 110 N. C., 525; *S. v. Snow,* 117 N. C., 778; *Guy v. Commissioners,* 122 N. C., 471; and *S. v. Herring,* 145 N. C., 418. Also to be noted are those cases, such as *Intendant v. Sorrell,* 46 N. C., 49, and *S. v. Moore,* 104 N. C., 714, which upheld local laws regulating the measuring to be used in the sale of agricultural products. Nor does the principle here expressed run counter to that line of cases, of an earlier period, dealing with a wide variety of subjects which, at the time of those cases, were considered matters properly subject to regulation by local laws. The following examples may be so characterized: *S. v. Wolfe,* 145 N. C., 445 (education and schools); *Broadfoot v. Fayetteville,* 121 N. C., 419 (stock running at large); *S. v. Pendergrass,* 106 N. C., 664 (sale of meat); *S. v. Warren,* 113 N. C., 683 (use of profanity); *S. v. Jones,* 121 N. C., 616 (payment of taxes); *S. v. Sharp,* 125 N. C., 628 (work on public roads); *Lumber Co. v. Hayes,* 157 N. C., 333 (cutting timber); *S. v. Dawson,* 189 N. C., 173 (ordinance requiring drivers' license of non-resident, as well as resident, drivers); and *Reed v. Engineering Co.,* 188 N. C., 39, and *Kenilworth v. Hyder,* 197 N. C., 85 (creation of sanitary districts).

Nor was the decision of this Court in *S. v. Lockey,* 198 N. C., 551, contrary to what is here said. In that case the apparent conflict between two State-wide acts—the Revenue Act and the Barbers' Act—was resolved by giving full effect to both acts, both being public acts expressive of general, State-wide policies. There the two acts standing together *in pari materia* were expressive of a single and State-wide policy; here there is but one act—the Revenue Act—setting forth a State-wide policy, the Real Estate Licensing Act (applicable to a relatively small area) being in conflict with the general act, and the policy set forth therein. Reference to the record and the briefs in the *Lockey case* make it clear that what was said in that case related not to the question dealt with here, but to the application of the doctrine of estoppel against the State, with an incidental allusion to the amount of the fees charged as not being unreasonable. Likewise, nothing said in *S. v. Lockey, supra,* or in *Roach v. Durham,* 204 N. C., 587, with respect to the power of the General Assembly to fix reasonable classifications in police measures is applicable here, as neither of those cases turned upon the conflict of a local statute with a general statute; furthermore, both of those cases dealt with general acts which incorporated minor exceptions and the comments in those cases merely upheld the validity of such exemptions as being insufficient to render void acts which were otherwise valid.

The able brief for the State and the argument of *amicus curiæ* were persuasive but not convincing.

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

Affirmed.

BARNHILL, J., concurring: The majority opinion discusses Art. II, sec. 29, of the Constitution, upon the theory that it divides legislation into two classes: "Local, private or special," and "general." But, in discussing the particular legislation under consideration, it deals with the act upon the basis that it is local. While it may be that every local act may be classified as "special," every special act is not necessarily "local." For that reason, while I concur in the majority view that the legislation is local in nature, I am persuaded to add a few words of discussion concerning the legislation as a special act.

The commonly accepted definition of a general law as distinguished from a special or local law is that it is a law that embraces a class of subjects or places and does not omit any subject or place naturally belonging to such class. A law is general in the constitutional sense when it applies to and operates uniformly on all members of any class of persons, places or things requiring legislation peculiar to itself in matters covered by the law. *People v. Borgeson,* 335 Ill., 136, 166 N. E., 451.

On the other hand, a special statute is one which does not include all of the persons within a given class, but relates to less than all the class, or one which relates and applies to particular members or a particular section of a class, either particularized by the express terms of the act or separated by any method of selection from the whole class to which the law might but for such limitation be applicable. *Arps v. State Highway Commission,* 90 Mont., 152, 300 P., 549; *City of Springfield v. Smith,* 322 Mo., 1129, 19 S. W., 2nd Ed., 1; *State ex rel. Powell v. State Bank,* 80 A. L. R., 1494; *R. R. v. Cherokee County,* 177 N. C., 86.

The term "special" in the constitutional provision prohibiting special laws in respect to certain subjects means laws imposing particular burdens or conferring special rights, privileges or immunities upon a portion of the people of the State without including therein and being applicable to all of the class throughout the State. *Matthews v. City of Chicago,* 342 Ill., 120, 174 N. E., 335.

The legislation under consideration is general in its terms and applies to real estate brokers and salesmen as a class. Its caption provides that it is "an act to define real estate brokers and salesmen; to provide for the regulation, supervision and licensing thereof; etc."; and in sec. 17 the purpose of the act is declared to be: "To provide for the regulation

and discipline of real estate brokers and salesmen doing business within the State of North Carolina to the end that the interest and welfare of the people of said State shall be safeguarded by such regulation." Thus, it appears that the purpose of the act is to regulate the trade of real estate brokers and salesmen, and that the legislature grouped the real estate brokers of the State as a whole into a class sufficiently distinguished by characteristics to make it the subject of legislation. However, notwithstanding the declared intent of the Legislature to deal with real estate brokers and salesmen as a class throughout the State, the act by sec. 17½ exempts from the operation thereof 64 counties. It appears, therefore, that the act does not apply to real estate brokers and salesmen throughout the State as a class, notwithstanding the declared purpose of the Legislature. The lawmaking body made a reasonable classification of citizens and then, by the express terms of the act, excluded from its operation a large portion of the class. To my mind, this alone stamps the legislation as special, brings it within the prohibitive provisions of Art. II, sec. 29, of the Constitution, and makes it invalid.

It may be conceded that the lawmaking body enacted the statute upon the theory that it was beneficial to the people of North Carolina and intended to protect the interests and promote the general welfare of the people of the State. If so, there is no sound reason why the people of the 64 excluded counties should not be protected in like manner. To regulate real estate salesmen and brokers for the protection of the people in 36 counties and to exclude the people in 64 counties from like protection clearly makes the act "special" and confers rights, privileges and immunities upon the people of the 36 counties which are denied to the people of 64 counties. If it be contended that the statute classified real estate dealers in the 36 counties included in the act as a group or class separate and apart from such dealers living in the 64 counties excluded, then the classification is arbitrary and discriminatory, without any sound basis in fact to support the classification.

I am, therefore, firmly of the opinion that the act under discussion is legislation clearly prohibited by Art. II, sec. 29, of the Constitution. It is local, it is special, the classification is arbitrary and discriminatory, and it confers upon citizens in one group of counties special rights and privileges that are denied to citizens of a larger group in direct violation of the declared purpose of the act.

The majority opinion is fully supported by *In re Harris* and by *S. v. Warren*, therein cited. While the conflict between the general licensing policy of the State and the act under consideration may be properly considered, it is not, in my opinion, essential to the determination of this cause.

DEVIN, J., dissenting: I cannot agree that the act in question violates any constitutional provision. The act was within the legislative power. If it be thought that the purpose or effect of the act is unwise, the unwisdom is that of the General Assembly. The question is one of power, not expediency. The courts have no responsibility. They are without power to revise or veto acts of a coördinate branch of the State government created by the Constitution.

We must not lose sight of the fundamental principle that since all political power is derived from the people and all government originates from them (Const. N. C., Art I, sec. 2), the sovereign will of the people expressed through their chosen representatives in the General Assembly is supreme, and a law by them enacted may not be set aside by the courts unless it contravenes some prohibition or mandate of the Constitution by which the people of the State have elected to be limited and restrained, or unless it violates some provision of the granted powers contained in the Constitution of the United States.

We must also keep in mind the well settled principle that no act of the General Assembly ought to be declared violative of any constitutional provision unless the conflict is so clear that no reasonable doubt can arise. *S. v. Lawrence,* 213 N. C., 674, 197 S. E., 586; *Glenn v. Board of Education,* 210 N. C., 525, 187 S. E., 781; *Plott v. Ferguson,* 202 N. C., 446, 163 S. E., 688; *Kornegay v. Goldsboro,* 180 N. C., 441, 105 S. E., 187.

The act here called in question prescribes the qualifications of those to whom license as real estate brokers may be granted as "persons who are trustworthy and who have good reputation for honesty, truthfulness and fair dealing, and are competent to transact the business of a real estate broker or real estate salesman in such a manner as to safeguard the interests of the public." There is no delegation of legislative powers to the board or commission created by the act. Reasonable provisions for application, for examinations, for the issuance of license upon payment of fee of ten dollars to be covered into the State treasury, for the maintenance of the commission, and for suspension, and, after due hearing, the revocation of license, are fully set out in the act.

In construing a similar statute in *Roman v. Lobe,* 243 N. Y., 51, 50 A. L. R., 1329, *Cardozo, J.,* stated with his usual clearness the basic reasons supporting regulatory provisions for real estate brokers: "The intrinsic nature of the business combines with practice and tradition to attest the need of regulation. The real estate broker is brought by his calling into a relation of trust and confidence. Constant are the opportunities by concealment and collusion to extract illicit gains. . . . With the temptation so aggressive, the dishonest or untrustworthy may

not reasonably complain if they are told to stand aside. No less necessary are safeguards against the perils of incompetence. The business of the broker is distinct from occupations which by general acquiescence are pursued by common right without regulation or restriction."

Statutes regulating real estate business have been enacted in a majority of the states of the union, and in every jurisdiction where the point has been raised the power of the Legislature has been upheld, with the possible exception of Kentucky. In *Bratton v. Chandler,* 260 U. S., 110, the Tennessee statute, very similar to the North Carolina act, was held not violative of the 14th Amendment to the Constitution of the United States. And upon the authority of that case the Supreme Court of the United States later declined to review the decision of the Supreme Court of California upholding the constitutionality of the real estate brokerage act of that state. *Haas v. Greenwald,* 275 U. S., 490.

1. The principal ground of challenge of the act in question is that it violates Art. II, sec. 29, of the Constitution. It is said in the majority opinion that this act is unconstitutional because it is a local act, and within the prohibition of this section of the Constitution, in that it attempts to regulate "trade." In view of the importance of the question, let us examine the phraseology of the section more closely. The section of the Constitution referred to contains several distinct classifications of what local acts are within its prohibition, and the clauses enumerating these classifications begin with words designating the kind and character of legislation the General Assembly is denied power to enact. The section prohibits acts "relating to" the establishment of inferior courts; "relating to" the appointment of justices of the peace; "relating to" health; "relating to" cemeteries. But when the clause, upon which the majority opinion in the case is based, is reached the word of characterization is changed. The word is "regulating" and the objects are "labor, trade, mining or manufacturing." Doubtless the framers of this section concluded that the words "relating to trade" would have been too comprehensive, and an undue limitation upon the power of the General Assembly. It is not when the local act merely "relates to" a business, but when it undertakes to "regulate" trade that it falls under the condemnation of this section of the Constitution.

Is the real estate brokerage business to be considered a trade within the meaning of this restrictive clause of the Constitution when the word is used in association with the word "labor" and "mining?" If so, does the act purport to "regulate" that trade? The act merely prescribes the qualification of persons who may enter upon and engage in that business. It does not undertake to regulate it. The power to regulate a business is the power to prescribe the rules by which it shall

be governed. *U. S. v. Knight Co.,* 156 U. S., 1; *Schechter v. U. S.,* 295 U. S., 495. A similar statute prescribing the qualifications of those entitled to enter upon and continue in the trade of plumbing, though the act applied only to the larger cities in less than half of the state, was held constitutional. *Roach v. Durham,* 204 N. C., 587, 169 S. E., 140.

2. Is the Real Estate License Act a local act?

The ground upon which the majority opinion rests the conclusion that this act violates Art. II, sec. 29, is that it is a local or special act and not a general law. This seems in conflict with the decision of this court in *In re Harris,* 183 N. C., 633, 112 S. E., 425. In that case an act relating to the establishment of courts inferior to the Superior Court, which applied to only fifty-six counties, was upheld as a general and not a local act.

The Court, when it wrote *In re Harris,* 183 N. C., 633, had the advantage of the same bibliography consulted and referred to in the majority opinion of the Court, and from which definitions of "general," "special," and "local" laws are quoted, and the Court in rendering decision in that case fully understood then, as we do now, that these definitions are not uniform.

Hence the case at bar is narrowed down to a consideration of whether the Court may find a distinction between *In re Harris* and the case at bar which will be sufficiently substantial to justify our action in striking down the Real Estate Brokerage Act. In my judgment, no such distinction exists.

The two acts—the one upheld in that case and the one now attacked—are identical in the method of enactment. Many counties are excepted from each. They are identical in that they do not apply to the whole State and do not affect in any manner citizens of the State outside of the territory to which they apply.

As to the General Inferior Courts Act, a person in the excepted territory is not in any way touched by the jurisdiction of the court until he goes within the territory to which they apply and violates some law which puts him within the jurisdiction of those courts. As to the Real Estate Brokers Act, a citizen outside of the territory to which it applies likewise is totally unaffected until he comes within that territory and does some of the acts or things therein specified.

The general rule, which has been uniformly followed in this State, is succinctly and accurately stated in 59 C. J., 730, as follows: "It is not necessary that a law, in order to be general, shall affect all of the people of the State, or all of the State, nor need it include all classes of individuals; it may be intended to operate over a limited number of

persons or things, or within a limited territory . . ." And on page 733 of the same volume, it is said: "A statute which relates to persons or things as a class is a general law, while a statute which relates to particular persons or things of a class is special."

In *Southern Railway Co. v. Cherokee County,* 177 N. C., 86, 97 S. E., 758, this Court said: "To make a statute a public law of general obligation, it is not necessary that it should be equally applicable to all parts of the State. All that is required is that it shall apply equally to all persons within the territorial limits described in the act."

So that in the last analysis the question of the constitutionality of the statute here attacked resolves itself into this: Can the Legislature by a general statute, valid and constitutional in every other respect, be overthrown because some counties are excepted from the provisions of the act? If the exception of sixty-four counties destroys the act, would twenty-five, would ten, would one? Where is the line to be drawn?

It seems to me that the question of the power of the Legislature to enact general laws applicable to certain territory has been so often decided that it ought to be deemed settled. When the Legislature exempted seventeen counties from the State-wide prohibition act, this Court repeatedly declined to hold it violative of the Constitution. *S. v. Davis,* 214 N. C., 787; *S. v. Lockey,* 214 N. C., 525; *Newman v. Comrs. of Vance,* 208 N. C., 675, 182 S. E., 453.

In *S. v. Moore,* 104 N. C., 714, 10 S. E., 143, it was said: "If the laws be otherwise unobjectionable, all that can be required in these cases is that they be general in their application, and they are then public in character, and of their propriety and policy the Legislature must judge." Quoted with approval in *Kornegay v. Goldsboro,* 180 N. C., 441, 105 S. E., 187; *Newell v. Green,* 169 N. C., 462, 86 S. E., 291.

"It (the Constitution) does not prohibit legislation which is limited either in the objects to which it is directed or by the territory within which it is to operate. It merely requires that all persons subject to such legislation shall be treated alike under like circumstances and conditions, both in privileges conferred and liabilities imposed." Cooley Const. Lim. (8th ed.), pp. 824-825.

"Laws public in their object may, unless express constitutional provisions forbid, be either general or local in their application. The Legislature must determine whether particular regulations shall extend to the whole State or to a subdivision of the State." Cooley Const. Lim. (8th ed.), pp. 803-804.

"To make a statute a public law of general obligation, it is not necessary that it should be equally applicable to all parts of the State. All that is required is that it shall apply equally to all persons within the

territorial limits described in the act. *Power Co. v. Power Co.*, 175 N. C., 668, 96 S. E., 99; *S. v. Barrett*, 138 N. C., 630, 50 S. E., 506.

In *S. v. Barrett, supra, Connor, J.*, speaking for the Court, uses this language: "This power (to pass statutes of local application) has been so long recognized by the Court and exercised by the Legislature that we do not deem it necessary to examine the foundations upon which it rests."

"Legislation, which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the Amendment (14th Amendment to Constitution of U. S.). *Barbier v. Connolly*, 113 U. S., 32. It merely requires that all persons subject to such legislation shall be treated alike. *Hayes v. Missouri*, 120 U. S., 71." *Broadfoot v. Fayetteville*, 121 N. C., 418, 28 S. E., 515.

In Connor and Cheshire's Constitution of North Carolina we find on page 14 this expression of the law: "A public-local act making that an offense in one district which is not an offense in another, is a constitutional exercise of the police power and not in violation of Art. I, sec. 7, if it bears alike on all persons in a defined locality," citing *S. v. Stovall*, 103 N. C., 416, and *S. v. Moore, supra.*

In *S. v. Blake*, 157 N. C., 608, 72 S. E., 1080, it was said: "Public-local acts passed in the exercise of the police power which apply only to certain localities are valid." And *Clark, C. J.*, cites many cases in which it has been so held. *S. v. Joyner*, 81 N. C., 537; *McCormac v. Comrs.*, 90 N. C., 441; *S. v. Barringer*, 110 N. C., 525, 14 S. E., 781; *S. v. Snow*, 117 N. C., 774, 23 S. E., 322; *Lyon v. Comrs.*, 120 N. C., 237, 26 S. E., 929; *Harriss v. Wright*, 121 N. C., 172, 28 S. E., 269; *Guy v. Commissioners*, 122 N. C., 471, 29 S. E., 771; *Tate v. Commissioners*, 122 N. C., 812, 30 S. E., 352; *Lumber Co. v. Hayes*, 157 N. C., 333, 72 S. E., 1078; *Reed v. Engineering Co.*, 188 N. C., 39, 123 S. E., 479; *S. v. Denson*, 189 N. C., 173, 126 S. E., 517; *Kenilworth v. Hyder*, 197 N. C., 85, 147 S. E., 736.

3. It is suggested in the majority opinion that the act is invalid because in conflict with the State-wide policy of the Revenue Act. But declarations of policy are matters for the General Assembly and not for the courts. The General Assembly has spoken in the Real Estate License Act. Shall the courts declare otherwise?

Nor may the act be attacked on the ground that since real estate brokers are taxed with other professions under the general Revenue Act (sec. 109, chap. 127, Public Laws 1937), they would be deprived of doing business in the counties within the act unless they paid the additional license fee required by the act. The same situation exists as to many other professions and trades taxed by sec. 109, as, for instance,

lawyers, chiropractors, barbers, photographers, etc. In the last case on this subject considered by this Court, *S. v. Lawrence,* 213 N. C., 674, 197 S. E., 586, where the act establishing a Board of Photographic Examiners with regulations and license fees was upheld as valid and constitutional, photographers were already taxed under sec. 109. In *S. v. Lockey,* 198 N. C., 551, 152 S. E., 693, construing the Barber's Act, the distinction between the two statutes was pointed out and the constitutionality of that act upheld. In the *Lockey case* the same objection as that referred to in the majority opinion in this case was raised by the constitutionality of the Barber's Act, but this Court dismissed the contention as "untenable," and definitely settled the point by the use of this language: "The annual occupation tax of the Revenue Act is for the privilege of exercising the trade of barbering and is simply a revenue act, whereas the Barber's Act is an exercise of the public power of the State to secure the public welfare by requiring proven capacity in the barbers." And in *Roach v. Durham,* 204 N. C., 587, 169 S. E., 140, the same question was again decided, and the act upheld.

The view expressed in the majority opinion that this act is invalid because of the general occupational privilege tax imposed on real estate brokers by sec. 109 of the Revenue Act, would seem in conflict with the previous decisions of this Court in these and other cases.

4. The power of the Legislature to create boards to require license fees and regulate certain professions and occupations affected with a public interest has been uniformly upheld by this Court and the question of the constitutionality of acts of this character seems well settled. *S. v. Lawrence,* 213 N. C., 674, 197 S. E., 586; *S. v. Lockey, supra; Roach v. Durham, supra.*

In *S. v. Warren,* 211 N. C., 75, 189 S. E., 108, chap. 241, Public-Local Laws of 1927, was held invalid because that act purported to apply only to eight counties, but in that case the power of the Legislature to "make reasonable regulations in regard to the real estate business" was expressly upheld. And in *S. v. Lawrence,* 213 N. C., 674, where the act establishing a State Board for regulating the practice of photography, with requirement of license fee before engaging in that business, was held constitutional, the same language was quoted with approval. "It is uniformly held that requirement of license fees from real estate brokers and regulations subjecting those of that profession or business to tests of character and competency in the interest of the public are within the power of the State Legislatures." (Cooley Const. Lim. [8th ed.], 1332).

5. The act is not discrimatory. It operates equally upon all subjects within the same class. All real estate brokers within the act are

subject to the same restrictions under the same conditions (*S. v. Denson, supra*). All brokers within the territory, and all brokers outside its limits, who, for the purpose of conducting a brokerage business, go into any of the counties not exempted, are treated exactly alike. The license fee fixed by the act cannot be said to violate the rule of uniformity. *Roach v. Durham, supra.*

The rule of *stare decisis* here invoked on account of the holding in *S. v. Warren, supra,* is inapplicable. That rule—meaning to stand by precedent and not disturb settled points—applies only where the Court has announced certain controlling principles of law or given a construction to a statute upon which individuals and the public have relied in making contracts. It is a species of judicial estoppel. In the *Warren case* the Court considered a public-local law applicable only to eight counties. Here we construe a different law, enacted by another Legislature, embodying a general statute applicable to the entire State, from the operation of which certain counties were excepted. The legal principles involved are not the same.

The reasons marshalled in support of the majority opinion are ably presented, but in my opinion should not prevail. The effort to distinguish this case from *In re Harris,* and from *S. v. Lockey* and *Roach v. Durham* is unconvincing. The effect is by implication to overrule those well considered cases. If the rule of *stare decisis* is to be invoked, it should be held applicable to those cases.

6. The cases cited in the majority opinion, *S. v. Worth,* 116 N. C., 1007; *S. v. Hunt,* 129 N. C., 686; and *Smith v. Wilkins,* 164 N. C., 135 (*Lewis v. Murray,* 177 N. C., 17, is not in point), in which this Court interpreted the word "trade" to include any employment or business embarked in for gain or profit, were all cases decided prior to the ratification of sec. 29 of Art. II, and related to liability for occupational license taxes under the terms of the revenue statute. In none of these was the question of restricting the otherwise unlimited power of the General Assembly involved. In the latter case I apprehend a different principle of construction would be applicable.

The cases of *S. v. Divine,* 98 N. C., 778, 4 S. E., 477, and *S. v. Fowler,* 193 N. C., 290, 136 S. E., 709, cited in the majority opinion, do not, I think, support the conclusion there reached when the facts in those cases are considered. The act construed in the *Divine case* made killing of cattle by a car or engine running on a railroad a misdemeanor in certain counties. The superintendent of a railroad, who had nothing to do with the violation of the act, was indicted. It was held the act would not sustain the indictment. In my opinion this is not authority for holding that the Legislature has no power to enact a criminal statute

applicable to less than the whole State. If it does, the many cases cited in the majority opinion are to the contrary. In *S. v. Warren,* 113 N. C., 683, 18 S. E., 498, the act construed made the use of profane language in certain locality unlawful. The Court upheld conviction and used this language: "It may be urged that this is a criminal law, and hence must be uniform and take effect over the whole State. But, on the contrary, it is a police regulation, and hence may be limited in its operation to such localities as the Legislature may prescribe. The distinction between the two has been too often pointed out to require reiteration."

In the *Fowler case* a public-local law was enacted prescribing a different punishment for violation of the prohibition law in five counties from that in the general statute. The Turlington Act made the manufacture or sale of intoxicating liquor unlawful anywhere in the State, in the five counties as well as in the remainder of the State, while the public-local act, without exempting the five counties from the general law, attempted to prescribe a different punishment for the same offense when committed in the five counties. The Court said: "The principle of uniformity in the operation of a general law extends to the punishment and denounces as arbitrary and unreasonable the imposition in one county of any kind of punishment which is different from that which is prescribed under the general law to all who may be guilty of the same offense." With that statement of the law I agree, but this is not our case. Nowhere does the *Fowler case* deny the power of the Legislature to enact a law making certain acts unlawful in territory less than the entire State. Here the law acts equally upon all persons who engage in the real estate brokerage business in the territory not excepted from its provisions. The power of the Legislature to except seventeen counties from the provision of the Turlington Act and to authorize the sale of intoxicating liquor, under restrictions, therein, while it was a violation of law to do so in the other eighty-three counties, has not been denied or questioned by the majority of this Court.

7. Some of the acts creating boards for the regulation of certain occupations were made applicable only to towns and cities of certain population. In the act relative to plumbing and heating contractors, towns and cities having a population of not more than 3,500 were exempted (which by the census of 1930 would exclude more than half the counties of the State). That fact was held not to constitute a violation of the rule of uniformity or affect the validity of the act as a general law. *Roach v. Durham, supra.* In the Photography Act, cities and towns having a population of not more than 2,500 were excepted. The act was held constitutional though a number of counties were excluded from its operation. *S. v. Lawrence, supra.*

It would seem, therefore, to involve a rather strained construction to denominate a law applicable to thirty-six counties in North Carolina, including the more populous counties of Guilford, Mecklenburg, Catawba, Forsyth, Buncombe, Wake, New Hanover, Cleveland, Alamance, Rowan, Nash, and others, containing approximately one-half the population of the State, as a local act beyond the power of the Legislature to enact.

Here the purpose of the act, as it applies to the real estate brokerage business in the territory within the counties not exempted, is to set up standards of fitness and competency and to provide for proper practices in the business for the promotion of the general welfare, in order to safeguard the public from incompetency and dishonesty.

Is the unconstitutionality of the act so clear and patent that no reasonable doubt can arise? If there is a doubt about it, then according to the unbroken rule of construction of written constitutions, the doubt should be resolved in favor of the validity of the act of the General Assembly.

In my opinion the judgment of the court below should be reversed.

SCHENCK and SEAWELL, JJ., concur in this dissent.

STATE v. O. G. THOMAS.

(Filed 1 March, 1939.)

APPEAL by the State from *Burgwyn, Special Judge,* at August Regular Criminal Term, 1938, of MECKLENBURG. Affirmed.

Defendant, by warrant, was charged with the violation of the N. C. Real Estate License Act (chapter 292, Public Laws of N. C., 1937). From a conviction in the recorder's court of the city of Charlotte, he appealed to the Superior Court. Upon the return of the jury therein with a verdict of guilty, defendant moved in arrest of judgment on the ground that said N. C. Real Estate License Act is unconstitutional. The judge below allowed the motion and entered an order arresting judgment to which the State excepted, assigned error and appealed to the Supreme Court. The State is permitted to appeal "upon arrest of judgment." C. S., 4649 (4).

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

Clayton L. Burwell, amicus curiæ.

D. B. Smith for defendant.

CLARKSON, J. The present action is similar to that of *S. v. Dixon, ante,* 161. The principles set forth in that case are applicable to the present one.

For the reasons given, in that case, the judgment of the court is Affirmed.

SCHENCK, DEVIN, and SEAWELL, JJ., dissent.

J. D. GRAY v. BENNY GRIFFIN.

(Filed 1 March, 1939.)

Bankruptcy § 7—Plaintiff trying case solely on theory that injury was willful is properly nonsuited upon failure of evidence supporting that theory.

Plaintiff instituted this action to recover for injuries sustained in an automobile collision prior to the discharge of defendant in voluntary bankruptcy, alleging that the injury was willful and malicious within the meaning of the bankruptcy act, and announced he desired to try the case solely on this theory. Plaintiff's evidence tended to show that defendant attempted to pass plaintiff's car, saw two cars approaching from the opposite direction, and chose to hit plaintiff's car rather than cause the more serious accident, and plaintiff himself testified that he did not think the injury was willful or malicious. *Held:* The evidence does not sustain the allegation that the injury was willful and malicious, and plaintiff having elected to pursue his remedy solely on this theory, judgment of nonsuit was properly entered.

APPEAL by plaintiff from *Burgwyn, Special Judge,* at November Term, 1938, of MARTIN. Affirmed.

Civil action to recover compensation for property damage and personal injury caused by the negligent operation of a motor vehicle.

Plaintiff alleges that while his car was being operated in the nighttime by one Alexander on Highway No. 90 and occupied by the plaintiff the defendant drove his car into the rear of plaintiff's car; that as the result thereof plaintiff sustained personal injuries and his car was demolished. He alleges various acts of negligence which he contends proximately caused the collision. The defendant, answering, denied any act of negligence and pleaded his voluntary bankruptcy in bar. Thereupon the plaintiff filed an amended complaint in which he alleged that the acts of the defendant which proximately caused the collision "were willful and malicious and said acts and omissions which caused the injury were wrongful and done intentionally without just cause or

excuse and were committed disregarding what the defendant knew to be his duty and which caused the injury."

On the hearing the plaintiff offered evidence tending to show negligence on the part of the defendant.

At the conclusion of the testimony the defendant renewed his motion to dismiss as of nonsuit first made at the time the plaintiff rested. The motion was allowed and judgment entered accordingly. The plaintiff excepted and appealed.

B. A. Critcher for plaintiff, appellant.
Clarence W. Griffin and Wheeler Martin for defendant, appellee.

PER CURIAM. The judgment entered recites that it is admitted by the plaintiff that defendant was adjudged a voluntary bankrupt 21 March, 1938, subsequent to the matters and things alleged in the complaint, and that plaintiff announced he "did not desire to try this case except on the alleged issue of negligence of the defendant being willful and malicious within the meaning of the bankruptcy act relating to the discharge of the bankrupt from claims existing at the time of his voluntary bankruptcy." The plaintiff testified: "He intended to pass us with two cars approaching and rather than kill all the folks approaching he took my car. I do not think he did it willfully and maliciously as he did it to save those other folks." The other evidence offered fails to bring the conduct of the defendant within the term "willful and malicious," as used in the bankruptcy act. *Tinker v. Colwell,* 193 U. S., 473, 48 L. Ed., 754; *Poznanovic v. Gilardine,* 57 A. L. R., 148; *Ely v. O'Dell,* 57 A. L. R., 151, and annotations; *Re Greene,* 109 A. L. R., 1188.

Perhaps, in making his election to pursue his cause of action upon the theory that the alleged negligence of the defendant constituted a willful and malicious injury to person and property, the plaintiff was inadvertent to the decision in *Re Greene, supra,* and cases there cited. Having made the election, the judgment of nonsuit was proper.

Affirmed.

EMORY SMITH, ADMINISTRATOR OF ROBERT DIXON, v. O. H. BONNEY.

(Filed 1 March, 1939.)

1. Negligence § 20—When case is tried on theory that defendant's negligence was sole proximate cause of injury, failure to charge on question of concurrent negligence is not error.

Plaintiff's intestate was killed while riding as a guest in a car. Plaintiff instituted this action against the driver of the car which collided

with the car in which intestate was riding, alleging that the car in which intestate was riding was being driven in a careful and prudent manner, and that the collision was caused by the negligent operation of defendant's car. *Held:* The theory of trial was that the negligence of defendant was the sole proximate cause of the accident, and plaintiff's exception to the charge for its failure to submit the question of concurrent negligence cannot be sustained.

2. Appeal and Error § 8—

An appeal will be determined in accordance with the theory of trial in the lower court.

APPEAL by plaintiff from *Thompson, J.*, at September Term, 1938, of CURRITUCK. No error.

McMullan & McMullan for plaintiff, appellant.

A. H. Scales, Chester Morris, and F. E. Kellam for defendant, appellee.

PER CURIAM. This is an action to recover damages for the wrongful death of the plaintiff's intestate, alleged to have been caused by the negligence of the defendant. The intestate was a passenger in an automobile operated by one Charlie Smith, which collided with an automobile operated by the defendant, which collision resulted in the death of said intestate. The trial was had upon the issues of negligence of the defendant and of damage, which were answered in favor of the defendant, and from judgment predicated upon the verdict the plaintiff appealed, assigning errors.

The exceptive assignments of error present the question as to whether the court failed to comply with C. S., 564, by failure to charge the jury that if the negligence of the defendant was one of the proximate causes of the death of the intestate they would answer the issue of negligence in favor of the plaintiff, the court having charged the jury that if the negligence of the defendant was the proximate cause of such death they would so answer the issue.

The case was tried below upon the theory that the negligence of the defendant was the proximate cause of the death of the intestate, the allegation of the complaint being that the automobile of Charlie Smith, in which the intestate was a passenger, was being operated in a careful and lawful manner, and that the collision was caused by the negligent operation of the defendant's automobile. Hence, the issue of the concurrent negligence of Charlie Smith and of the defendant was not raised, but only the issue of the negligence of the defendant. This issue was duly presented by the charge. To sustain the assignments of error would be to allow the appellant to try the case in the Superior Court

upon one theory and to have the Supreme Court to hear it on a different theory. "The theory upon which a cause is tried must prevail in considering the appeal, and in interpreting a record and in determining the validity of exceptions." *Potts v. Ins. Co.*, 206 N. C., 257, and cases there cited.

No error.

CASWELL COUNTY v. THOMAS ABRAM SCOTT, CHARLIE MOSES SCOTT, W. C. TAYLOR, GENERAL GUARDIAN OF THOMAS ABRAM SCOTT AND CHARLIE MOSES SCOTT, R. B. DAWES AND F. O. CARVER, TRUSTEE, MOZETTA SCOTT JEFFRIES, EXECUTRIX OF WILL OF CHARLIE SCOTT, DECEASED, AND MOZETTA SCOTT JEFFRIES, INDIVIDUALLY (AND JASPER JEFFRIES, HUSBAND OF MOZETTA SCOTT JEFFRIES, L. P. HUDSON, MAUDE HUDSON AND A. B. VERNON, ADDITIONAL PARTIES DEFENDANT).

(Filed 1 March, 1939.)

Judicial Sales § 3: Taxation § 40b—Tax sale not had on a Monday or on one of first three days of term of court held void.

Motion in the cause to set aside tax foreclosure sale and decree of confirmation *held* erroneously denied under authority of *Bladen County v. Breece*, 214 N. C., 544, when it appears from the record that the sale was not had on a Monday or on one of the first three days of a term of the Superior Court of the county, and that in the order of sale no other day was designated.

APPEAL by defendant Mozetta Scott Jeffries from judgment rendered by *Clement, J.*, at Chambers, 6 December, 1938. From CASWELL. Reversed.

This was a motion in the cause to set aside a tax foreclosure sale and the decree confirming same. From judgment denying the motion, defendant Mozetta Scott Jeffries appealed.

Glidewell & Glidewell and R. T. Wilson for plaintiff.
C. J. Cates and E. R. Avant for defendant.

PER CURIAM. It appears from the record that the tax foreclosure sale was made under order of court, and that it was had on Saturday, 27 August, 1938, and not on a Monday or during the first three days of a term of the Superior Court of said county, and that in the order of sale no other day was designated. Public Laws 1931, ch. 23.

Under authority of *Bladen County v. Breece*, 214 N. C., 544, the sale must be held void, and the judgment below

Reversed.

ROBERT GRANT v. ALLIE J. LONG.

(Filed 1 March, 1939.)

Judgment § 32—Prior judgments in action for possession and action to recover payments made on option held to bar this action for possession.

An administrator executed an option on lands of the estate and thereafter sold same to defendant. Defendant instituted action against the purchaser in the option contract and others, for the possession of the lands and final judgment was entered that defendant was the owner of the lands and awarding damages for wrongful detention. Thereafter the purchaser in the option contract instituted suit against the administrator and recovered judgment for the amount paid under the contract. Thereafter he instituted this action against defendant to recover possession of the lands. *Held:* The record justifies the judgment of the lower court that the present action is barred by the judgments in the prior proceedings.

APPEAL by plaintiff from *Bone, J.*, at October Term, 1938, of EDGECOMBE. Affirmed.

In this case the plaintiff sued for the recovery of certain lands described in the complaint, and the defendant pleaded in bar of the action that the plaintiff was estopped by final judgment in a former action.

On 15 December, 1932, J. Walter Brown, administrator of the estate of J. D. Brown, executed an option on the lands and on other lands to the plaintiff, Robert Grant, which option was never properly recorded. Grant failed to make the payment required in the option, and on 5 April, 1933, Brown, administrator, conveyed the lands to Allie J. Long, by deed duly registered 6 April, 1933. In June, 1933, Allie J. Long, defendant in the present suit, instituted an action in the Superior Court of Edgecombe County against Robert Grant and others for the possession of the land described in the deed, this being identical with that described in the complaint in the present action, and for damages for wrongful detention. Subsequently, at the November Term, 1933, of Edgecombe Superior Court, an order was entered requiring Grant and other defendants in that suit to surrender possession of the lands in controversy to Allie J. Long, pending the final determination of that action, and without prejudice to either party; which possession was to commence on 28 December, 1933, and to continue until the final determination of the action, and in any event to last through the year 1934.

That case was tried at the October Term, 1934, and issues as to ownership and possession of the land and damages were decided in favor of Allie J. Long and against Robert Grant. Final judgment was thereupon entered adjudging that Allie J. Long was the owner and entitled

to possession of the land, and awarding damages against Grant and the other defendants.

In August, 1933, Grant instituted an action in the Superior Court of Edgecombe County against Brown, administrator, setting out the above mentioned option and contract and praying judgment for recovery of the amount of money paid thereunder in the sum of $445.00 and for damages for breach of contract. The contract was the same as that referred to in the complaint, and judgment was rendered in that action in favor of Grant against Brown.

The judgment roll in the prior action was introduced in the present action, and, upon an inspection of the record and the facts found, the trial judge concluded that the plaintiff in the present action was estopped by the former proceedings and judgments thereupon and entered judgment accordingly, from which the plaintiff appealed.

T. T. Thorne for plaintiff, appellant.
Henry C. Bourne for defendant, appellee.

PER CURIAM. We are of the opinion that the conclusion reached by the court below is justified by the record, and the judgment is

Affirmed.

JOHANNA FOX v. THE ASHEVILLE ARMY STORE, INC.

(Filed 8 March, 1939.)

1. Trial § 24—More than scintilla of evidence takes the case to the jury.

Where there is more than a scintilla of evidence to sustain the allegations of the complaint, the case must be submitted to the jury, its sufficiency to warrant a verdict for plaintiff being for the determination of the jury, subject only to the discretionary power of the trial court to set the verdict aside in proper cases, and a strict adherence to this rule is necessary to preserve the right of trial by jury guaranteed by the Constitution, Art. I, sec. 19.

2. Trial §§ 22b, 23—On motion to nonsuit, evidence which makes for plaintiff's claim must be considered in light most favorable to plaintiff.

Upon a motion to nonsuit, the evidence must be considered in the light most favorable to plaintiff, and contradictions and discrepancies in plaintiff's testimony, or the testimony of her witnesses, will not justify the withdrawal of the case from the jury, since plaintiff is not bound by every word of the testimony of her witnesses, and since only the evidence favorable to plaintiff should be considered, it being for the jury to determine what part of the evidence they will believe. C. S., 567.

3. Trial § 24—

The natural and physical evidence, in its relation to the oral testimony, is properly to be considered in determining the sufficiency of the evidence to overrule defendant's motion to nonsuit.

4. Negligence §§ 3, 19a—Whether injury from air rifle shot was the result of negligence of defendant's salesman held for jury.

Plaintiff brought this action to recover for injuries to her eye alleged to have been sustained when a shot from an air rifle fired by defendant's salesman hit and broke the left lens of her eyeglasses. The physical evidence tended to show that plaintiff was standing at the back of defendant's store, that she was wearing a hat with a brim four or five inches wide, was looking directly at the salesman, and that the shot bored a round hole in the center of the lens, indicating that the shot was traveling in a line perpendicular to the plane of the lens. Plaintiff introduced the deposition of the salesman, taken under C. S., 900-901, to the effect that the salesman examined the gun and thought that he had removed all the shot, that he then pulled the trigger twice to test the air compression machinery, pointing the gun at the ceiling toward the front of the store, and that the second time the gun expelled the shot which must have struck the ceiling and ricocheted to strike plaintiff. *Held:* The physical evidence contradicts the evidence of the salesman in critical points, and the sufficiency of the salesman's examination of the gun, whether he pointed it at the ceiling toward the front of the store, and whether the shot ricocheted, are questions for the jury to determine from all the evidence, and the evidence should have been submitted to the jury on the question of negligence in handling the dangerous instrumentality, and the question of proximate cause, the occurrence not being so unforeseeable as to put it, as a matter of law, beyond the range of proximate causation.

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

BARNHILL, J., dissenting.

DEVIN, J., concurs in dissent.

APPEAL by plaintiff from *Johnston, J.*, at October Term, 1938, of BUNCOMBE. Reversed.

This is an action for damages for an injury sustained by the plaintiff through the alleged negligence of the defendant.

The evidence is substantially as follows:

The plaintiff had entered defendant's store in the city of Asheville to make a purchase, and had gone toward the rear. A salesman of the defendant discharged a shot out of a Daisy air rifle, which struck the left lens of her eyeglasses, making a hole in the same and driving splinters of glass into her eye. Plaintiff had already lost the sight of her right eye in a former accident.

The clerk, or salesman, had been examined on oath by the plaintiff, under C. S., 900-901, and his deposition was used in the trial. He testified that a customer had brought back into the store a Daisy air rifle, complaining of some defect in it.

This air rifle used a "BB" shot, which was projected by means of compressed air. The barrel part of the rifle consisted of two concentric cylinders; the smaller inside cylinder, or tube, was used for the discharge of the shot and the space between it and the surrounding outside cylinder was used as a magazine for shot, and held about 500 shot. The shot were introduced through an opening near the muzzle.

Witness stated that he unscrewed the cap on the end of the muzzle, took out the inner cylinder, and, on examining it, found no shot in it. He turned the gun down and shot contained in the magazine rolled out. Conceiving then that it was empty, he reassembled the gun, gave the piston the proper compression, and discharged it twice, the end of the gun, as he says, being "pointed to the ceiling, a little to the front of the store." (The witness states he was facing the front of the store.) He was trying to see whether the rifle would work.

At the time of her injury plaintiff was wearing a hat with a brim, four or five inches wide, low on her forehead. She further testified that the shot struck about half way between the top and bottom of the lens. "There was a perfectly round hole in the lenses and the lens were shivered into like as if dozens of pieces, but yet it was holding together. But this hole was here."

There was further evidence as to the injury done plaintiff's eye, and the impairment of its vision.

The trial judge sustained the defendant's motion for judgment as of nonsuit and plaintiff appealed.

George M. Pritchard, C. E. Blackstock, and M. A. James for plaintiff, appellant.

Smathers & Meekins for defendant, appellee.

SEAWELL, J. This case brings up a consideration of the conditions upon which the trial court may take a case away from the jury for want of sustaining evidence.

According to the uniform holding of this Court, a case cannot be taken away from the jury when there is more than a scintilla of evidence to sustain the allegations of the complaint. *Gates v. Max,* 125 N. C., 139, 34 S. E., 266; *Cable v. R. R.,* 122 N. C., 892, 29 S. E., 377; *Cox v. R. R.,* 123 N. C., 604, 31 S. E., 848. "That act" (C. S., 567) "was not intended to deprive parties of the right to trial by jury where there is any evidence . . ." *Willis v. R. R.,* 122 N. C., 905, 908, 29 S. E., 941. If there is such evidence, the quantum which it takes to produce mental conviction resulting in a verdict is a matter for the jury, and the evidence must be left to it, subject only to the discretion of the trial judge to set aside the verdict in proper cases.

Only by a strict adherence to this principle can the Court hope to preserve the right of trial by jury guaranteed by the Constitution, Art. I, sec. 19.

In applying this principle in cases involving negligence, as well as in others, the Court has repeatedly held that on a motion for nonsuit the evidence must be taken in the light most favorable to the plaintiff. *Gladstone v. Swaim,* 187 N. C., 712, 122 S. E., 755; *Allen v. Garibaldi,* 187 N. C., 798, 123 S. E., 66; *Godfrey v. Power Co.,* 190 N. C., 24, 128 S. E., 485; *Cabe v. Parker-Graham-Sexton, Inc.,* 202 N. C., 176, 162 S. E., 223; *Gunn v. Taxi Co.,* 212 N. C., 540, 193 S. E., 747; *Leonard v. Ins. Co.,* 212 N. C., 151, 157, 193 S. E., 166; *Pearson v. Luther,* 212 N. C., 412, 193 S. E., 139; *Gower v. Davidian,* 212 N. C., 172, 193 S. E., 28; *Hedgecock v. Ins. Co.,* 212 N. C., 638, 194 S. E., 86; *Anderson v. Amusement Co.,* 213 N. C., 130, 196 S. E., 386; and he is entitled to every reasonable intendment thereon, and every reasonable inference therefrom. *Hancock v. Wilson,* 211 N. C., 129, 189 S. E., 631; *Cole v. R. R.,* 211 N. C., 591, 191 S. E., 353; C. S., 567. See annotations N. C. Code, Michie, 1935, sec. 567. The rule is sometimes stated conversely, with perhaps more pointed significance. Upon demurrer, the evidence must be taken most strongly against the defendant. *Gates v. Max, supra; Purnell v. R. R.,* 122 N. C., 832, 29 S. E., 953.

The rule that the evidence must be considered in the light most favorable to the plaintiff goes even further and applies to the testimony of the plaintiff herself, although there may be discrepancies and contradictions in it. *Matthews v. Cheatham,* 210 N. C., 592, 188 S. E., 87; *Mulford v. Hotel Co.,* 213 N. C., 603, 197 S. E., 169; *Gunn v. Taxi Co., supra; Ferguson v. Asheville,* 213 N. C., 569, 197 S. E., 146; *Lumber Co. v. Perry,* 212 N. C., 713, 194 S. E., 475. *A fortiori,* the rule must apply to the testimony of a witness for plaintiff; *Tomberlin v. Bachtel,* 211 N. C., 265, 189 S. E., 769; no matter whether to a witness indifferent to the result or to one, as here, who is himself charged with the negligence.

The plaintiff is not bound by every word uttered by her witness. That would be an absurd and impractical rule, which would probably take the vast majority of cases from the jury and make the judicial investigation of truth an impossibility.

We cannot find where the Court has knowingly deviated from these principles. It must be clear, then, without violating them, that the Court cannot come to a conclusion based upon an impressionistic view of the evidence, *en masse,* which takes into consideration, consciously or unconsciously, its inconsistencies and contradictions. It cannot institute a comparison between the favorable and unfavorable and cancel out favorable factors to reach what it might consider a better result. It

cannot select, out of confused and inconsistent and contradictory evidence, the testimony of any one witness, or any part of his testimony, as conclusive on the plaintiff upon the theory that she vouches for his truthfulness, or the correctness of his statement, when there is any evidence from which negligence can be inferred. The reason is simple and is plainly stated in the decisions: The jury alone have the right to say what part of the evidence they will believe. *Gunn v. Taxi Co., supra; Shell v. Roseman,* 155 N. C., 90, 71 S. E., 86; *Ward v. Mfg. Co.,* 123 N. C., 248, 252, 31 S. E., 495; *Smith v. Coach Line,* 191 N. C., 589, 132 S. E., 567. In *Newby v. Realty Co.,* 182 N. C., 34, 41, 108 S. E., 323, the Court lays down the rule from which, as far as we are aware, it has never consciously departed: "Plaintiff also is entitled to the most favorable inferences deducible therefrom, considering only so much of the evidence as is favorable to the plaintiff and rejecting that which is unfavorable."

Procedural rules applying to the development of a case on trial such as "the plaintiff will not be permitted to contradict her own witness," and the like, have already served their purpose and have come to an end with the trial. Here the evidence must be considered objectively, without any obligation of the parties thereto as proponents and sponsors, save that which requires the court to look at the evidence in the most favorable light to the plaintiff, with a view of finding whether there is any evidence tending to establish her cause.

In applying this test to the evidence it is also proper to examine the natural and physical evidence in its relation to the oral testimony. In the language of *Powers v. Sternberg,* 213 N. C., 41, 195 S. E., 88: "There are a few physical facts which speak louder than some of the witnesses." The physical evidence is sometimes more persuasive than words, since it is free from human prejudice and unaffected by the "personal equation." *Goss v. Williams,* 196 N. C., 213, 145 S. E., 169; *Burnett v. Williams,* 196 N. C., 620, 146 S. E., 533. We shall discuss this evidence as sparingly as possible, but some reference to it has been rendered unavoidable.

The witness, Roy Dindinger, a salesman in the Army Store, was handling and testing an air rifle that had been brought back by a dissatisfied customer. The rifle, or one of similar make, was exhibited to this court without objection and examined. The court is at liberty to form its own conclusions from the evidence before it as to the character of the rifle as a dangerous instrumentality, as a matter of law, and would find no difficulty in following other courts in pronouncing it a dangerous instrumentality to be handled with commensurate care; *Pudlo v. Dubiel,* 175 N. E., 536 (Mass.); *Gerbino v. Greenhut, Etc., Co.,* 152 N. Y. Supp., 502; and that, nothing else appearing, the discharge of a shot

therefrom in an open store, containing invited customers, is evidence of negligence demanding explanation to relieve the act from such implication. It is not, however, necessary to decide that question as a matter of law here. There is ample evidence from which the jury might determine the character of a rifle capable of projecting, by means of compressed air, leaden shot of the size indicated, with the apparent result.

The witness Dindinger testified as to his examination of the rifle before discharging it, and stated that upon such examination he found no shot in it; but there was a shot left in it, as proved by a subsequent discharge, which raises a very practical question as to the sufficiency of his investigation. This Court has no right to single out the testimony of Dindinger relating to this examination, on the theory that the plaintiff vouches for Dindinger's truthfulness by introducing him, and to pronounce that examination, as a matter of law, sufficient. It is for the jury to say whether the examination was as perfunctory as it was futile —at any rate, to pass upon its sufficiency.

In that particular, as well as others relating to the critical points of the evidence, the plaintiff is entitled to the inferences to be drawn from the physical facts which plainly contradict the testimony of Dindinger. The fact that he is so contradicted does not necessarily mean that he intentionally misstated the facts. If the jury accepted the evidence of the physical facts and drew therefrom the inferences which it was their privilege to draw, they might have come to the conclusion that he was mistaken.

Further analyzing this part of the evidence, Dindinger says he pointed the rifle toward the front of the store; but there is evidence that the shot hit the plaintiff's eye while she was at a distance from the witness *in the rear of the store.* The jury might have found such a ballistic performance incredible.

Defendant argues that the shot ricocheted from the ceiling, but the evidence is that the plaintiff was wearing a hat with a brim four or five inches wide, low on the forehead, and was looking directly toward the man handling the gun. There is evidence that the shot bored a round hole in the center of the lens, from which the jury may well have inferred that the impact was in a line normal to the plane of the lens.

We have tried to appraise the facts in a cold light without reflection on the motives of any party or witness in the case. The Court is neither prosecutor, nor defender, nor jury. Speculations as to why the plaintiff did not call certain witnesses to corroborate her testimony, appropriate perhaps before the jury, where the credibility of the witness is an issue, are usually regarded as advocative in character, and are without significance here.

Even if we accept the theory that the shot ricocheted after impact on the ceiling, which the physical evidence tends to contradict, we cannot accept the conclusion that the sequel was so unforseeable as to put the occurrence, as a matter of law, beyond the range of proximate causation, as not being the natural and probable result of the negligent conduct of Dindinger, if such negligence should be found; and on that question we cannot say that this evidence, considered in the light most favorable to the plaintiff, discloses nothing for the jury to consider.

The judgment of nonsuit is

Reversed.

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

BARNHILL, J., dissenting: If I correctly interpret the majority opinion and the inferences which necessarily must be drawn therefrom, it undertakes to modify materially the rule which has heretofore prevailed in this Court in determining the correctness of a judgment of nonsuit. It is true that plaintiff is not bound by every word uttered by her witnesses and that where conflicts and inconsistencies appear they must be resolved in favor of the plaintiff. But this does not mean that we are not required to view as a whole the picture painted by plaintiff's testimony. We only disregard the defects therein which mitigate against the plaintiff's case. We are not permitted to blot out and wholly disregard a complete section of the picture so as to arrive at the conclusion that the plaintiff has established a cause of action. To do so would make it practically impossible to sustain any judgment of nonsuit. For instance, in cases where the plaintiff's testimony discloses that her cause of action is barred by her own contributory negligence we would be required to overlook completely any of the testimony other than that tending to show that the defendant was negligent and that the plaintiff received injuries. The evidence of contributory negligence being adverse to her cause of action, we would be required to disregard it entirely.

The plaintiff offered the evidence of the witness Dindinger and relies upon his testimony. The plaintiff, having offered the evidence of the witness Dindinger, she thereby vouched for his truthfulness. While she could show by other witnesses that the facts were different from those testified by this witness, in some or all particulars, she could not base her case upon the suggestion that he had testified falsely, when no evidence was offered and when no witness had testified to facts in any way contradictory.

The plaintiff, through her testimony, including that of Dindinger, gives a complete picture of the occurrence about which she complains. While she was in the store of the defendant a customer returned an air rifle to the clerk at the gun counter, complaining that it was out of order and would not work. The clerk took the precaution to dismantle the gun for the purpose of unloading it. He looked in the cylinder and ascertained that there was no shot therein. He then emptied the shot out of the magazine and reassembled the gun. Then, for the purpose of testing it to see whether the air compression machinery would work, he compressed the air in the rifle and pulled the trigger. No shot came out. He again compressed the air and pulled the trigger. At this time a shot was ejected and in some manner struck the plaintiff, penetrating the lens to her left eyeglass. At the time, he had the rifle pointed upward and in an opposite direction to plaintiff. So far as I can see the explanation of the occurrence and the fact that the plaintiff was struck in the eye presents no inconsistency or contradiction which requires us to disregard any part of Dindinger's testimony. The explanation merely composes a part of the complete picture which we must consider to determine whether there was any negligence on the part of the clerk which proximately caused injury to the plaintiff.

Furthermore, I am unable to see wherein lies the negligence. The clerk exercised every reasonable precaution to determine that the gun was not loaded before testing it. In my opinion, to say that this evidence should be totally disregarded and that we should look only to the testimony tending to show that the rifle was fired and the physical evidence that the plaintiff was struck in the eye, takes this case completely out of the general rule in determining when a nonsuit is proper.

Even if we concede that, notwithstanding the care exercised by the clerk to determine that the rifle was not loaded, the mere fact that he pulled the trigger when the air in the rifle was compressed constituted negligence, it would seem to me that the testimony fails to disclose that the circumstances were such that the clerk could have reasonably foreseen that under the circumstances injury was likely to occur. Having exercised precaution in unloading the rifle he exercised the further precaution to point it upward before pulling the trigger. I do not comprehend that any man of ordinary prudence could, or would, have foreseen that injury was likely to occur therefrom to some customer in the store.

It is somewhat significant that, although the plaintiff testified she was taken to a doctor immediately, she did not tender as a witness the physician who examined and treated her for the alleged injury. She offered a physician who had treated her eyes theretofore, who testified

that she had a deficiency of vision. She likewise offered one who examined her sometime thereafter, who testified he found no evidence of traumatic injury, and that if she suffered an injury as testified to by her it was possible that it had some effect on her vision. Nevertheless, his testimony as to the condition of her left eye, which she alleges was injured, shows that it was in substantially the same condition as it was when it was treated by Dr. McCall.

After careful examination of the evidence, and the reasoning in the majority opinion, I am compelled to differ with the majority. In my opinion the judgment of nonsuit should be sustained.

DEVIN, J., concurs in dissent.

MARY B. GORHAM v. THE PACIFIC MUTUAL LIFE INSURANCE COMPANY OF CALIFORNIA.

(Filed 8 March, 1939.)

1. Appeal and Error § 22—

The record imports verity, and the Supreme Court is bound thereby.

2. Appeal and Error § 43—Petition to rehear for asserted misinterpretation of record is dismissed, it appearing that the record was correctly construed.

On the appeal in this action to recover on a policy of accident insurance it was held that the judgment as of nonsuit granted for forfeiture for failure to give notice and proof of death was error, and that the acquiescence of the parties in the ruling of the trial court that the evidence was sufficient to be submitted to the jury on the question of accidental death within the coverage of the policy precluded defendant insurer from maintaining on appeal that the judgment as of nonsuit should be affirmed on that ground, the appeal being governed by the theory of trial. Defendant filed this petition to rehear, asserting a misinterpretation of the record, and claiming that throughout the trial it had consistently urged a nonsuit on the dual grounds of noncoverage and forfeiture, and that the judgment as of nonsuit was entered on both grounds. *Held:* A careful review of the record, and the remarks of the court, printed by consent in defendant's brief, further strengthened by remarks in the oral argument upon appeal, discloses that the record was properly interpreted, and the petition to rehear is dismissed.

3. Appeal and Error § 20—

An application for *certiorari* will be denied when not made until after the appeal has been decided by the Supreme Court.

4. Same—

A motion for *certiorari* to bring up the entire remarks of the trial judge relative to the phase of the record applicant asserts was misinterpreted cannot be allowed when it appears that the parties agreed that applicant should print in its brief "all or any part" of the judge's remarks, the agreement being binding on the courts as well as on the parties.

5. Same—

Petition for *certiorari* is denied in this case because not made in apt time and because precluded by prior agreement of the parties in regard to the record, but the Supreme Court has nevertheless examined the entire remarks of the trial court, urged as disclosing a misinterpretation of the record in the decision of the Court, and has found nothing that would have changed the result, a full examination disclosing that the record is and was as it was intended to be.

BARNHILL, J., did not participate in the rehearing of this case.

DEVIN, J., dissenting.

PETITION to rehear this case reported in 214 N. C., 526, and application for *certiorari.*

L. L. Davenport and W. H. Yarborough for plaintiff, respondent.
Battle & Winslow for defendant, petitioner.

STACY, C. J. The burden of the petition to rehear is that the Court has misinterpreted the record, or, if not, the record should be corrected and clarified to make it speak the truth, and as thus amended, reconsidered. In its initial allegation the petition is not unlike the one filed in *Cook v. Mfg. Co.,* 183 N. C., 48, 110 S. E., 608. Beyond this the analogy ceases.

First. Exception is taken to the holding that the theory of the trial precluded any consideration on appeal of whether the case was one for the jury on the issue of accidental death or death through accidental means, and to the statement that in respect of this matter the defendant had executed a *volte face* between the trial and appellate courts. Defendant asserts that it has consistently and at all times urged a nonsuit on the dual grounds of suicide and failure to give immediate notice of insured's death, and that the judgment was entered on both grounds.

As to this, let the record speak. It imports verity and we are bound by it. *S. v. Dee,* 214 N. C., 509. At the close of plaintiff's evidence, the defendant interposed a motion for judgment as in case of nonsuit, which was overruled. The court and counsel then engaged in the following discussion:

"By the court: Now, our Supreme Court, in a case in 212 N. C., 640, recently has held that where a suit is brought upon an insurance policy which insures generally against all forms of death, except suicide, the

insurer has the burden of proof to satisfy the jury if it can, by the preponderance of the evidence, if it can, of the exception, that it is suicide. So far as I know, our Court has not passed upon the question of the burden of proof in an accident policy which insures only against accidental death. The court is of the opinion that in a case of this character the burden of proof is upon the plaintiff to satisfy the jury by the greater weight of the evidence, if it can, that the death was accidental. That is a condition precedent to liability. Now, in addition to that, the Court has used this language and particularly the Supreme Court of the United States—the fact of violent death, without more, creates a presumption, or if it does not create a presumption, it creates an inference of death by accident rather than by suicide, and if it does and that inference or that presumption is not rebutted by the plaintiff's evidence, it would appear it is a case for the jury. Now, if you gentlemen wish to debate the proposition of law that I have laid down, I would be very glad to hear you, and then you can also state the facts. I call on Mr. Winslow first. If you think that is the correct law then I will hear from you if there is sufficient evidence to rebut the presumption or inference.

"By Mr. Winslow: I think you are right on the law.

"By the Court: Do you gentlemen wish to debate the law?

"By Mr. Davenport: We think you have the law. We have two cases that elaborate on your Honor's statement of it. That is our contention.

"By the Court: I am not asking either side to abide by my statement of the law, but both of you are of the opinion now that the law stated by the court is correct.

"COUNSEL FOR BOTH THE PLAINTIFF AND THE DEFENDANT STATE THAT IT IS."

The foregoing is all that appears in the record on the subject. It was inserted by the trial court at the time of settling case on appeal when he allowed the defendant's 10th exception to plaintiff's "statement of case," and it should have appeared "immediately after the motion for nonsuit and before the overruling of the motion." The transcript discloses no subsequent reversal or modification of the announcement. Nor does it contain any suggestion that in the opinion of the court the permissible inference arising from the evidence of violent death was later rebutted by plaintiff's rebuttal testimony. The printing of the last sentence or paragraph in large type rather indicated a purpose to emphasize the fact therein stated as an important circumstance in the case, or at least that it was one which should not be overlooked.

We are told in defendant's brief, and the matter was called to our attention on the argument, that "the defendant wanted the judgment of

the trial judge included in the record but it was excluded by the judge upon settlement of the case on appeal on the ground that the plaintiff ought not to have to pay for printing it and upon the statement, assented to by plaintiff's counsel, Mr. Yarborough, that the defendant might print the same in its brief if it so desired."

That portion of the judge's remarks, thus incorporated in the defendant's brief by consent of plaintiff's counsel, appears in the dissenting opinion on pages 537 and 538 of the 214 Report. These remarks refer exclusively to the failure to give notice. Hence, taking these latter remarks of the judge in connection with his previous announcement that the permissible inference arising from the evidence of violent death, unless rebutted by plaintiff's evidence, would seem to require the aid of a jury on the issue of accidental death or death through accidental means, readily acquiesced in by counsel on both sides as a correct statement of the law, we think the interpretation heretofore placed upon the record is, not only the one naturally induced thereby, but also the one fully supported by the record as it appears. Indeed, it may be doubted whether the record admits of any other interpretation. The denial of the motion to nonsuit at the close of plaintiff's evidence necessarily involved the holding that plaintiff's evidence had not rebutted the permissible inference of accidental death or death through accidental means arising from the evidence of violent death. Then when it later appeared from the remarks of the judge as quoted in defendant's brief that in his opinion the plaintiff had "fatally failed to give notice . . . of loss," the interpretation seemed irresistible. Having concluded that plaintiff's failure to give immediate notice of the death of the insured was fatal, it was not necessary to decide the case on any other ground. One fatality was enough.

Nor is this all. It is recalled that defendant's counsel in concluding his argument before us on the issue of coverage, did so with the remark, "but that is not my strongest point," and then passed to a discussion of the question of forfeiture or failure to give notice. In reply, plaintiff's counsel called attention to the defendant's change of front on the issue of coverage, and in support thereof, directed our attention to that portion of the record above set out, reading it in full. We were left with the impression that the suggestion was not challenged. Such a shift is not an uncommon occurrence as many cases in the Reports will attest. For example, see *Lumber Co. v. Perry,* 213 N. C., 533, 196 S. E., 831; *Weil v. Herring,* 207 N. C., 6, 175 S. E., 836; *Potts v. Ins. Co.,* 206 N. C., 257, 174 S. E., 123; *Holland v. Dulin, ibid.,* 211, 173 S. E., 310; *Rand v. Gillette,* 199 N. C., 462, 154 S. E., 746; *Shipp v. Stage Lines,* 192 N. C., 475, 135 S. E., 339; *Walker v. Burt,* 182 N. C., 325, 109 S. E., 43, and cases there cited.

It will be observed that in the interpretation of the record, the Court was a unit, there being no disagreement as to the theory of the trial. See first paragraph of dissent on page 536. It is also noted that in the certificate of counsel, accompanying the petition to rehear, they say: "From the record as amplified and clarified by the letter from the trial judge, and the complete oral judgment of the trial court, now brought to the attention of the Supreme Court by the petition to rehear, it appears," etc. Certificates of error are usually based upon the record as it appears here. The language used in the majority opinion is not different from that appearing in other cases. We had in mind only the rights of the parties as revealed by the record. The opinion is susceptible of no other interpretation. There was no fictive or supposititious establishment of "the law of the case" on the issue of coverage.

Second. Simultaneously with the filing of the petition to rehear, the defendant gave notice of application for *certiorari* to bring up the entire remarks of the judge, if deemed necessary to make clear its position of consistency.

The following quotations from the pertinent decisions will suffice to dispose of this application:

1. "We have never entertained an application for the writ (of *certiorari*) after the argument has commenced, and surely not after the case has been submitted, taken into conference and decided by the Court, and certainly not except under extraordinary circumstances." *Walker, J.*, speaking for the Court in *Todd v. Mackie,* 160 N. C., 352, 76 S. E., 245.

2. "If the defendant had proper ground for a *certiorari,* he should have moved for it before the cause was reached for argument. *S. v. Rhodes,* 112 N. C., 857. He will not be allowed to obtain a delay of six months by his own laches in this regard." *Clark, J.,* speaking for the Court in *S. v. Harris,* 114 N. C., 831, 19 S. E., 154.

3. "The suggestion of counsel that, if against the appellant, we award him a writ of *certiorari* in order that a case may be properly prepared and sent up, cannot be entertained when the merits of the case are presented for adjudication. The application should be made before the trial, and if the appellant fails to make it and goes to trial he must abide the consequences." *Smith, C. J.,* speaking for the Court in *McDaniel v. Pollock,* 87 N. C., 503.

4. "It is too late for a *certiorari* after the case has been decided on appeal." Syllabus of *Wilson v. Lineberger,* 84 N. C., 836.

In its last analysis, however, the complete answer to the defendant's present move is, that the record is as it was intended to be (with the exception of a slight rearrangement, not material). By consent or agreement the defendant was permitted to print in its brief "all or any part" of the judge's remarks. It elected to print only a part. This

agreement is binding on the courts as well as on the parties. *S. v. Dee, supra.* Nothing has been overlooked. The suggestion or implication is that we examined the transcript a little too closely. The parties ought not to object to a careful perusal of the record. *S. v. Blackburn,* 80 N. C., 474. To go back and amplify it now and hear the case again would be to take "another bite at the cherry." *Dependents of Thompson v. Funeral Home,* 205 N. C., 801, 172 S. E., 500. In the meantime, other rights have intervened.

Moreover, it should be remembered there is no concession on the part of the plaintiff that the case has been decided "upon a sham issue," or "upon a supposed state of facts which does not exist," nor yet upon a misconception of the record. *Cook v. Mfg. Co., supra; S. v. Marsh,* 134 N. C., 184, 47 S. E., 6. These are allegations of the defendant, and plaintiff says they rest only in allegation. She further says that the interpretation heretofore placed upon the record "was and is absolutely correct"; that it accords with the theory of the trial, and that the transcript admits of no other interpretation.

The case is unlike *Miller v. Scott,* 185 N. C., 93, 116 S. E., 86, where, by agreement, the parties were permitted to correct an inadvertence and supply an omission in the record; nor is it similar to *Thompson v. Funeral Home,* 208 N. C., 178, 179 S. E., 801, where an unusual procedure was followed.

The application for *certiorari* will be denied.

Third. Notwithstanding the rules and decisions applicable to the situation, we have examined the judge's complete remarks, as attached to the petition to rehear, and may say that we find nothing in them which would have changed the result of our decision had they been before us in their entirety.

Fourth. The remainder of the petition consists of a critical analysis of the opinion and the authorities cited therein.

We adhere to our original position that on the record as presented. the case is one for the jury.

The costs will be taxed against the petitioner.

Certiorari denied. Petition dismissed.

BARNHILL, J., did not participate in the rehearing of this case.

DEVIN, J., dissenting: To the ruling of the Court in dismissing the petition to rehear, and reaffirming the former decision of the case reversing the nonsuit, I respectfully note my dissent. My reasons were fully set forth in dissenting opinion filed in the case and reported in 214 N. C., at page 535.

EVA HIGGINS GIBBS AND HUSBAND, H. C. GIBBS, v. R. L. (BOB) HIGGINS AND WIFE, WINNIE HIGGINS.

(Filed 8 March, 1939.)

1. Partition § 5—When sole seizin is pleaded in partition proceeding it becomes in effect an action in ejectment for trial on issue of title.

Where, in a special proceeding in the Superior Court for partition, C. S., 3213, 3215, tenancy in common is denied and there is a plea of sole seizin, *non tenent insimul*, the proceeding in legal effect is converted into an action in ejectment and should be transferred to the civil issue docket for trial at term on issue of title, the burden being upon petitioners to prove their title as in ejectment. C. S., 758.

2. Partition § 10: Judgments § 32—

Judgment in partition proceedings in which title has been put in issue is conclusive on the parties on the issue of title, and operates as a bar to a subsequent action between the parties as to matters which were adjudicated or which were within the scope of the issue and might have been litigated.

3. Same—Judgment in partition proceeding upholding validity of deed of party claiming sole seizin held to bar later action attacking the deed.

In a prior partition proceeding in which the present plaintiffs and defendants were parties, defendants pleaded sole seizin under a deed from the common source of title, and plaintiffs attacked the deed on the ground of mental incapacity of the grantor. Judgment was entered that defendants were the sole owners of the land. Thereafter plaintiffs instituted this action attacking the deed on the ground of undue influence. *Held:* Plaintiffs might have properly attacked the deed in the partition proceeding on the ground of undue influence upon supporting allegation, and the judgment in the partition proceeding bars plaintiffs from maintaining this action, it being incumbent on plaintiffs to have brought forward and asserted their whole case in the partition proceeding upon the issue of title.

4. Partition § 5—

Where a party in proceedings for partition sets up a deed from the common source of title under his plea of sole seizin, petitioners may introduce parol evidence attacking the deed for mental incapacity without supporting allegation, but parol evidence on the question of undue influence must be supported by proper allegation.

APPEAL by plaintiffs from *Pless, J.*, at October Term, 1938, of YANCEY.

Civil action to set aside and cancel deed from J. N. Higgins to R. L. (Bob) Higgins for alleged undue influence, and to declare heirs at law of J. N. Higgins owners of land in question.

Plaintiff Eva Higgins Gibbs and defendant R. L. (Bob) Higgins are children of J. N. Higgins, deceased, of Yancey County, and they with four others, and the children of two deceased children are the only heirs at law of said J. N. Higgins, who died on 10 October, 1936.

J. N. Higgins, being the owner of a tract of land on Jack's Creek in Yancey County, on 26 May, 1935, executed a deed therefor to the defendant R. L. (Bob) Higgins.

Plaintiffs allege that this deed was executed by reason of "wrongful, fraudulent and undue influence exerted by the defendant Bob (R. L.) Higgins on the mind of said J. N. Higgins" in certain respects under specified circumstances and surroundings.

Defendants deny material allegations of the plaintiffs and plead *sole seizin* and *res adjudicata*.

The facts upon which defendants rest their plea of *res adjudicata* are not in controversy. They are substantially these: In April, 1937, the plaintiffs herein together with George Higgins, son of J. N. Higgins, instituted in the Superior Court of Yancey County, before the clerk, a special proceeding for the partition of the lands in question. C. S., secs. 3213 and 3215. The defendants herein, together with all others of the heirs at law of J. N. Higgins, were made parties defendant and served with summons. In petition filed therein it is alleged, *inter alia*, that J. N. Higgins died intestate, seized of the lands in question; that J. N. Higgins left the petitioners and defendants as his only heirs at law; that they are tenants in common and in possession of said land; that Eva Higgins Gibbs owns one-eighth, Bob Higgins one-eighth, and others the remaining interests therein, in the proportions set forth; and that petitioners desire to hold their interests in severalty.

The defendants here, being defendants there, filed an answer in which, while not denying the allegation of the petition as to who are the only heirs at law of J. N. Higgins, they deny the other allegations and set up plea of *sole seizin* in themselves, *non tenent insimul*, under and by virtue of said deed from J. N. Higgins to the defendant R. L. (Bob) Higgins, dated 26 May, 1935. The other defendants did not answer. Plaintiffs filed no reply.

The proceeding was thereupon transferred to the civil issue docket of the said Superior Court for trial during term upon issues raised by the pleadings. C. S., 758. On trial at the June, 1937, term of said court, upon issue answered by the jury, judgment was entered declaring that the defendants "Robert L. Higgins and wife, Winnie Higgins," are the sole owners of the land in question. Petitioners appealed therefrom to the Supreme Court. A new trial was granted for that the court below, upon objection by defendants, excluded evidence offered for the

purpose of attacking the said deed from J. N. Higgins to R. L. (Bob) Higgins upon the ground that J. N. Higgins was "without mental capacity to make a valid conveyance at the time he signed the said purported deed." *Higgins v. Higgins,* 212 N. C., 219, 193 S. E., 159.

Upon retrial at the January Term, 1938, the court submitted to the jury these issues:

"1. Are the petitioners and respondents the only heirs at law of J. N. Higgins, deceased?

"2. Did the deceased, J. N. Higgins, make and deliver a deed conveying the lands described in the petition to R. L. Higgins and wife, as alleged in the Further Answer and Defense?

"3. Did the said J. N. Higgins at said time have sufficient mental capacity to execute the deed to R. L. Higgins and wife?

"4. If not, did R. L. Higgins and wife have knowledge of said mental capacity?"

The jury answered the first three issues in the affirmative, and judgment was rendered adjudging that the defendants "R. L. Higgins and wife, Winnie Higgins, are the sole owners" of the lands in question. Though petitioners gave notice of appeal, they failed to perfect same, and instituted the present action, which came on for hearing at the October Term, 1938, of said Superior Court of Yancey.

After finding facts substantially as above set forth, "the plaintiffs making no claim that the evidence upon which they now propose to proceed is newly discovered or that it was not available at the time of the former trial," the court below held as a matter of law that the cause is *res adjudicata,* and that the plea in bar ought to be and is sustained.

From judgment in accordance therewith, plaintiffs appeal to the Supreme Court, and assign error.

R. L. Whitmire and Watson, Fouts & Watson for plaintiffs, appellants.

Charles Hutchins and G. D. Bailey for defendants, appellees.

WINBORNE, J. When on trial in partition proceeding, defendants, having denied tenancy in common, plead *sole seizin, non tenent insimul,* by reason of deed to them from common source, and, the proceeding having been transferred to the civil issue docket for trial, plaintiffs fail before the jury in their attack upon that deed on the ground that the grantor did not have sufficient mental capacity, at the time, to execute it, and final judgment sustaining the plea of *sole seizin* is entered, is such judgment *res adjudicata,* and, when pleaded, a bar to prosecution of subsequent independent action to set aside and cancel the deed for undue influence exerted by the grantees?

The uniform decisions of this Court are consonant with an affirmative answer.

Tenancy in common in land is necessary basis for maintenance of special proceeding for partition by petition to the Superior Court. C. S., 3213, 3215. *Gregory v. Pinnix,* 158 N. C., 147, 73 S. E., 814. When tenancy in common is denied and there is a plea of *sole seizin, non tenent insimul,* the proceeding in legal effect is converted into an action in ejectment and should be transferred to the civil issue docket for trial at term on issue of title, the burden being upon the petitioners to prove their title as in ejectment. C. S., 758. *Huneycutt v. Brooks,* 116 N. C., 792, 21 S. E., 558; *Alexander v. Gibbon,* 118 N. C., 796, 24 S. E., 748; *Bullock v. Bullock,* 131 N. C., 29, 42 S. E., 458; *Sipe v. Herman,* 161 N. C., 108, 76 S. E., 556; *McKeel v. Holloman,* 163 N. C., 132, 79 S. E., 445; *Ditmore v. Rexford,* 165 N. C., 620, 81 S. E., 994; *Lester v. Harward,* 173 N. C., 83, 91 S. E., 698; *Moore v. Miller,* 179 N. C., 396, 102 S. E., 627; *Higgins v. Higgins, supra.*

The doctrine of estoppel, with its conclusive effect, applies to proceedings in partition which are no longer merely possessory actions but are proceedings in which the title can be litigated. *Armfield v. Moore,* 44 N. C., 157; *Carter v. White,* 134 N. C., 466, 46 S. E., 983; *McCollum v. Chisholm,* 146 N. C., 18, 59 S. E., 160; *Buchanan v. Harrington,* 152 N. C., 333, 67 S. E., 747; *McKimmon v. Caulk,* 170 N. C., 54, 86 S. E., 809; *Bank v. Leverette,* 187 N. C., 743, 123 S. E., 68; *Wallace v. Phillips,* 195 N. C., 665, 143 S. E., 244.

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, supra; Crawford v. Crawford,* 214 N. C., 614, 200 S. E., 421.

The general rule is that judgment of a court of competent jurisdiction is final and binding upon parties and privies. Ordinarily, to constitute a judgment an estoppel there must be an identity of parties as well as of the subject matter. In scope of operation with respect to the subject matter "it is not only final as to the matter actually determined, but as to every other matter which the parties might litigate in the cause, and which they might have had decided. . . . The court requires parties to bring forward the whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect to matters which might have been brought forward as part of the subject in controversy . . . The plea of *res adjudicata* applies, except in special cases, not only to the

points upon which the court was required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject in litigation and which the parties, exercising reasonable diligence, might have brought forward at the time and determined respecting it." Herman on Estoppel and Res Judicata, sec. 122, p. 130, and sec. 123, p. 131.

To like effect are decisions of this Court. *Tuttle v. Harrill,* 85 N. C., 456; *Wagon Co. v. Byrd,* 119 N. C., 460, 26 S. E., 144; *Buchanan v. Harrington, supra; In re Will of Lloyd,* 161 N. C., 557, 77 S. E., 955.

Applying these principles to the present action, there are here both identity of parties and identity of subject matter. The plaintiffs here were of petitioners, and the defendants here were of defendants in the former proceeding. Likewise, the title to the same land as affected by the same deed was in issue and involved in the former proceeding as in the case at bar. In the former, plaintiffs attack the deed for mental incapacity of the grantor, and in the present action, for undue influence exerted upon the grantor by the grantee. These grounds of attack are pertinent to the same subject and germane to the same issue.

When in answer filed in partition proceeding the defendants R. L. Higgins and wife pleaded *sole seizin,* and based that plea upon the deed from J. N. Higgins, the source under which plaintiffs claim title, plaintiffs were put upon notice that the title to the land was in issue and that the defendants relied upon that deed as the basis for their claim. The way was then open to plaintiffs to attack the deed upon any and all existing grounds, both legal and equitable. It was incumbent upon them to bring forward and assert their whole case with respect thereto. They relied upon their right, upon general issue of title, to offer evidence in attack upon the legality of the deed in question solely upon the ground of mental incapacity of J. N. Higgins to execute the deed. If the plaintiffs desired to attack the deed by reason of undue influence exerted upon J. N. Higgins by the defendants, the door was open to them to plead same and to offer evidence in support thereof. *Toler v. French,* 213 N. C., 360, 196 S. E., 312, and cases there cited. As to mental incapacity, parol evidence may be offered without appropriate allegation. *Alley v. Howell,* 141 N. C., 113, 53 S. E., 821; *Higgins v. Higgins, supra.* But as to undue influence, parol evidence will not be received unless there be appropriate allegations. *Alley v. Howell, supra; Toler v. French, supra.* Both could have been asserted and relied upon in the former action. But, having elected to attack the deed solely upon the ground of mental incapacity, plaintiffs have had their day in court, and are deemed to have waived the right to allege and assert undue influence. The jury found that J. N. Higgins had sufficient

mental capacity at the time to execute the deed. Final judgment declaring the defendants sole owners of the land in question has been entered. After judgment it is too late for plaintiffs to set up new and different ground upon which to attack the same deed. *Graves v. Barrett,* 126 N. C., 267, 35 S. E., 539.

The judgment below is

Affirmed.

BRANCH BANKING & TRUST COMPANY AND W. R. HAMPTON v. J. E. TONEY, JR., AND J. E. TONEY, SR.

(Filed 8 March, 1939.)

1. Vendor and Purchaser § 15—

The purchaser's father may not extend the time for performance on the part of the vendor in the absence of evidence that he was the purchaser's agent or had authority to extend the time.

2. Vendor and Purchaser § 21—

In the vendor's action to enforce the contract, its cashier is not a necessary party when it nowhere appears that he had any interest in the land, had any enforcible interest in the contract, or signed any paper comprising a part of the agreement.

3. Same—

In the vendor's action to enforce the contract, the purchaser's father is not a necessary party when it appears that he was not the purchaser's agent, had no enforcible interest in the contract, and was not served with process.

4. Vendor and Purchaser § 21—Purchaser held entitled to repudiate contract for vendor's delay and failure to furnish satisfactory title policy.

When it appears that the vendor agreed to give the purchaser an unconditional title insurance contract on the land, which policy should be satisfactory to and accepted by the purchaser, a delay of three months in furnishing the title policy, and its rejection by the purchaser as not being as stipulated in the agreement, justifies the purchaser's rejection of the policy and his repudiation and abandonment of the contract, when his action is not unreasonable or arbitrary.

5. Appeal and Error § 3a—

A party who is not a necessary party to the action and who has no enforcible interest in the contract sued on is not entitled to be heard on appeal.

APPEAL by W. R. Hampton from *Bone, J.,* at October Term, 1938, of WASHINGTON. Affirmed.

This is an action instituted under Article 25A. "Declaratory Judgments" 628 (a) *et seq.*

The complaint alleges, in part: "That prior to the 15th day of October, 1937, Branch Banking & Trust Company and W. R. Hampton, its co-plaintiff, entered into an agreement to sell and did sell to the defendants a tract of land in the town of Plymouth, Washington County, North Carolina, and deed of conveyance, by agreement between the plaintiffs and defendants, was executed to J. E. Toney, Jr., the same having been done for convenience of the parties and to enable the parties to consummate immediately the said sale; that copy of the deed executed to the defendant J. E. Toney, Jr., and as above referred to, is hereto attached and marked Exhibit 'A'."

The material allegations of the above complaint are denied. The deed, Exhibit "A," referred to, was dated 6 July, 1937, the name of W. R. Hampton does not appear as a grantor. The deed is made by the Branch Banking & Trust Company, a corporation, to J. E. Toney, Jr. The grantee Toney refused to accept this deed for the reason that the deed contained no general warranty of title. The following was in the deed: "And the said party of the first part, for itself, its successors and assigns, does hereby covenant to and with the said party of the second part, his heirs, executors, administrators and assigns, that it will forever warrant and defend the title to the said lands against all persons claiming by, through, or under the said party of the first part, its successors and assigns."

The Bank contracted and agreed, that in lieu of a warranty to be incorporated in the deed, that it would promptly procure, pay for and deliver to the grantee, along with the deed, a policy of title insurance, free and clear of any and all restrictions and reservations, guaranteeing to the grantee a fee simple title to the said property free and clear of any and all mortgages, liens or other encumbrances. Instead of complying with this agreement promptly, the matter was delayed and W. L. Whitley, attorney for J. E. Toney, Jr., wrote the following letter:

"PLYMOUTH, NORTH CAROLINA, Oct. 15, 1937.

Branch Banking & Trust Company,
Mr. H. E. Beam, Cashier,
City.

DEAR BEAM: I am herewith handing to you, to be held by you in escrow upon the conditions herein set forth, the following: Six notes executed by J. E. Toney, Jr., aggregating the total sum of $4,500.00; deed of trust securing the same, executed to H. D. Bateman, trustee, conveying the property that the Bank is to convey to him; check of J. E. Toney, Jr., No. 2240 for the sum of $500.00, being the cash payment upon this

property. These papers are to be held by you and not formally delivered until the following conditions have been fully complied with:

The Bank is to properly execute and deliver to Mr. Toney deed conveying the property in fee simple free and clear of all encumbrances, including all taxes to be paid up to and including taxes for the year 1937 on the property. There is also to be delivered to Mr. Toney, along with the deed, a policy of title insurance to be issued by the Lawyers Title Insurance Company of Richmond, insuring the title to the property to be conveyed to Mr. Toney without restrictions or reservations of any sort, this policy to be inspected by and satisfactory to Mr. Toney in all respects before the closing of the transaction. The papers herewith handed to you are to remain under the control of Mr. Toney and not to be used until the deed and policy, both satisfactory to him, are executed and delivered to him and all encumbrances on the property removed, and pending this the papers are not to be delivered or recorded as aforesaid. As you know, the Bank would not make a warranty of title of the property to Mr. Toney. Thereupon it was agreed that the title policy above referred to was to be procured and delivered for the purpose of fully and completely protecting Mr. Toney against any and all defects in the title. As you know, I have not investigated the title to the property, but this has been done by Mr. Z. V. Norman for the Title Insurance Company and the title policy will be issued upon Mr. Norman's certificate to the Company. I am to inspect and pass upon the deed and title policy before delivery of any of the papers and in the event that the same, for any reason, are not approved, then the papers herewith handed to you are to be returned to Mr. Toney and the whole transaction called off.

Yours very truly,

W. L. WHITLEY."

The defendants' answer, in part, is as follows: "This defendant avers that the instrument referred to in said section as an 'Interim Title Insurance Binder,' is not a title insurance policy of the kind and character that the said Bank contracted and agreed to procure and deliver to this defendant along with a good and sufficient deed for the said property, and this defendant avers that he declined to accept the same and complete the transaction as the same was not in accordance with the letter so written by his attorney, W. L. Whitley, on the 15th day of October, 1937. Further answering said section, this defendant avers that said 'Interim Title Insurance Binder' was not procured until the 15th day of January, 1938, long after the letter of the said W. L. Whitley was written on the 15th day of October, 1937. . . . That instead of proceeding promptly to secure the policy of title insurance, as it had agreed

to do, said Bank waited for an unreasonable and unnecessary length of time to proceed to procure the said policy, during which time the value of the said property dropped considerably and conditions had changed around the town of Plymouth, necessitating the departure of this defendant from the said town; that having patiently waited for what he deemed to be a reasonable length of time and said Bank never having procured the said policy, this defendant wired his said attorney from Troy, North Carolina, where this defendant was then living, on the 9th day of December, 1937, to call the transaction off and to demand the papers back, including the cash deposit of $500.00; that pursuant to this direction of this defendant, that the said attorney, W. L. Whitley, on the 9th day of December, 1937, gave notice to the said Bank, in writing, that the said transaction had been abandoned, and demanding a return of the deed of trust and notes and the cash deposit of $500.00, which said Bank refused to do, and still holds the said deed of trust, the notes referred to therein, and the cash deposit of $500.00, and this defendant avers that the said Bank should be compelled forthwith to surrender the same to him. That this defendant again avers that the said Bank has never complied with the said letter of the said W. L. Whitley, dated October 15, 1937, in that it has never procured the title policy free of all restrictions and reservations, and has never delivered the same, nor tendered the same, along with the deed for the property, all of which appears from the face of the complaint filed herein; that this defendant avers that the instrument, copy of which is attached to the complaint, and referred to as an 'Interim Title Insurance Binder' is not a compliance with the contract and agreement between the parties as set forth in the said letter of W. L. Whitley, dated October 15, 1937, all of which will appear from an inspection of the said instrument; that the defendant is informed and believes, and upon such information and belief avers, that the said instrument was not procured until the 15th day of January, 1938; that this defendant again avers that he has never written any letter extending the time for plaintiff to perform its agreement to the 15th of January, 1938, nor has he ever authorized J. E. Toney, Sr., nor anyone else to do so, and avers that he is not bound by any such letter."

The judgment of the court below is as follows: "This cause coming on to be heard and being heard at the above named term of court before his Honor, Walter J. Bone, Judge Presiding, and upon the completion of the reading of the pleadings, the defendant J. E. Toney, Jr., having moved for judgment upon the pleadings, and the court being of the opinion that the motion should be allowed: It is Therefore, Ordered, Adjudged and Decreed that the plaintiffs have not complied with the

terms and conditions and the agreement between the parties evidenced by the letter of October 15, 1937, referred to in the pleadings and that the plaintiff Bank be and is hereby required to return and refund to said J. E. Toney, Jr., the deed of trust and notes and the cash deposited of $500.00 referred to in the pleadings. Let the plaintiffs pay the cost. Walter J. Bone, Judge Presiding."

Carl L. Bailey for appellant W. R. Hampton.
W. L. Whitley for defendant, J. E. Toney, Jr.

CLARKSON, J. J. E. Toney, Sr., was not served with process and from the record was not a necessary party to the action nor a party to the contract in controversy. There was no evidence on the record that he was an agent of J. E. Toney, Jr., and had any authority to extend time to plaintiff Bank to fulfill its contract with J. E. Toney, Jr.

It nowhere appears in the record that W. R. Hampton has any enforcible interest in the matter. The title to the property is not in him and he has signed nothing. It nowhere appears in the record that J. E. Toney, Sr., has any enforcible interest in the matter. The only real parties are the Branch Banking & Trust Company and J. E. Toney, Jr. The Branch Banking & Trust Company did not appeal from the judgment rendered in the court below. The only exception and assignment of error is that made by W. R. Hampton to the judgment as signed.

The answer is not denied and no issues arose on the pleading to be submitted to a jury. The letter of 15 October, 1937, says, in part: "I am to inspect and pass upon the deed and title policy before delivery of any of the papers and in the event that the same for any reason are not approved, then the papers herewith handed to you are to be returned to Mr. Toney and the whole transaction called off." Under this agreement the papers were delivered and accepted by plaintiff Branch Banking & Trust Company under the terms and stipulations set forth in the letter. On 9 December, 1937, W. L. Whitley received from J. E. Toney, Jr., the following letter: "Advise Bank we will have to call off trade. They have had plenty time to receive insurance title. Have Bank send me check by return mail. Send me statement for your work." Whitley immediately notified the plaintiff Bank: "I understand therefrom that Mr. Toney wishes the check which he deposited with you back and wishes now to abandon the matter, the seller having failed to comply with the terms of the agreement."

The defendant J. E. Toney, Jr., had the right under the contract with the Bank to reject the "Interim Title Insurance Binder" which he did. We see no arbitrary or unreasonable conduct on the part of J. E. Toney,

Jr. He was patient and on his part used due care to perform his part of the contract and was met by delay for a long time by the Bank. The Bank has abandoned its appeal. We can find from the record no cause of action on the part of W. R. Hampton that entitles him to be heard.

We think the judgment must be

Affirmed.

JAMES WEST, BY HIS NEXT FRIEND, W. C. WEST, v. F. W. WOOLWORTH COMPANY AND ROBERT E. ANTHONY.

(Filed 8 March, 1939.)

1. Principal and Agent § 10—

A principal is liable for the wrongful acts of the agent, not only if the acts are expressly authorized, but also if the acts are within the agent's implied authority.

2. Same—Definition of "implied authority."

An act is within the agent's implied authority, even though contrary to the express directions of the principal, when the act is done in furtherance of the principal's business and in the discharge of the duties of the employment, the principal being liable if the agent, in performing such duties, adopts a method which constitutes a tort and inflicts injury on a third person.

3. Same: Corporations § 25—Instruction held for error in failing to fully define "scope of authority."

Plaintiff's evidence in this action for slander tended to show that the corporate defendant's assistant manager was in charge of the corporate defendant's store during the absence of the manager and that, at such time, he was charged with the duty of preventing theft of merchandise, that during the manager's absence the assistant manager spoke of and concerning plaintiff words amounting to a charge of larceny. The corporate defendant denied liability on the grounds that, if the assistant manager uttered the slanderous words, such act was contrary to his express instructions and was outside the scope of his authority. *Held:* In instructing the jury upon the corporate defendant's contention, it was error for the court to fail to further instruct the jury upon the law of the principal's liability for acts within the agent's implied authority and to apply it to the evidence in the case.

4. Trial § 29b—

It is the duty of the court to state and explain a material phase of the law applicable to the evidence without any special request for instruction.

APPEAL by plaintiff from *Johnston, J.*, at December Term, 1938, of BUNCOMBE. Reversed.

Civil action to recover damages, both compensatory and punitive, alleged to have been sustained by plaintiff as a result of slanderous accusations made by the individual defendant as the agent and employee of the corporate defendant.

The defendant Anthony was assistant manager of the corporate defendant. The infant plaintiff was a customer or prospective customer in defendant's store in Asheville. The assistant manager approached him and used language which the jury found, in view of the attendant circumstances, amounted to a charge of larceny. The individual defendant denied that he used the language alleged, or any other language which could reasonably be interpreted as a charge of larceny. The corporate defendant denied that the agent used any language in speaking to the plaintiff which amounted to a charge of larceny, and that if he did use such language he did not do so as its agent, for that he had been expressly instructed to never, under any circumstances, charge any person with theft.

In the trial in the general county court of Buncombe County appropriate issues were submitted to the jury as to the individual defendant and, as to him, the jury answered the issues in favor of the plaintiff. The third issue, and the answer thereto, was as follows: "3. If defendant, Robert E. Anthony, used said language as alleged in the complaint, was he at the time acting within the course and scope of his authority? Answer: 'No.'" Judgment was entered against the individual defendant, from which there was no appeal. It was further adjudged that the plaintiff recover nothing of the corporate defendant and that it go hence without day. From said judgment the plaintiff appealed to the Superior Court.

When the appeal came on for hearing in the Superior Court the judge below overruled each and every of plaintiff's assignments of error and signed judgment affirming the judgment of the general county court. The plaintiff excepted and appealed.

George M. Pritchard and M. A. James for plaintiff, appellant.
Parker, Bernard & Parker for defendant, appellee.

BARNHILL, J. A number of the plaintiff's exceptive assignments of error are directed to the failure of the trial court to properly explain the law in respect to the liability of an employer for the torts of an employee committed while about the master's business in the scope of his employment, and to apply the same to the evidence in the cause. The plaintiff complains that the court below failed to adequately differentiate between actual and implied authority and to explain to the jury that

under the law an employer is liable for the tort of his employee committed while acting in the scope of his authority while about his master's business, although the particular act is in violation of positive instructions not to perform his duties in the manner complained of.

The statements of law contained in the court's charge appear to be in accord with the decisions of this court. To determine whether a charge as given, or a failure to charge upon some particular phase of the case, constitutes harmful error, it is frequently necessary for us to examine the charge as a whole. Here, it appears that the defendant set up in its answer that if the individual defendant used language which amounted to a charge of larceny he violated the express instructions from said company that he should never under any circumstances charge any person with theft. It further appears that in the statement of the contentions of the corporate defendant the court charged the jury:

"Defendant on the other hand contends you ought not to so find. Defendant contends even if you find Anthony at the time was acting as manager of the store, was assistant manager in the employ of Woolworth & Co., as a matter of fact he had no authority to accuse anybody of stealing a knife, or any other property, from the store.

"Defendant contends that the manager and assistant manager and all other employees in the store were specially instructed in writing never under any circumstances to accuse anybody of stealing anything; that whenever they had any reason to believe some person in the store was, or had picked up some article of merchandise, they were to send some floor walker, or some person employed by the store to stay around close to that person, and offer to sell the things the person would be looking at until he had left the store; that the value of any small article picked up in the store was too slight for the defendant to risk a wrong accusation being made, and all the employees understood that, and the defendant, Anthony, had no authority, because he had been instructed otherwise, and he would not have done so even if he had seen the boy take the knife, so defendant contends you ought not to find he was acting within the scope of his employment or course of his authority, even if you should find he was guilty of accusing the boy of taking the knife."

In connection with this defense set up by the corporate defendant and under this charge as to the contentions of the defendant it was the duty of the jury to answer an issue which required it to determine whether Anthony at the time he used the alleged language was "acting within the course and scope of his *authority.*" In view of these circumstances it became important to the plaintiff's cause that the court correctly define the term "authority" and to explain that it embraced not only actual, but implied authority; and that when the agent or employee is

about his master's business, acting within the apparent scope of his authority, the principal is liable for his torts, even though his act is committed in violation of express instructions.

A principal is liable for the torts of his agent when the act is expressly authorized. He is likewise liable for the tort of the agent when it is committed within the scope of his employment and in furtherance of his master's business—when the act comes within his implied authority. It is elementary that the principal is liable for the acts of his agent, whether malicious or negligent, and the master for similar acts of his servant which result in injury to third persons, when the agent or servant is acting within the line of his duty and exercising the functions of his employment." *Roberts v. R. R.*, 143 N. C., 176, 55 S. E., 509; *Snow v. DeButts*, 212 N. C., 120, 193 S. E., 224. "In the furtherance of the business of the employer" means simply in the discharge of the duties of the employment. *Pierce v. R. R.*, 124 N. C., 83, 32 S. E., 399; *Gallop v. Clark*, 188 N. C., 186, 124 S. E., 145. By "authorized" is not meant authority expressly conferred; but that the act was such as was incident to the performance of the duties entrusted to him by the master, even though in opposition to his express and positive orders. An act is within the scope of the servant's employment where necessary to accomplish the purpose of his employment and intended for that purpose, although in excess of the powers actually conferred upon the servant by the master. That the act was committed while the servant was on duty performing the functions of his employment and it was committed for the purpose of furthering the business of the master, rather than its method of performance, is the test of employment. When a wrong is committed by an employee in performing or attempting to perform the duties and functions of his employment it is immaterial whether the injury was a result of negligence or willful and wanton conduct; nor is it necessary that the master should have known that the particular act was to be done. The master is liable even if the particular act committed under such circumstances was in violation of direct and positive instructions. *Jackson v. Telegraph Co.*, 139 N. C., 347, 51 S. E., 1015; *Pierce v. R. R., supra; Gallop v. Clark, supra.* The question of liability does not depend on the quality of the act, but rather upon the question whether it has been performed in the line of duty and within the scope of the authority conferred by the master. *Munick v. Durham*, 181 N. C., 188, 106 S. E., 665; *Clark v. Bland*, 181 N. C., 110, 106 S. E., 491; *Long v. Eagle Stores Co.*, 214 N. C., 146; *Gallop v. Clark, supra.*

While the actual authority of the employee is usually material in determining the scope of his employment it is not determinative of the

liability of the principal. Employers seldom, if ever, instruct or directly authorize their employees to wrongfully invade the personal or property rights of others. We may assume that torts committed by employees are committed contrary to the desire and purpose of the employer. When, however, the employee is undertaking to do that which he was employed to do and, in so doing, adopts a method which constitutes a tort and inflicts injury on another it is the fact that he was about his master's business which imposes liability. That he adopted a wrongful or unauthorized method, or a method expressly prohibited, does not excuse the employer from liability. Causes of action against an employer such as is here asserted usually arise out of the fact that the employee adopted a negligent, wrongful, or prohibited method of performing an authorized duty.

The evidence offered by the defendant, as well as that offered by the plaintiff, tends to show that Anthony was the assistant manager of the corporate defendant; that when the manager was absent he was in full charge; and that at the time of the matters complained of the manager was absent and Anthony was the acting manager of the store. Anthony testified "as assistant manager in the store, I wouldn't permit anyone to pick up and carry off property of the store without trying to stop them. One of my duties is to see that no one carries off the property of the store. Yes sir, when I first said this to him I admit it was in connection with the knife. . . . We had been missing some knives back there. You know if you have knives around on the counter you will miss them. . . . I walked over there from the other side of the store to the knife counter to see everything that took place." The manager testified: "He (Anthony) is assistant manager and what you call floor helper. He and I and other assistant managers have general charge and supervision of the store. The difference in me and Mr. Anthony is that he is assistant manager and I am general manager; in my absence he is in my shoes, he is in charge. He is manager in my absence. It is his duty to look after the company's property in the store. It is our duty to see that things are not taken out of the store."

If the defendant Anthony, in the discharge of his duty to look after the property of the corporate defendant and to prevent anyone from taking any articles away, approached the plaintiff at the knife counter for the purpose of preventing the plaintiff from taking a knife or other property without paying therefor and, in the course of the performance of this duty, used language which in law amounted to a charge of larceny the corporate defendant is liable for the resulting damages under the doctrine of *respondeat superior*. Was he about his master's business and acting within the scope of his employment in approaching and

speaking to plaintiff in defendant's store, and, if so, did he utter slanderous words of and concerning plaintiff in attempting to perform that duty, is the question to be determined. The evidence offered and the contentions made by the defendant paramounted this phase of the law as it applies to the evidence in this case. It was the duty of the court to state, explain and apply it to the evidence in the case without any special request. Its failure to do so was prejudicial error. *Harvell v. City of Wilmington,* 214 N. C., 608.

The cause is remanded to the Superior Court with direction that an order be entered transferring the same to the general county court for a new trial.

Reversed.

BOARD OF EDUCATION OF WILSON COUNTY v. TOWN OF WILSON.

(Filed 8 March, 1939.)

1. Schools § 27: Municipal Corporations § 43—County board of education held not entitled to recover from municipality funds allocated to it by State from intangible tax, even though municipality is in nowise liable for maintenance of constitutional school term.

The State, through its appropriate agency, allocated to defendant municipality upon the basis set out in the statute, a portion of the tax collected by the State on intangible personal property. Schedule H, Art. VIII, of ch. 127, Public Laws of 1937. There was no school district coterminous with the corporate limits of the municipality, and the municipality in its corporate capacity was charged with no responsibility for providing facilities and equipment for the maintenance of the constitutional school term within its limits, and had no bonded or other indebtedness outstanding for this purpose, the county having assumed all district school bonds, including the district in which the municipality was included. The county board of education instituted this action for the recovery of the funds, claiming that the act required their expenditure for school purposes. Art. V, sec. 6; Art. IX, secs. 2 and 3. *Held:* The county board of education is not entitled to recover the funds, since it could not expend the funds as agent of the municipality in discharging the debts of the municipality for school purposes since the municipality had no such debt, nor could it expend such funds for school purposes in any of its districts since there was no district coterminous with the municipal limits and such expenditure would take taxes collected from citizens of the municipality and expend same in part for the benefit of those living outside its limits, and since the act does not provide for distribution of the funds to the county board of education in such cases and such provision may not be interpolated therein, and since by a proper construction of the act the provision for expenditure for school purposes may relate to counties rather than to cities and towns. The right of the State to recover such funds, Art. V, sec. 7, is not presented, the State not being a party.

2. Statutes § 5a—

The courts may not interpolate provisions which are wanting in a statute and thereupon adjudicate the rights of parties thereunder.

3. Trusts § 8g—The doctrine of cy pres does not prevail in North Carolina.

While ordinarily equity will not permit a trust to fail for want of a trustee, and in a proper case may appoint the trustee, this principal does not extend to the expenditure of the trust funds for another purpose or for the benefit of those outside the territorial limits designated in the trust, or where the purpose of the trust has failed, the doctrine of *cy pres* not prevailing in this jurisdiction.

APPEAL by plaintiff from *Bone, J.*, at Chambers, 7 January, 1939, of WILSON. Affirmed.

Connor & Connor for plaintiff.
Finch, Rand & Finch and W. A. Lucas for defendant.

DEVIN, J. The Board of Education of Wilson County instituted its action to recover the sum of $1,701.30 which had been allocated and paid to the Town of Wilson under the Intangible Personal Property Schedule of the Revenue Act of 1937.

Under the provisions of Schedule H, Art. VIII, of ch. 127, Public Laws 1937, the State levied and collected a tax on certain forms of intangible personal property, to-wit: bank deposits, money on hand, accounts receivable, certain deposits with insurance companies, evidences of debt, and shares of stock (secs. 700 to 716 inclusive). The act provided that fifty per centum of the total amount so collected should be returned to the counties and cities of the State, the distribution to be, as to some taxes, upon the basis of amounts collected in each county, and as to other taxes upon the basis of population. The act further provided that the amounts allocated to each county should in turn be divided between the county and all municipalities therein in proportion to the total amount of ad valorem taxes levied in each on tangible personal property during the preceding fiscal year. Pursuant to this statute, the State of North Carolina, through its proper agency, allocated the fund created by collections from the taxpayers of Wilson County and the Town of Wilson, and made distribution thereof to the County and to the Town upon the basis set out in the statute. From this source there was transmitted to and received by the Town of Wilson the sum of $1,701.30, which was duly covered into its treasury.

The plaintiff Board of Education of Wilson County now brings this action to require the defendant Town of Wilson to turn over this sum to the plaintiff so that it may be used for school purposes in accordance

with the provisions of the act. The defendant maintains its right to retain the fund and to use it as other public funds for general corporate purposes.

It was admitted that there was no school district whose boundaries were coterminous with the corporate limits of the Town of Wilson, that there was no indebtedness for school purposes for which the Town was liable, that the Town levied no taxes for public schools, and was under no duty to maintain a six months' school term. It was not denied that the County of Wilson had assumed all district school bonds of the County, including those of the district in which the Town of Wilson was included.

There was no controversy as to the material facts which were set out in the pleadings. The court below, being of opinion that the plaintiff was not entitled to recover the fund sued for, dismissed the action, and the plaintiff appealed to this Court.

The determination of the question presented by this appeal involves an interpretation of certain provisions of the Revenue Act relating to the tax upon intangible personal property. At the beginning of Art. VIII of the act, wherein this class of property is segregated for State taxation, it is stated that "Taxes levied in this Article (are) for the maintenance of the public schools of the State under authority of sec. 6, Art. V of the Constitution." By this declaration the General Assembly apparently endeavored to avoid the suggestion of exceeding the general limitation placed by the quoted section upon its taxing power upon property, and to levy the tax as one within the proviso which excepts from the limitation taxes for the maintenance of the public schools of the State for the constitutional period. Also, at the end of that portion of the act dealing with the method of distribution of the fund derived from this taxation between the counties and municipalities, these words are found: "The amounts distributed to the counties and cities of the State shall be used for the payment of principal or interest on indebtedness or expenses incurred on account of providing facilities and equipment necessary for the maintenance of the constitutional six months' public school term."

It is admitted that the Town of Wilson had no bonded or other indebtedness for expenses incurred "on account of providing facilities and equipment" for the maintenance of public schools, and that the Town in its corporate capacity, is charged with no responsibility with respect to providing facilities for them.

The Constitution of North Carolina recognizes that the maintenance of public schools is primarily a duty resting upon the State. It declares that "the General Assembly . . . shall provide by taxation

and otherwise for a general and uniform system of public schools" (Art. IX, sec. 2), and it is required of the counties as administrative subdivisions of the State that "each county of the State shall be divided into a convenient number of districts in which one or more public schools shall be maintained at least six months in every year, and if the commissioners of any county shall fail to comply with the aforesaid requirement of this section, they shall be liable to indictment" (Art. IX, sec. 3). *Moore v. Board of Education,* 212 N. C., 499, 193 S. E., 732.

It would seem, therefore, that the more reasonable interpretation of the act is that the clause referring to the use of the fund for the maintenance of the constitutional six months' public school term, relates to the counties upon whom alone a duty in this respect is imposed, rather than to the cities and towns charged with no such obligation.

Can the Board of Education of Wilson County now maintain an action to recover from the Town of Wilson the amount which has been allocated according to the method prescribed by the act and paid to the Town as its proper share of the fund derived from taxation upon the property of its citizens? If so, how would the fund be expended? Since there is no school district coterminous with the Town of Wilson, nor school indebtedness obligatory upon the Town, the fund would necessarily have to be expended for the benefit of school districts or portions thereof outside of the Town of Wilson—thus using funds created by taxation upon the property of residents of the Town for the benefit of the County, in exoneration in part of indebtedness due by the County and by other municipalities of the County.

While ordinarily a court of equity will not permit a trust to fail for want of a trustee, and in a proper case may appoint the trustee, the analogy will not be extended to include the right of another agency, as trustee, to use the trust fund for purposes beyond the designated limits and for purposes other than those specified, or where the purpose of the trust has failed. The *cy pres* doctrine does not prevail in North Carolina. If there were outstanding indebtedness which had been incurred by the Town of Wilson for the school purposes mentioned in the statute, it might be said that the Board of Education of Wilson County could properly administer the fund as an agency of the Town, and hence might be given control of the fund for that purpose. But that is not the case here.

It will also be noted that the act purports to limit the use of the fund allocated to the counties and towns to payments on indebtedness for school facilities and equipment, and does not authorize its appropriation to any other school purpose. It involves no details of administration.

It is urged that as the fund now in the hands of the Town was created for certain definite school purposes and the County Board of Education

is the only agency clothed with power to effectuate those purposes, the latter should be permitted to recover the fund in order to do so.

But we cannot concur in that view. Where the fund has been duly allocated and paid to the Town of Wilson in accordance with the explicit requirements of the statute, there is no provision in the act permitting another corporate entity to remove it therefrom. The County Board of Education is not referred to or recognized as a party to the distribution of the fund under the statute. Only counties and municipalities are made recipients. Whatever may have been the legislative intent relative to this situation, it was not expressed, and we may not interpolate provisions which are wanting in the statute and thereupon adjudicate the rights of parties thereunder.

Whether the State, having allocated the proper amount due to the Town of Wilson under the act, and having paid the same to the Town to be used as prescribed by the act, upon ascertaining that there was no indebtedness incurred by the Town for school facilities, could have recovered the amount so paid, as having been applied by the State to purposes other than those prescribed by the act (Constitution, Art. V, sec. 7), is a question not presented on this record, as the State is not a party and is asking no relief. The only party plaintiff before us on the record is the Board of Education of Wilson County.

We have examined the case of *Jones v. Commissioners*, 143 N. C., 59, 55 S. E., 427, cited by appellant, but do not regard the decision in that case as controlling on the facts presented by the record before us.

We conclude that the court below has correctly ruled upon the admission in the pleadings that the plaintiff is not entitled to the relief sought. The judgment of the Superior Court is

Affirmed.

STATE v. STEVE NORGGINS.

(Filed 8 March, 1939.)

1. Criminal Law § 52b—

In order to overrule a motion to nonsuit, the State must prove that the act charged was committed and that the person or persons charged committed the act, proof of the *corpus delicti* being just as essential as proof of the identity of the defendant.

2. Larceny § 13—Evidence held insufficient to show that crime of larceny was committed, and nonsuit should have been granted.

The evidence, viewed in the light most favorable to the State, tended to show that defendant's possession of the property in question was wrongful, but there was no evidence that the warehouse in which the

property was stored had been broken into, or that defendant, who was a truck driver for the company owning the property, had access to the key to the warehouse except when with other employees, and no evidence that any property had been taken from the warehouse except for delivery to purchasers. *Held:* The evidence is insufficient to show that the crime of larceny had been committed, and defendant's motion to nonsuit should have been allowed.

3. Larceny § 5—

There is no presumption that a person in the wrongful possession of property acquired such possession by the commission of the crime of larceny.

APPEAL by defendant from *Parker, J.*, at September Term, 1938, of WARREN. Reversed.

Criminal action in which the defendant was tried under bill of indictment which charged him with the larceny of ten cases of motor oil and four kegs of nails, the property of Alston Grocery Company.

The count in the bill charging that the defendant did receive the said property, knowing that the same had been stolen, was dismissed as of nonsuit. Upon the trial of the issue of larceny there was a verdict of guilty. From judgment pronounced thereon the defendant appealed.

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

Gholson & Gholson for defendant, appellant.

BARNHILL, J. The trial of this cause involved very largely questions of fact. The only material question of law presented to us for decision is as to whether there was sufficient evidence that the crime of larceny had been committed to justify the submission of the cause to a jury.

Evidence offered, considered in the light most favorable to the State, tends to show that the Alston Grocery Company of Warrenton is engaged in selling merchandise, including Sterling motor oil and nails, by wholesale; that the warehouse in which the oils and nails are stored and the garage in which the seven trucks used by the corporation in the delivery of merchandise are kept are under the same roof, but that a person having access to the garage does not have access to the warehouse; that the defendant was the driver of one of the seven trucks used in the delivery of merchandise; that one of the keys to the warehouse was kept at the office and the other one was kept by an employee, Pitt; that the defendant did not have access to a key or to the warehouse except when in company with another employee; that an officer of Halifax County searched the home of one Pat Baltrip of Halifax County and there found the merchandise described in the bill of indictment; and that the

defendant shortly prior thereto, some time after sundown and before midnight, carried the merchandise to the Baltrip home and requested that he be permitted to leave it in the house out of the rain.

Prior to the discovery of the merchandise none had been missed from the warehouse and, after its discovery, no check was made of the merchandise to determine whether any had been wrongfully removed. One witness made an inspection of the windows of the warehouse and found several windows unlocked and a pane of glass broken out of one of the windows which opened into the garage. The employee who had a key to the warehouse testified that the defendant had no access to the warehouse except in his presence; that the doors were kept locked; that he examined the latches on all of the windows after the goods were brought back and they were all fastened; that he examined them as soon as he heard that some goods were supposed to be missing; that the defendant did not have access to the key in the office; that he found no evidence of any fresh breaking of glass or any entrance large enough for a man to have gone in and out with cases of oil; that the windows were nailed down from the inside; that they were just as he had been seeing them for sixteen months; that he kept the windows nailed down; that sometimes they were opened to get shingles out, but that when they got through he again nailed the windows down; that he did not fasten the latches or locks and did not know whether they worked or not; that he used nails to fasten the window; that he could not look at the stock and tell that a single solitary case of oil or keg of nails had been missing; that he could not say that any merchandise had been removed from the warehouse which had not been bought and paid for by someone.

The witness, Gid Alston, identified the goods found in the Baltrip house as merchandise of the Alston Grocery Company. In the course of his testimony he referred to the merchandise as "these stolen goods." He further testified, however, that he had not checked the stock in the warehouse since the inventory was taken and that he could not swear how many cases of motor oil or kegs of nails were in the warehouse on any day in July, and that it was impossible for him to say the goods were stolen or were not paid for; that he could not testify that they had not been bought and paid for, or that they were stolen or unlawfully or wrongfully removed from the warehouse.

It is fundamental law that the proof of a charge in criminal cases involves the proof of two distinct propositions: (1) That the act itself was done, and (2) that it was done by the person or persons charged. The proof of the *corpus delicti* is just as essential as is the proof of the identity of the person committing the offense, and proof thereof is a prerequisite to a conviction. Bearing this principle of law in mind, we

are of the opinion that there is insufficient evidence of the commission of the crime of larceny to justify the submission of this cause to a jury. No one has testified that any of the merchandise of the Alston Grocery Company was stolen or wrongfully removed from its warehouse. Nor has any person testified to any facts and circumstances which would reasonably justify that conclusion. It is true that one witness referred to the merchandise as "these stolen goods." It is apparent from his subsequent explanation that he was using the term in describing the merchandise in controversy. In any event he was not stating as a fact that they were stolen, and his use of that term, under the circumstances, amounted to nothing more than a conclusion unsupported by facts.

There are facts and circumstances which would lead a reasonable mind to the conclusion that the defendant's possession of the merchandise in controversy was a wrongful possession, but this does not justify the conclusion that the merchandise was stolen. He was one of the drivers of the trucks used in the delivery of merchandise. It does not appear, either directly or inferentially, that this was not merchandise which he had received for delivery but which he had stored away elsewhere instead.

The rule that where a person is in the recent possession of stolen property, which possession is not satisfactorily explained, it is presumed that the person in possession is the person who committed the larceny, presupposes proof that the property was stolen. There is no converse rule under which it is presumed that a person who is in the wrongful possession of property acquired such possession by the commission of the crime of larceny.

The evidence offered, considered in the light most favorable to the State, fails to disclose that the crime charged in the bill of indictment has been committed. For that reason there was error in the refusal of the defendant's motion to dismiss as of nonsuit.

The judgment below is

Reversed.

REIDSVILLE GROCERY COMPANY, INCORPORATED, v. SOUTHERN RAILWAY COMPANY.

(Filed 8 March, 1939.)

1. Contracts § 8—

When a contract is not ambiguous, the meaning of its terms must be ascertained from the writing itself, and inferences from extraneous facts may not be considered in aid of its interpretation.

2. Same—

A contract must be considered contextually as a whole without technical distinction or arbitrary preference between any of its clauses because of their historical significance or the order in which they come in the instrument.

3. Railroads § 2—Conveyance held to grant right of way, unrestricted as to its use, with right to relocate same to service grantor's land.

The conveyance in question, by proper interpretation of its terms, *is held* to grant a right of way for a spur track over the lands of the grantor, unrestricted as to its use, with further provision that the railroad company might relocate and extend the track on the lands of the grantor when found necessary to facilitate service to the grantor's enterprises or other industries located on the lands owned by the grantor, and the grantor's contention that the right of way granted was limited to the use thereof for servicing enterprises and industries located on his land, and that the railroad company's use of the spur track across grantor's lands to service industries not located on the lands constituted an additional burden and a trespass on the lands, is untenable.

4. Injunctions § 6a—Application for injunctive relief against alleged trespass held properly denied under the facts of this case.

Where defendant's use of the right of way granted by plaintiff is within the provisions of the contract of conveyance granting the easement, and there is no allegation that the easement was negligently used nor that in its use defendant maliciously damaged plaintiff's property, plaintiff's application for injunctive relief is properly denied.

DEVIN, J., dissenting.

CLARKSON and SCHENCK. JJ., concur in dissent.

APPEAL by plaintiff from *Clement, J.,* at November Term, 1938, of ROCKINGHAM. Affirmed.

The plaintiff brought this action to restrain the defendant from acts of trespass on certain premises belonging to plaintiff in the city of Reidsville, and to recover damages for the trespass.

Plaintiff complains in substance that the defendant, in pursuance of a written agreement, built a "spur track" on plaintiff's lot, for the purpose of serving plaintiff's business, with the permission to shift or extend the tracks upon said lands only for the purpose of serving other industries thereupon; that defendant recently extended this track into adjacent property belonging to the Standard Oil Company, which was never a part of the described lands, and has been serving the Oil Company through and over the above mentioned track across plaintiff's lot. A part of the Oil Company's distribution plant is located on a portion of the property contained in the original description, which had been sold to the Oil Company by plaintiff.

Plaintiff complains that the use of the track across its lot for the purposes mentioned is not authorized by the contract, is an attempted

taking of its property without compensation, and has put an additional servitude on the land never intended by the parties to the agreement. It is alleged that the defendant, in serving the Oil Company, has constantly used engines and cars of a heavier type than that necessary to serve plaintiff, with much heavier and more frequent traffic; that on account of the nearness of plaintiff's warehouse and offices to defendant's track the ordinary business of plaintiff is frequently interrupted; that the heavy traffic and jar of the earth near the walls of plaintiff's building causes a vibration which greatly injures the structure; that arising out of plaintiff's alleged trespass there have been other injuries to plaintiff's building; and that defendant threatens to continue the extension of its tracks into the adjacent property of the Oil Company and serve the latter by operating trains over plaintiff's property on the right-of-way described in the conveyance. The prayer is for an order restraining defendant from further acts of the nature described, constituting the alleged trespass.

The map accompanying the pleadings and taken in connection therewith shows that the defendant has constructed its tracks entirely across the premises of the plaintiff to the property line, and further immediate extension in that direction would be across the property owned by the Oil Company which had never been a part of the original tract described in the conveyance.

The defendant admits its use of the tracks described for service of the Oil Company and its intention to continue such service and to extend its tracks further into the Oil Company's property, if necessary, to facilitate such use of its tracks already built.

The defendant demurred to plaintiff's cause of action, and from the order sustaining the demurrer, the plaintiff appealed.

D. F. Mayberry for plaintiff, appellant.
J. C. Brown and W. T. Joyner for defendant, appellee.

SEAWELL, J. Where the terms of an instrument are unambiguous its meaning must be gotten from the writing itself. *Town of Jacksonville v. Bryan,* 196 N. C., 721, 147 S. E., 12; *McCain v. Ins. Co.,* 190 N. C., 549, 551, 130 S. E., 186. The right-of-way conveyance involved in this controversy does not seem to have that ambiguity that would justify us in entertaining inferences drawn from extraneous facts in aid of its interpretation.

While the conveyance must be considered as a whole, all of its clauses contextually, without technical distinction or arbitrary preference of any of them because of the order in which they come in the instrument,

or their historical significance (*Triplett v. Williams*, 149 N. C., 394, 63 S. E., 79, 16 Am. Jur., p. 533-535), still, so considered, we cannot find that the grant of right-of-way across plaintiff's land is so modified by the further provisions of the instrument as to restrict its use to the service of plaintiff's enterprises or of industries located on the land described. Plaintiff's contention to that effect is based on the italicized portion of the following excerpt from the conveyance, which is here given with its context:

"Reidsville Grocery Company . . . in consideration of one dollar . . . paid by the Railway Company . . . does convey unto the Railway Company a right-of-way 15 feet in width . . . over and upon the land . . . for an industrial spur track . . . which will spring from the passing track of the Railway Company . . . at a point on said passing track 562 feet north of mile post 263 and will extend thence, in a southeasterly direction, for a distance of 353 feet, more or less, of which 196 feet will be upon the right-of-way of the Railway Company for its said main track; 71 feet, more or less, upon and along East Market Street, and 86 feet, more or less, upon the said land of the party of the first part, *together with such additional right-of-way over and upon the said land . . . as may be necessary . . . for the purpose of shifting and relocating said industrial spur track or constructing, maintaining and operating branches or extensions thereof to serve with shipping facilities industries located upon said lands. . . .*"

We can interpret this only as a conveyance of the right-of-way, unrestricted as to its use, across the lands described, with the additional privilege of shifting the location of the tracks or extension of the line on said land when found necessary to facilitate service to plaintiff's enterprises or other industries located thereon. If there was any understanding to the contrary when the contract was made, it did not find adequate expression in the written instrument; and, as stated in *McCain v. Ins. Co., supra.* "The contract is what the parties agreed and not what either party thought." Whatever restriction there is as to the use of the tracks on plaintiff's premises is confined to the relocation of defendant's tracks, or extension thereof, as a further encroachment on the premises.

It follows that the acts of which plaintiff complains are not trespasses and cannot be legally restrained.

Since the damage to plaintiff's property which is alleged to have occurred is made to depend entirely on the theory of trespass, growing out of a supposed want of authority in the conveyance to use the right-of-way for the purposes indicated, and no allegation is made of any

negligent use of the right-of-way or operation of trains, or of malicious or wanton destruction of the plaintiff's property, or any actionable cause other than the described trespass, such damage, as far as this action is concerned, must be regarded as *damnum absque injuria*.

The judgment is

Affirmed.

DEVIN, J., dissenting: I find myself unable to agree with the conclusion reached in this case. In my opinion the motion for judgment of nonsuit should have been denied.

"Upon a motion as of nonsuit, all the evidence which makes for the plaintiff's claim and tends to support his cause of action is to be considered in its most favorable light for plaintiff, and he is entitled to every reasonable intendment thereon and every reasonable inference therefrom." *Owens v. Lumber Co.*, 210 N. C., 504, 187 S. E., 804.

Applying this principle to the evidence here, I think the case should have been submitted to the jury. The contract between the parties conveyed to defendant a right of way over plaintiff's land for a spur track to plaintiff's place of business, together with right to construct and operate extensions of said track "to serve with shipping facilities industries located on said (plaintiff's) land." There was evidence tending to show that defendant has imposed an additional servitude upon plaintiff's land by the increased and frequent use of locomotives and cars upon said spur track alongside plaintiff's wholesale grocery establishment, to plaintiff's substantial injury, in order to supply shipping facilities to industries located upon other lands than those of the plaintiff.

CLARKSON and SCHENCK, JJ., concur in this opinion.

HATTIE LASSITER v. CAROLINA TELEPHONE & TELEGRAPH COMPANY.

(Filed 8 March, 1939.)

1. Master and Servant § 40f—Injury sustained while employee is being gratuitously transported to work is not in course of employment.

Evidence tending to show that an employee was fatally injured while being transported from his home to the place of his work, and that such transportation was gratuitous and not furnished as a matter of right under the contract of employment, sustains the finding of the Industrial Commission that the injury did not arise in the course of the employment.

2. Master and Servant § 55d—

The findings of fact by the Industrial Commission are conclusive and not subject to review on appeal, either in the Superior Court or Supreme Court, if they are supported by competent evidence, even though the Court might have reached a different conclusion if it had been the fact-finding body.

APPEAL by plaintiff from *Bone, J.,* at November Term, 1938, of EDGECOMBE. Affirmed.

This is an action brought by plaintiff, Hattie Lassiter (widow), against defendant for the death of her husband, Alexander Lassiter, under the N. C. Workmen's Compensation Act.

The Hearing Commissioner "finds as a fact that from the time the truck in which the deceased was riding left the point of operations in Eastern North Carolina, until they arrived at the home of the deceased in Rocky Mount and from the time the deceased left his home at Rocky Mount until he got back to the scene of the operations, if he reached that place before the time of the accident, he was not performing any duty or labor for the employer, and that the transportation from the scene of the operations to Rocky Mount and from Rocky Mount back to the scene of the operations of the deceased, was pure accomodation for the deceased. AWARD: Wherefore the Commissioner finds as a fact that the deceased's injuries resulting in his death did not arise out of and in the course of his employment. It is directed that an award shall issue denying compensation and directing that claimant's claim be dismissed. Each party will pay its own costs."

Upon appeal, the judgment of the Hearing Commissioner was approved, as follows: "The Full Commission is of the opinion that the plaintiff's deceased's right to transportation was merely a gratuitous one, a mere accomodation. *Hunt v. State,* 201 N. C., 707. The Full Commission affirms the findings of fact, the conclusions of law, and the award of the hearing Commissioner. The claim is dismissed. Each side will pay its own costs."

Upon appeal from the full Commission to the Superior Court, the following judgment was rendered: "Upon the hearing and after argument of counsel for both parties, the court is of the opinion that the findings of fact, as stated by the Industrial Commission, are supported by competent evidence, and that the conclusions of law therefrom, as found by the Industrial Commission, are in all respects correct. Therefore, it is adjudged, ordered and decreed that the award of the Industrial Commission be and the same hereby in all respects is approved and confirmed, that this action be dismissed and that plaintiff be taxed with the costs incurred in this court. Walter J. Bone, Judge."

From the above judgment the plaintiff excepted, assigned error and appealed to the Supreme Court.

O. B. Moss, Harold D. Cooley, and Dan B. Bryan for plaintiff.
Gilliam & Bond for defendant.

CLARKSON, J. The question involved: Is the finding of the Industrial Commission to the effect that the fatal injuries received by the employee, the husband of plaintiff, did not "arise out of and in the course of his employment" supported by competent evidence? We think so.

In *Hunt v. State,* 201 N. C., 707 (710-11), it is written: "So, 'while there is a difference between the beginning of employment and the beginning of work, or going to work on the employer's time, an accident to a workman on his way to work is not ordinarily in the course of employment.' I Honnold on Workmen's Compensation, sec. 107. True, the moment when he begins his work is not necessarily the moment when he gets into the employment, because a reasonable margin must be allowed him to get to the place of work if he is on the premises of the employer or on some access to the premises which the employer has provided. *Davidson v. M'Robb, supra* (Appeal Cases, 1918, 304). 'The workman is not regarded to be outside the scope of his employment unless actually at work or in the receipt of wages, nor is he regarded as within it because what he is doing is something which has relation only to his work. The test finally adopted lies between the two. The place at which the injury is sustained becomes the determining factor among those things which he does solely because he is engaged in a particular employment; only those are regarded as in the course of the employment which are done within the master's premises or upon some means of conveyance to or from his place of work which is provided by the master for the sole use of his servants and which the servant is required or entitled to use by virtue of his contract of employment.' 25 Harvard Law Review, 403. This is also Honnold's conclusion. He says: 'The rule has been established in accordance with sound reason that the employer's liability in such cases depends upon whether the conveyance has been provided by him, after the real beginning of the employment, in compliance with one of the implied or express terms of the contract of employment, for the mere use of the employees, and is one which the employees are required, or as a matter of right are permitted, to use by virtue of that contract. Pursuant to this rule, the employee is in the course of employment if he has a right to the transportation, but not if it is gratuitous, or a mere accomodation. A workman injured while riding to or from his work in the conveyance of a third person is not ordinarily entitled to compensation.' Honnold, sec. 110. This is the

principle underlying the decision in *Dependents of Phifer v. Dairy,* 200 N. C., 65, to the effect that if an employer furnishes transportation for his employee as an incident of the employment, or as a part of the contract, an injury is compensable if suffered by the employee while going to or returning from the place of work in the vehicle furnished by the employer and under his control." *Hildebrand v. Furniture Co.,* 212 N. C., 100; *Davis v. Mecklenburg County,* 214 N. C., 469.

It is established in this jurisdiction that the findings of fact made by the Industrial Commission, if supported by competent evidence, are conclusive on appeal and not subject to review by the Superior Court or this Court, although this Court may have reached a different conclusion if it had been the fact finding body.

From the findings of fact by the Industrial Commission on competent evidence, the judgment of the court below must be

Affirmed.

JOE WEISS v. PACIFIC MUTUAL LIFE INSURANCE COMPANY.

(Filed 8 March, 1939.)

1. Insurance § 13—

The rule that any ambiguity in an insurance contract should be resolved in favor of insured does not justify the creation of ambiguity by strained construction of ordinary words, when no ambiguity would otherwise exist.

2. Insurance § 29—

Since insurer may exempt all provisions relating to disability benefits from the incontestability clause of the policy, the extent to which it does so is to be determined by the language used in the excepting phrase of the incontestability clause.

3. Same—Language of incontestability clause held not to preclude insurer from setting up fraud as defense to liability for disability benefits.

The incontestability clause in the policy in suit provided that the policy and application should constitute the entire contract and should be incontestable after the period stated, except as to the conditions and provisions relating to disability benefits. The provisions of the policy relating to disability benefits made certain restrictions and limitations to the liability for disability payments. *Held:* The language of the incontestability clause excluded from its provision the whole portion of the policy relating to disability benefits, and insurer's contention that it excepted only the restrictions and limitations specifically enumerated in the disability clause of the policy is untenable, and in an action on the disability clause insured's motion to strike from the answer allegations setting up the defense that the policy was obtained by false and fraudulent representations, is properly denied.

WEISS *v.* INSURANCE CO.

APPEAL by plaintiff from *Pless, J.*, at January Term, 1939, of BUNCOMBE. Affirmed.

J. M. Horner, Jr., for plaintiff, appellant.
Jones, Ward & Jones for defendant, appellee.

SCHENCK, J. This is an appeal by the plaintiff from a denial of his motion to strike from the answer of the defendant certain allegations to the effect that two policies of life insurance issued to him, the liabilities of which had been assumed by the defendant company, had been obtained by false and fraudulent representations. The action is to recover the benefits under a clause in the policies which reads: "Should the insured, . . . while this policy is in full force, become permanently totally disabled, . . . the company . . . will, during the continuance of such disability, waive the payment of all future premiums . . . and pay a monthly income of $50.00. . . ." The policies, which are identical, were issued 22 November, 1934, and the premiums due thereon have been paid by the plaintiff up to the time of the institution of this action on 4 April, 1938. It is alleged in the complaint that the plaintiff became permanently and totally disabled by reason of pulmonary tuberculosis on 12 June, 1937. The answer denies the disability of the plaintiff, and as a further defense alleges that said policies were procured by false and fraudulent representations by the plaintiff as to his name, residence, identity, age, state of health, and family record.

The plaintiff moved the court to strike from the answer the allegations of false and fraudulent representations as being "irrelevant, redundant, immaterial and not the basis for a defense in law to the suit of the plaintiff," and contended that such defense was not available to the defendant by reason of the incontestibility clause contained in the policies sued on. This clause reads: "This policy and the application therefor constitute the entire contract between the parties and such contract shall be incontestable after it shall have been in force for two years from the date of the policy, . . . except as to the conditions and provisions relating to benefits in event of permanent total disability."

The policies under the title "General Conditions and Provisions" reserve to the company the defense that it will not pay disability benefits if the insured is injured from being in any vehicle for aerial navigation which is not a scheduled airline carrier, and that it will not be liable for income payments in excess of what the insured was making prior to the time he became disabled, and also make provision for the termination of disability.

It is the contention of the plaintiff that the words "except as to the conditions and provisions relating to benefits in event of permanent total disability" refer only to defenses mentioned in the policies relating to the insured being injured in aerial navigation, nonpayment of benefits in excess of insured's income, etc., and since the further answer does not allege any of these defenses, the defenses therein alleged are precluded by the incontestability clause and should be stricken out of the pleadings.

It is the contention of the defendant that the words "except as to the conditions and provisions relating to benefits in event of permanent total disability" are not limited in their application to the defenses mentioned in the policy under "General Conditions and Provisions," but are general in their application and refer to all provisions in the policy relating to permanent total disability benefits.

While it is the rule that where there is any ambiguity in an insurance policy such ambiguity should be resolved in favor of the insured, such rule does not require the court by strained construction of ordinary words to create an ambiguity which would not otherwise exist.

The plaintiff relies upon the case of *Ness v. Mutual Life Insurance Co. of New York,* 70 Fed. (2d), 59, wherein it was held that the defenses excepted from the operation of the incontestability clause were those enumerated in the sections to which specific reference was made in the exception.

The defendant relies upon the case of *Equitable Life Assurance Society of U. S. v. Deem,* 91 Fed. (2d), 569, wherein it was held that there was excepted from the operation of the incontestability clause the whole portion of the policy relating to disability benefits.

It is settled law that the insurer has the power to except from the incontestability clause all provisions relating to disability benefits, and in interpreting the excepting phrase the only question is whether the wording used discloses a purpose definitely so to do.

In the *Ness case, supra,* the excepting phrase is quite different from that in the *Deem case, supra,* and the phrase in the *Deem case* is practically the same as the phrase in the instant case. In the instant case there is no ambiguity or uncertainty in the excepting phrase. The wording naturally suggests itself to express the thought intended. The words "provisions relating to benefits in event of permanent total disability" are comprehensive in scope and embrace all such provisions in the policy, and, as was said in the case of *Connecticut General Life Insurance Co. v. McClellan,* 94 Fed. (2d), 445, in speaking of the language of the excepting phrase of the policy under consideration, "It is unambiguous, clear, so clear that, in our opinion, to argue the point would be an attempt to overclarify it."

We are of the opinion, and so hold, that his Honor was correct in ruling that the allegations of false and fraudulent representations made in procuring the policies were not irrelevant and immaterial to the cause of action alleged in the complaint by reason of the incontestability clause contained in said policies, and in denying the motion to strike from the answer such allegations.

It is interesting to note that the senior judge in the *Ness case, supra,* and in the *Deem case, supra,* was one and the same person, Honorable *John J. Parker, Circuit Judge,* and that apparently there was no conflict in the decisions of these two cases in so far as his mind was concerned, the difference in the result being due to the difference in the wording of the excepting phrases in the policies involved in the respective cases.

The judgment of the Superior Court is

Affirmed.

J. W. PACK v. NATHAN KATZIN AND WIFE, BERTHA K. KATZIN.

(Filed 8 March, 1939.)

1. Appeal and Error § 37e—

The findings of fact by the referee supported by evidence, affirmed by the county court and the Superior Court on appeal, are conclusive and not subject to review in the Supreme Court unless the findings are based upon testimony which is incompetent and prejudicial.

2. Contracts § 22: Trial § 13—

Objections to testimony tending to show modifications and abandonment of the contract in suit before the introduction of the contract in evidence are rendered untenable by the subsequent introduction of the contract.

3. Evidence § 45—

In this action on a contract for the construction of a dwelling, plaintiff's witnesses were permitted to testify that certain work constituted a change from the original plans and specifications. *Held:* The testimony is competent as "short-hand" expressions of fact.

4. Evidence § 39—Testimony of acts constituting subsequent modification and abandonment of contract does not violate parol evidence rule.

Plaintiff contractor instituted this action on the contract for the erection of a dwelling, contending that the owners made such extensive alterations and changes in the original plans and specifications as to constitute an abandonment or rescission of the original written contract and the adoption of another contract in lieu thereof. *Held:* Testimony of the alleged alterations and changes for the purpose of showing an abandonment of the original contract does not violate the parol evidence rule.

5. Reference § 8—Referee's report must show his rulings on evidence with sufficient particularity to afford sufficient basis for review.

While ordinarily the referee should enter his rulings on each objection to the evidence taken before him, either at the time of taking the testimony or subsequently in his report, where the exceptions are very numerous and relate to a single ground of objection, it is a sufficient compliance with this rule if the referee incorporates in his report a general statement of his rulings sufficient to give the parties and the reviewing judge full opportunity to consider the referee's rulings on, and to give proper weight to his findings from, the evidence reported. C. S., 577.

APPEAL by defendants from *Olive, Special Judge,* at October Term, 1938, of FORSYTH. Affirmed.

Ingle, Rucker & Ingle for plaintiff.
Parrish & Deal for defendants.

DEVIN, J. Plaintiff instituted his action in the Forsyth county court to recover upon a contract for the erection of a dwelling house for defendants. Without objection, the cause was referred to E. F. Butler, as referee, who heard the evidence and subsequently made report to the court of his findings of fact and conclusions of law. The defendants filed numerous exceptions to the findings of fact and conclusions of law set out in the referee's report, including exceptions to the referee's rulings on questions of evidence. The judge of the county court overruled defendants' exceptions to the report, adopted the referee's findings of fact and affirmed his conclusions of law, and the defendants appealed to the Superior Court, assigning errors. The judge of the Superior Court overruled all of defendants' assignments of error and affirmed the judgment of the county court. From the judgment of the Superior Court the defendants appealed to this Court, preserving the exceptions noted in the trial before the referee.

It is apparent from an examination of the record that there was evidence to support the findings of fact by the referee, and we do not understand this to be seriously controverted by the appellants. Thereupon, the adoption of those findings by the county court, affirmed by the Superior Court, would render the facts so found conclusive and not open to review upon appeal, unless it be shown that the findings were based upon testimony which was incompetent and prejudicial. *Anderson v. McRae,* 211 N. C., 197, 189 S. E., 639.

Here the principal ground upon which appellants bottom their appeal is that evidence which should have been ruled incompetent by the referee entered into his findings of fact, to the substantial injury of the defend-

ants, and that the Superior Court erred in refusing to sustain their exceptions thereto.

There was both allegation and proof on the part of plaintiff tending to show that though a written contract with specifications was entered into between the parties before the construction was begun, subsequently during the progress of the work so many changes, modifications and replacements were required by defendants as to constitute an abandonment of the original contract and to substitute a contract on the part of defendants to pay plaintiff the reasonable cost of the construction. Defendants complain that the witnesses whom plaintiff offered in support of this allegation were permitted to testify what changes were made in the plans set out in the contract without first having the contract and specifications introduced in evidence. However, the contract and specifications were subsequently admitted in evidence, thus removing any tenable ground for objection on this score.

Defendants also noted numerous exceptions to evidence of witnesses whose testimony they contend consisted of conclusions and opinions that certain work constituted changes. From an examination of the testimony to which objection was noted, we are inclined to the view that this evidence more properly may be considered as "short-hand" expressions of fact, and hence not incompetent. *Marshall v. Tel. Co.*, 181 N. C., 292, 106 S. E., 818; *Leonard v. Ins. Co.*, 212 N. C., 151, 193 S. E., 166.

Defendants excepted to the failure of the referee to rule on their exceptions to testimony either at the time they were made or specifically in his subsequent report.

The defendants noted 362 exceptions in the taking of testimony, the transcript of which covers 225 printed pages. While some of the testimony in the form in which it was offered might be subject to criticism, there was ample evidence free from valid objection tending to support the findings and conclusions of the referee. The referee noted in his report his rulings on defendants' principal line of objections to the testimony, as follows: "The defendants strenuously objected to the introduction of parol evidence showing alterations and changes from the original written contract and from the plans and specifications. The referee is of the opinion that the parol evidence rule does not preclude the plaintiff from showing by subsequent evidence alterations and changes from the written contract, plans and specifications, nor from introducing evidence tending to show an abandonment or rescission of the original written contract and the subsequent adoption of another contract in lieu thereof."

The referee's ruling is in accord with the authorities which he cites in support: *Harris v. Murphy,* 119 N. C., 34, 25 S. E., 708; *McKinney*

v. Matthews, 166 N. C., 576, 82 S. E., 1036; *Brown v. Mitchell,* 168 N. C., 312, 84 S. E., 404; *Bixler v. Britton,* 192 N. C., 199, 134 S. E., 488; *Roebuck v. Carson,* 196 N. C., 672, 146 S. E., 708; *Grubb v. Ford Motor Co.,* 209 N. C., 88, 182 S. E., 730.

There was competent evidence to sustain the determinative findings of fact by the referee, which he reported as follows:

"From the commencement of the construction of the dwelling the plaintiff was required by the defendants to make certain changes in the plans and specifications. During the construction of said dwelling the defendants continued to order and direct the plaintiff to make numerous and material changes in the plans and specifications, which, in many instances, necessitated the tearing down and rebuilding of parts of the house. The plaintiff complied with all of the demands and wishes of the defendants in the construction of the dwelling, without regard to the plans and specifications and under the personal direction and supervision of the defendants. The alterations and changes necessitated by the plaintiff's compliance with the instructions of the defendants were so numerous and of such varied and complex character as to constitute an entirely different construction from that contemplated by the plans and specifications, and the alterations demanded by the defendants and carried out by the plaintiff from time to time during the process of construction of the dwelling increased materially the time, labor and building materials necessitated in the construction of the dwelling."

The proper procedure in the taking of testimony by a referee would seem to require him to include in his transcript the entire evidence offered, together with notation of all objections made thereto. The referee should enter his ruling on each objection, either at the time of taking the testimony, or subsequently, or in his report, to the end that it may be known whether the evidence objected to was considered or excluded from consideration in making his findings of fact. However, where the objections are made to a certain line of testimony, or to all testimony tending to show certain facts, it would be regarded as a compliance with this rule if the referee incorporates in his report a general statement of his rulings such as would afford the parties and the reviewing judge on exceptions filed full opportunity to consider the effect of the referee's ruling and to give proper weight to his findings from the evidence reported. C. S., 577; McIntosh Prac. & Proc., 572-573; 53 C. J., 732; 23 R. C. L., 295-298; *Skinner v. Conant,* 2 Vt., 453.

Considering the nature and purpose of the testimony heard by the referee in this case, we are unable to say that the defendants have been prejudiced by the manner in which the referee has made his report and noted his rulings.

After a careful consideration of the testimony, the referee's report and exceptions thereto, and the appellants' assignments of error, together with the excellent briefs of counsel, we reach the conclusion that the result arrived at below should not be overthrown or set aside, and that the judgment of the Superior Court should be

Affirmed.

F. S. LANGLEY, JR., v. PLANTERS TOBACCO WAREHOUSE, INC., AND W. F. RUSSELL.

(Filed 8 March, 1939.)

1. Process § 6f—Service of process on president of foreign corporation within the State on personal business held not sufficient.

Where a foreign corporation does not do business within the State, does not maintain a process agent or any other agent here, and has not domesticated, and owns no property in the State, service of process on its president while he is within the State on personal business in nowise connected with the business of the corporation, is not a valid service of process. C. S., 483 (1). *Cotton Mills v. Menefee*, 237 U. S., 189. cited as controlling.

2. Courts § 9—

Since the question of validity of service of process on a foreign corporation involves the Federal question of the denial of due process under the 14th Amendment to the Federal Constitution, the State courts are bound by the ruling of the Supreme Court of the United States.

APPEAL by plaintiff from *Pless, J.*, at January Term, 1939, of BUNCOMBE. Affirmed.

W. K. McLean for plaintiff, appellant.
Milligan & Haynes and Lee & Lee for defendant, appellee.

SCHENCK, J. This is an action instituted in the general county court of Buncombe County to recover damages for an alleged breach of contract of employment of the plaintiff by the corporate defendant.

After complaint was filed and before time for answering expired, the defendants entered special appearances and moved to dismiss the action upon the ground that there has been no valid service of process under C. S., 483 (1). The motion was denied as to the individual defendant, and allowed as to the corporate defendant. From the allowance of the motion as to the corporate defendant by the county court, the plaintiff appealed to the Superior Court, and upon the hearing of the case upon

appeal, the Superior Court overruled the exceptions of the plaintiff and affirmed the judgment of the county court dismissing the action as to the corporate defendant. From the judgment of the Superior Court the plaintiff appealed to the Supreme Court, assigning errors.

The plaintiff relies upon the cases of *Jester v. Steam Packet Co.*, 131 N. C., 54; *McDonald v. MacArthur*, 154 N. C., 122; *Cunningham v. Express Co.*, 67 N. C., 425; and *Menefee v. Cotton Mills*, 161 N. C., 164, and the corporate defendant, appellee, concedes that these cases support the contentions of the plaintiff and are against its position, but the appellee contends that the case of *Cotton Mills, plaintiff in error, v. Menefee*, 237 U. S., 189 (59 Law ed., 910), which reversed the decision of this Court in *Menefee v. Cotton Mills, supra*, is applicable to the instant case and destroys the authority of the cases mentioned for the position of the plaintiff on this appeal.

The Superior Court adopted the findings of fact and affirmed the judgment of the county court dismissing the action. The findings of fact are supported by the evidence, and, when the principles enunciated in *Cotton Mills v. Menefee, supra*, are applied to the facts found, they support the judgment. These facts are substantially that the defendant appellee, the Planters Tobacco Warehouse, Inc., is a corporation chartered by and having its principal office and place of business in the State of Tennessee, and operates three warehouses in Greenville, Tennessee, at which tobacco is sold on commission; that W. F. Russell is the president of said corporation; that on and prior to 30 September, 1938, the date service of summons was made upon said Russell by delivering to him a copy thereof, said corporation was not doing business within the State of North Carolina, and did not maintain a process agent or any other agent in, and had not domesticated in, and did not own property in said State; that said Russell was in the State of North Carolina on 30 September, 1938, to attend to his cattle business, which business was personal and in no wise connected with the business of the defendant corporation; that the plaintiff is a resident of Asheville, North Carolina.

The Supreme Court of the United States in *Cotton Mills v. Menefee, supra*, states: ". . . it is indubitably established that the courts of one state may not, without violating the due process clause of the 14th Amendment, render a judgment against a corporation organized under the laws of another state where such corporation has not come into such state for the purpose of doing business therein, or has done no business therein, or has no property therein, or has no qualified agent therein upon whom process may be served; and that the mere fact that an officer of a corporation may temporarily be in the state or even permanently

reside therein, if not there for the purpose of transacting business for the corporation, or vested with authority by the corporation to transact business in such state, affords no basis for acquiring jurisdiction or escaping the denial of due process under the 14th Amendment which would result from decreeing against the corporation upon a service had upon such an officer under such circumstances."

Since a federal question is involved, we are bound by the ruling of the Supreme Court of the United States, and an application of such ruling to the instant case impels the affirmation of the judgment of the Superior Court.

Affirmed.

G. G. HYDER v. MARY J. HYDER.

(Filed 8 March, 1939.)

1. **Divorce § 2a: Husband and Wife § 23—Abandonment of wife by husband is his willful separation from her without providing adequate support.**

   Where, in the husband's action for divorce on the ground of two years separation, the wife sets up the defense that he had abandoned her, an instruction that the two elements of abandonment are his willful separation from her without just cause or excuse and his failure to provide adequate support, is without error, and plaintiff's contention that the court should have charged that the failure to provide support must have been willful in order to constitute an abandonment is untenable. C. S., 4447.

2. **Divorce § 2a—Burden is on wife to prove abandonment by greater weight of evidence and not beyond reasonable doubt.**

   Where, in the husband's action for divorce on the ground of two years separation, the wife sets up the defense of abandonment, the burden of the issue is on her to prove the defense by the greater weight of the evidence and not to prove same beyond a reasonable doubt, even though the issue may involve a criminal charge, since the defense is set up in the trial of a civil action.

3. **Same: Action § 4—**

   In the husband's suit for divorce on the ground of two years separation, the wife's defense that the separation was the result of his unlawful abandonment of her is valid, and the husband's demurrer *ore tenus* thereto is properly overruled, since a party may not maintain a civil action based upon his own violation of the criminal laws of the State.

APPEAL by plaintiff from *Pless, J.*, at November Term, 1938, of HENDERSON. No error.

This is an action under the provisions of ch. 100, Public Laws 1937, in which the plaintiff makes the necessary allegations for a divorce on the ground of having lived separate and apart from his wife for two years. The defendant, answering, admits the marriage between herself and the plaintiff, the plaintiff's residence in the State for one year, and the fact of his having lived separate and apart from her for two years. The defendant, by way of further answer and plea in bar, alleges that the plaintiff willfully abandoned her, his wife, without providing adequate support for her. The jury answered the issues of marriage, residence and separation in favor of the plaintiff, but answered in the affirmative the fourth issue, which reads: "Did the plaintiff wrongfully abandon the defendant, as alleged in the answer?" From a judgment denying him a divorce the plaintiff appealed, assigning errors.

Arthur J. Redden for plaintiff, appellant.
J. E. Shipman for defendant, appellee.

SCHENCK, J. The appellant assigns as error an excerpt from the charge which reads: "Now, gentlemen, the burden of proof of that issue is on the defendant Mrs. Hyder to satisfy you by the greater weight of the evidence that the plaintiff criminally and unlawfully abandoned her; and there are two elements of abandonment which must be shown, and shown by the greater weight of the evidence, before she can prevail. She must first show that the abandonment, that is, the separation, was willful on his part, that is, wrongful, without just cause or excuse; and, second, that he has failed to provide adequate support for her. If she has failed to establish both of these elements, that is, willful abandonment and lack of adequate support, then the defendant has failed to carry the burden imposed by law and the plaintiff will prevail. On the other hand, if she has shown this by the greater weight of the evidence, then it will be your duty to answer the fourth issue in her favor."

The appellant contends that the omission of the court to instruct the jury that the failure to provide adequate support for his wife must be willful, as well as the abandonment of her, constitutes error. A reading of the statute making abandonment a criminal offense divulges that such contention is untenable. The statute, C. S., 4447, reads: "If any husband shall willfully abandon his wife without providing adequate support for such wife . . . he shall be guilty of a misdemeanor." The purpose of the statute was to make unlawful a willful abandonment of a wife by a husband without providing adequate support for her. It is not made unlawful for a husband to simply willfully abandon his wife —a husband is not compelled to live with his wife if he provides her adequate support.

The charge is consonant with what was said in *S. v. Johnson,* 194 N. C., 378, as follows: "An offending husband may be convicted of abandonment and nonsupport when—and only when—two things are established: First, a willful abandonment of the wife; and, second, a failure to provide 'adequate support for such wife, and the children which he may have begotten upon her.' *S. v. Toney,* 162 N. C., 635; *S. v. Hopkins,* 130 N. C., 647. The abandonment must be willful, that is, without just cause, excuse or justification. *S. v. Smith,* 164 N. C., 475. And both ingredients of the crime must be alleged and proved. *S. v. May,* 132 N. C., 1021."

The appellant assigns as error a portion of the charge to the effect that the burden was upon the defendant to establish the essential elements of the offense of abandonment by the greater weight of the evidence, contending that since the offense is a crime the elements must be established beyond a reasonable doubt. Such is not the rule in the trial of a civil action although the issue may involve a criminal charge.

The plaintiff's demurrer *ore tenus* to the plea in bar in the answer of the defendant is overruled, since there is an allegation therein that the plaintiff seeks to maintain a civil action based upon his own violation of the criminal law of the State, which is contrary to the practice in this jurisdiction. *Reynolds v. Reynolds,* 208 N. C., 428; *Brown v. Brown,* 213 N. C., 347.

In the trial we find

No error.

HENRY SAWYER, ADMINISTRATOR OF J. L. SAWYER, v. T. L. COX.

(Filed 8 March, 1939.)

1. Quasi-Contracts § 2—Instruction in this action to recover reasonable value of board furnished defendant held not erroneous.

On the pleadings, evidence and issues in this action to recover of defendant the value of board furnished him, an instruction that if plaintiff undertook to board defendant at her table without definite arrangements as to payment, plaintiff would be entitled to recover the reasonable value thereof and that the jury might consider in extinguishment or reduction of the amount due, the value of the provisions furnished by defendant, *is held* without prejudicial error.

2. Appeal and Error § 43—

Where petitioner fails to show substantial or prejudicial error, the petition for rehearing will be dismissed.

PETITION to rehear case decided Fall Term, 1938, and reported in 214 N. C., 839. Petition dismissed.

L. T. Hammond and J. A. Spence for plaintiff, appellee.
J. G. Prevette and Daniel L. Bell for defendant, appellant.

DEVIN, J. The only questions presented for review by the petition to rehear relate to the cause of action prosecuted by the *feme* plaintiff for table board and services rendered the defendant, extending over a period of more than five years. The statute of limitations was not pleaded.

The plaintiff testified that defendant had agreed to pay her fifty cents per day for the entire period, and that the services were reasonably worth that amount, or fifteen dollars per month. The defendant admitted that he had originally agreed to pay her fifty cents per day, but he testified that that arrangement had been terminated and the plaintiff paid in full at the beginning of the period for which plaintiff now claims compensation, and that, while he boarded with her from time to time since, no definite amount had been agreed upon.

He further testified that he was to furnish, and did furnish, certain provisions for the table, which were consumed by plaintiff and her husband as well as by himself, and that he owed her nothing.

While he alleged in his answer as a counterclaim that he had furnished as much as $500.00 in provisions and supplies more than he had consumed, he testified on the trial, in part, as follows: "Assuming that my board was $15.00 a month, the amount I furnished was not above that. No, it was not that much . . . I would say the supplies I furnished amounted to $10.00 a month." Plaintiff testified the provisions furnished by defendant amounted to about $2.00 a month.

No separate issue as to defendant's counterclaim was submitted. No issue was tendered and no exception was noted to the court's failure to submit such an issue. The court charged the jury that there was no sufficient evidence to substantiate a counterclaim, but he permitted the jury to consider the value of the provisions furnished by defendant as an extinguishment or reduction of the amount due her for defendant's board. The verdict in plaintiff's favor was for less than the amount she claimed. Among other things the court charged the jury that if they were "satisfied from the testimony and by its greater weight, that she entered into the employment of housekeeper and boarding him at her table without any definite arrangement as to the amount or as to the time he stayed there, the law implied she was to be paid what her services were fairly worth, and that would be for the jury to determine."

While the portions of the charge of the court to which exceptions were noted by defendant may be open to criticism in some respects, after a careful consideration of the case, as presented by the record

before us, we conclude that the case has been fairly tried, that it principally involved issues of fact which have been determined by the jury, and that no substantial or prejudicial error sufficient to warrant setting aside the verdict and judgment has been shown.

Petition dismissed.

J. F. METCALF ET AL. v. M. L. RATCLIFF ET AL.

(Filed 8 March, 1939.)

Limitation of Actions § 18—Where one cause alleged is not barred by statute of limitations, nonsuit on ground of bar of statute is error.

The present actions, consolidated for trial, were instituted to revive and establish the balances due on certain judgments and to subject certain lands to their payments. Defendant pleaded the ten and three-year statutes of limitations. *Held:* The granting of the judgment as of nonsuit on the plea of the bar of the statutes is error, since the first cause of action was not barred, and it is not necessary on the appeal to determine whether the bar of the statute applied to other aspects of the action.

APPEAL by plaintiffs from *Johnston, J.*, at October Term, 1938, of BUNCOMBE.

Civil actions to revive and to establish balances due on judgments and to subject certain lands to their payments.

At the July Term, 1928, Buncombe Superior Court, the plaintiffs, J. F. Metcalf and wife, Georgia Metcalf, obtained a judgment against the defendant, M. L. Ratcliff and her husband, J. F. Ratcliff, for the sum of $245.58 plus interest and costs.

At the same term of court, the plaintiffs, J. E. Metcalf and wife, Vera May Metcalf, obtained a judgment against the same defendants for the same amount plus interest and costs.

Both judgments were duly recorded in the office of the clerk of the Superior Court of Buncombe County.

Two credits of $25.00 and $21.50 have been made on each of the judgments.

The present actions, consolidated for trial, were instituted 15 June, 1938, to revive and to establish the balances due on said judgments and to subject certain lands to their payments.

The defendants pleaded the ten and three-years statutes of limitations.

From judgment of nonsuit entered at the close of plaintiffs' evidence, they appeal, assigning errors.

Don C. Young for plaintiffs, appellants.
E. L. Loftin for defendants, appellees.

STACY, C. J. The trial court evidently overlooked the fact that in each case the plaintiffs are seeking to revive and to have the balance due on their judgment fixed and established as well as to subject certain lands to its payment. Whether the complaints, to the extent that they may be regarded as bills of discovery, *Jackson v. Thompson,* 214 N. C., 539, were properly dismissed, need not now be determined, as it is necessary to reverse the nonsuit on the first ground. Perhaps upon a further hearing, the facts will be more fully developed.

Reversed.

STATE v. E. B. HIGH AND W. I. TANNER.

(Filed 8 March, 1939.)

1. Assault and Battery § 12: Criminal Law § 53d—

In this prosecution for felonious assault with intent to kill, the instruction of the court as to the lesser offenses embraced in the charge *are held* without error.

2. Assault and Battery § 8: Indictment § 22—

An indictment charging a felonious assault with intent to kill as defined in C. S., 4213, embraces as a lesser degree of the crime charged the offense of assault with a deadly weapon, and where the evidence is sufficient to sustain a verdict of the offense charged, defendant may not complain of a verdict of guilty of the lesser offense.

APPEAL by defendant W. I. Tanner from *Hamilton, Special Judge,* at August Term, 1938, of NASH. Affirmed.

Criminal action in which the defendants were tried under a bill of indictment charging them with felonious assault with intent to kill, as defined in C. S., 4213.

The State offered evidence tending to show that K. B. Matthews, a merchant in the city of Rocky Mount, on Saturday night, 12 March, 1938, drove to his home about midnight; that as he got out of the car and attempted to leave his garage he was assaulted with deadly weapons by two persons; that he was struck a number of times with iron pipes about the head and body; that at the time he had more than $300.00 on his person; and that Matthews identified the two defendants as being the persons who assaulted him. There was other evidence tending to indicate that the defendants were the persons who committed the assault.

The defendants offered evidence tending to contradict the evidence offered by the State as to the identity of the assailants and other evidence tending to establish an alibi for each of the defendants.

The court in charging the jury instructed them that they could return either one of five verdicts, as they found the facts to be, to wit: Guilty of a felonious assault as charged in the bill of indictment; guilty of an assault with a deadly weapon, inflicting serious injury; guilty of an assault with a deadly weapon; guilty of a simple assault; or not guilty. In so doing the court properly placed the burden of proof upon the State. After the jury had been out for some time it returned to the courtroom and its spokesman informed the court that the jury wanted to know in what degree of guilt the jurors could make it as light as possible. The court inquired if the jury meant that they did not understand the instructions with regard to the various offenses. The spokesman replied: "We cannot carry all of them." Thereupon the court again outlined the offense charged and the lesser degrees thereof upon which a verdict of guilty might be returned, particularly outlining the difference between assault with a deadly weapon and a simple assault. The jury returned to its room and shortly thereafter returned a verdict of guilty of assault with a deadly weapon. Judgment was pronounced thereon and the defendant Tanner appealed.

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

T. T. Thorne and W. H. Yarborough for defendant, appellant.

PER CURIAM. While the defendant in the case on appeal makes twelve separate assignments of error, nine of which are directed to alleged errors in the charge, and the other three of which are directed to the refusal of the court to set aside the verdict and to grant a new trial, he does not bring forward any one of the assignments in his brief. He merely discusses his contention that the colloquy between the jury and the court, when the jury returned to the courtroom for further instructions, indicates that the jury was confused by the charge and rendered a compromise verdict, and his further contention that a verdict of guilty of an assault with a deadly weapon was not permissible under the bill of indictment and the theory upon which the case was tried.

The exceptions to the charge are without merit. The court properly instructed the jury as to the lesser offenses embraced in the bill of indictment. The language of the statute and of the bill makes an assault with a deadly weapon an essential element of the major offense. It was, therefore, permissible for the jury to return the verdict which appears of record as a lesser offense of the crime charged. While it is true that

the evidence of the State, if accepted and believed by the jury, warranted a verdict of guilty of the offense charged, this did not preclude a verdict upon a lesser offense and the defendant cannot complain that the jury did not accept the State's evidence in full.

Bartholomew v. Parrish, 186 N. C., 81, 118 S. E., 899, relied on by the defendant, is not in point. There the jury returned a verdict which in no aspect of the case was supported by evidence, and it expressly stated in its verdict that it was a compromise. Here the verdict is supported by evidence and the defendant was adjudged guilty of a crime which is a lesser offense of the felony charged.

The trial involved largely an issue of fact. The jury rejected the defendant's evidence tending to show an alibi and accepted the evidence tending to identify the defendant as one of the assailants. As no prejudicial or harmful error is pointed out in the brief and no error appears in the record or in the charge of the court, the judgment below must be

Affirmed.

N. B. FINCH v. TOWN OF SPRING HOPE.

(Filed 8 March, 1939.)

Municipal Corporations § 14—

In this action to recover for injury sustained by plaintiff when he fell over roots of trees growing above the surface of the sidewalk in defendant municipality, judgment as of nonsuit should have been granted under authority of *Watkins v. Raleigh,* 214 N. C., 644.

APPEAL by defendant from *Ervin, Special Judge,* at September Term, 1938, of NASH.

W. H. Yarborough, Harold D. Cooley and Dan B. Bryan for plaintiff, appellee.

O. B. Moss for defendant, appellant.

PER CURIAM. This is an action to recover damages for personal injuries to the plaintiff alleged to have been proximately caused by the negligent failure of the defendant to maintain a sidewalk in a municipality in a reasonably safe condition, in that the defendant permitted said sidewalk to become obstructed and dangerous by allowing roots of trees to grow and remain upon and above the surface of said sidewalk, against which roots the plaintiff while walking on said sidewalk struck his feet and fell, and thereby caused his injury.

Trial was had upon the usual issues of negligence, contributory negligence and damage, resulting in the issues being answered in favor of the plaintiff. From judgment predicated on the verdict the defendant appealed, assigning errors.

The defendant demurred to the evidence and moved for a judgment as in case of nonsuit when the plaintiff had rested his case and at the close of all of the evidence, C. S., 567, and reserved exceptions to the refusal of the court to allow its motion. We are constrained to hold that the exceptions are well taken, and that the motion should have been allowed. The case is governed by the principles enunciated in *Houston v. Monroe,* 213 N. C., 788, and *Watkins v. Raleigh,* 214 N. C., 644, and cases therein cited.

Reversed.

RIGO MANUFACTURING COMPANY v. B. D. PRIDGEN ET AL.

(Filed 8 March, 1939.)

Carriers § 10—

An action against a carrier by the consignor to recover the value of certain shipments of goods rejected by the consignee is properly dismissed when instituted without any prior notice or claim of loss having been filed with the carrier as required by the bill of lading as a condition precedent.

APPEAL by plaintiff from *Bone, J.,* at November Term, 1938, of WILSON.

Civil action by consignor to recover of consignee and delivering carrier $181.73 value of three interstate shipments of goods.

On 8 March, 1935, on 5 September, 1935, and again on 3 February, 1936, the plaintiff delivered to the Nashville, Chattanooga & St. Louis Railway Company at Nashville, Tenn., a shipment of goods consigned to B. D. Pridgen, Wilson, N. C., taking therefor on each occasion a uniform straight bill of lading.

There is evidence tending to show that the delivering carrier tendered the goods to the consignee, who rejected them, and the record is silent as to what became of the shipment.

This action was instituted 7 September, 1937, without any prior notice or claim of loss having been filed with the Atlantic Coast Line Railroad Company, as required by the bills of lading.

In the court of first instance, the plaintiff was awarded judgment against the carrier and a nonsuit entered in favor of the consignee.

From this judgment, the carrier appealed to the Superior Court, where "a voluntary nonsuit was taken as to B. D. Pridgen," and the court sustained a motion for judgment as in case of nonsuit in favor of the A. C. L. Railroad Company.

From this latter judgment, the plaintiff appeals, assigning error.

D. M. Hill and Connor & Connor for plaintiff, appellant.

F. S. Spruill, W. A. Townes, and Finch, Rand & Finch for defendant A. C. L. Railroad Company.

PER CURIAM. As plaintiff failed to comply with the requirements of notice set out in each bill of lading and designated "as a condition precedent to recovery," its action against the carrier was properly dismissed. *St. Sing v. Express Co.*, 183 N. C., 405, 111 S. E., 710; *Culbreth v. R. R.*, 169 N. C., 723, 86 S. E., 624.

Affirmed.

STATE v. CLARENCE BRACY, ALIAS DAVID JIGGETTS.

(Filed 22 March, 1939.)

1. Criminal Law § 5c—Instruction that burden was on defendant to prove to satisfaction of jury defense of mental incapacity held correct.

In this prosecution for murder defendant relied on the defense of mental incapacity. The court instructed the jury to the effect that the burden was on defendant to prove to the satisfaction of the jury that by reason of insanity, mental disease, or low degree of intelligence, he did not have, at the time the crime was committed, sufficient mentality to form a criminal intent, did not know the nature or quality of his act, or did not know right from wrong. *Held:* The charge is without error.

2. Criminal Law §§ 5d, 53a—Court need not instruct jury that defendant would be confined in asylum if found not guilty on plea of insanity.

It is the province of the jury to find the facts from the evidence, and the province of the court to sentence defendant on the verdict rendered, and in a prosecution for murder it is not error for the court to refuse defendant's request for instruction that if the jury found defendant not guilty by reason of insanity defendant would be committed to a State hospital, C. S., 6237, and could be released therefrom only under the provisions of C. S., 6239, and defendant's contentions that the jury might have returned a verdict of guilty rather than have turned defendant loose under the solicitor's argument that a verdict of not guilty would set defendant free, made by the solicitor in answer to the argument of defendant's counsel that defendant would be committed to a State hospital, is untenable, since the jury must be content to leave with the judge the grave responsibility imposed upon him to render a judgment, upon their verdict, according to law.

STATE *v.* BRACY.

APPEAL by defendant from *Parker, J.*, and a jury, at October Term, 1938, of VANCE. No error.

The defendant was indicted under a bill of indictment charging him with murder in the first degree. "On the 31st day of August, in the year of our Lord one thousand nine hundred and thirty-eight, with force and arms, at and in the County aforesaid, unlawfully, willfully, feloniously, premeditatedly, deliberately and of his malice aforethought did kill and murder one W. H. Williamson, against the form of the statute in such case made and provided and against the peace and dignity of the State." N. C. Code, 1935 (Michie), secs. 4200 and 4614. The verdict of the jury was, "Upon their oath, say that the said Clarence Bracy, *alias* David Jiggetts, is guilty of the felony and murder as charged in the bill of indictment, in the first degree." The court below rendered judgment on the verdict: "Death by the administration of lethal gas." From the judgment pronounced of murder in the first degree, the defendant appealed to the Supreme Court.

The facts were to the effect: The deceased, W. H. Williamson, was curing tobacco at his barn. He had some small amount of money ($9.80) in a little tobacco sack. He went to the barn a little after 10:00 o'clock on the night of 31 August, 1938. Next morning about 6:00 o'clock a hand working on the place, Tobe Henderson, notified Williamson's daughter, Lillie Williamson. She testified, in part: "We found my father lying on the ground; he had been struck and there was a knot not quite as large as a hen egg on the right side of his head. As to the other cuts I do not remember. He was unconscious and as to whether he regained consciousness before he died I do not know. My brother Ollie, Charlie Howell, Uncle John Burwell and Cleve Stegall picked my father up and carried him to the hospital. He was very near the front of the door but a couple of feet from the barn on the ground. He had some guano bags folded under his head for a pillow; they were on the ground and his head lying on them. There was one tobacco truck near. The little tobacco sack that he carried his money in was on the bench where he slept, about six feet from where my father was lying. The bench was made of some long planks and his feet kinda under the end of the bench. It was about 6:00 o'clock on Thursday morning when we found him. Clarence Bracy, *alias* David Jiggetts, had been working for my father from Monday afternoon of one week until Wednesday night of the next week, the night my father was struck. . . . I had opportunity to observe Clarence Bracy, *alias* David Jiggetts, when I fed him at the table and while he was working on the farm. I would say he had the mental capacity of the average colored man. He acted like other colored people. He was polite and mannerable in every way. Of course I did not ever talk to him more than was

necessary with any colored people that worked there. Tobe Henderson has worked at home off and on, not regularly, for the last ten years. His general reputation in the community where he lives is good."

O. G. Williamson testified, in part: "I am the son of W. H. Williamson. I am married and live about a half mile from my father's home. . . . I know that my father carried his money in a little sack with some red letters on it; I gave it to him. The sack which you have handed me is the one he carried. I did not know my father had been stricken until Tobe Henderson came down to let me know around 6:00 o'clock Thursday morning. I then got in my automobile and went up to the barn where he was and brought him to the hospital. I did not particularly notice the ground around him for I was after getting him up as quickly as I could and getting him to the hospital. He was unconscious at the time and never regained consciousness. I was present while the doctors were examining him until they prepared his head for the operation. He was injured over the right ear; his skull seemed to be crushed for 3½ or 4 inches on the right side, and when Dr. Bass was ready to sew it up he ran his fingers down to find out whether his skull was crushed and I was standing there looking. They then told me I could not stay any longer. I did not know Clarence Bracy, *alias* David Jiggetts, before this happened but I had seen him working for my father. I had been in fifteen yards of him but had not spoken to him. He started working there on Monday of one week and worked until Wednesday of the next week, the Wednesday that my father was stricken that night. I next saw Bracy in Raleigh on Tuesday, two weeks ago, when I talked with him some. He said he knew me and I asked him what he did with the pocketbook the old fellow had, and he said he did not have a pocketbook, that he had a little tobacco sack. I asked him what he did with it and he said he left it by the tobacco bench. I asked him did he know who I was and he said he did, and told me I rode a horse up to to my father's one day and he recognized me. I went back and found the tobacco bag where he said it was. Clarence Bracy claimed he had all the money he got out of the sack that he took from my father; said he got the amount of money out of the bag that the officers got off of him. He said that he, himself, hit my father with a wagon standard while he was lying on the bench asleep; said he hit him to get the money. Mr. H. M. Lewis, Mr. J. W. Keeter, Charlie Howell and Thomas L. Williamson were present when this conversation took place."

J. W. Keeter testified, in part: "I live near Townsville, about 3 or 3½ miles from the late W. H. Williamson. I have known Clarence Bracy, *alias* David Jiggetts, since 1927. He worked for me in the years 1927 and 1928. I went to Raleigh with Mr. Lewis and some of the boys and talked to him in the Raleigh jail, in the office. The jailer brought

him in the office and that is where I had the conversation with him. . . . I did not make any suggestion of any benefit that would accrue by way of making the statement. Mr. Lewis, the jailer, and his wife, the two Williamson boys and Charlie Howell were present when the conversation took place. Continuing the conversation, I said to him, 'Who was with you the night you murdered Mr. Williamson?' He said, 'Nobody.' I said, 'Davy, who was the man on the road in the automobile waiting to take you away; did he help you?' He said, 'No, sir.' I said, 'Did not Robert Henderson help you?' He said, 'He was not there.' I said, 'Where was he?' He said, 'I did not see him after he ate supper.' I asked when he saw Robert and he said he did not see him any more until after he come to Raleigh. I said, 'Davy, I can hardly believe you murdered Mr. Williamson alone, I think you had some help.' He said, 'No, sir, I did it myself.' I then said, 'What tool did you use to murder him with, I understand there was an axe close by the wagon standard.' He said, 'I used the wagon standard.' I said, 'Go ahead and tell how it happened.' He said, 'I laid down under the shed and went to sleep and woke up, could not tell the time, and looked around and Mr. Williamson was lying out on a frame he had up on some trestle benches; Mr. Williamson was lying on that table and I got up and went out there and looked at him and he was asleep,' and he seemed to stop talking then and I said, 'Go ahead and tell the truth, the whole story.' He said, 'Then I went back to the shed and got a wagon standard and hit him.' I asked him if he hit him with one or both hands and he said, 'I hit him with both hands.' I said, 'You murdered him and robbed him,' and he said, 'Yes, sir.' I said, 'You did it by yourself,' and he said, 'Yes, sir.' During the conversation I asked him the same question seven or eight times and when I finished up Mr. Lewis said, 'That is sufficient, let us go.' I said, 'Let me ask you this one question—Davy, my understanding is that you murdered Mr. Williamson and then robbed him by yourself and did not have any help, is that what you told me?' He said, 'Yes, sir.' In the conversation I asked him what kind of pocketbook Mr. Williamson had the night he murdered him and he said, 'He did not have any pocketbook, he had a little smoking tobacco sack with his money in it.' I said, 'How much money did you get off of Mr. Williamson?' He said, '$3.20.' I said, 'If you had known you were not going to get but $3.20 would you have killed him?' He said, 'No, sir.' I said, 'How much money did you expect to get off of Mr. Williamson?' He said, 'I thought sure I would get $15.00 or $20.00.' . . . I saw him (Clarence Bracy, *alias* David Jiggetts) practically every day for three years. I had not seen him since 1931 until I saw him in Raleigh. From my observation of him up until the end of 1931, and from the conversation I had with him in Raleigh, I think he has the

mental capacity of the average colored man. I have known Tobe Henderson for six or seven years. His general reputation in the community where he lives is good." There was other evidence to the same effect.

Sheriff J. E. Hamlett testified, in part: "From my conversation with him I think he has a very low mentality and in my opinion something like a ten or twelve-year-old boy. In my opinion the defendant has sufficient mind to know right from wrong."

Mack Hargrove testified, in part: "Mr. Williamson had the habit of sleeping on a bench at the barn when curing tobacco. The wagon standard was about twelve feet from where he slept. The first time I saw the standard there was on the Monday night before Mr. Williamson was hurt. I was at home on Wednesday night. The wagon standard is made of dogwood. . . . The last time I was at the barn before Mr. Williamson was struck was about day on Wednesday morning and a wagon standard like the one here was there at that time."

Charlie Howell testified, in part: "Mr. W. H. Williamson was my father-in-law. I went to the tobacco barn about 6:00 o'clock on the morning after Mr. Williamson was struck. The wagon standard was lying as close to Mr. Williamson as that table—about five feet. Mr. Cottrell picked up the wagon standard and examined it and someone brought it to Henderson to see if they could get some fingerprints. . . . I examined the wagon standard very closely that morning and I know the one here is the same one that was there that morning."

W. B. White testified, in part: "I have known Clarence Bracy or David Jiggetts some ten or twelve years and have seen him constantly during that time, some two or three times a week. He is twenty-three or twenty-four years old. I have had opportunity to observe him during these years and in my opinion he has the mental capacity of the average colored boy. He would trade at my store sometimes once a week on Saturday and sometimes during the week. He would pay for what he got and knew change when I gave it to him."

Dr. H. H. Bass (admitted to be a medical expert) testified, in part: "He was struck on the right side of his head and had a laceration on his head about four inches long, a straight but downward laceration. The skull was crushed in and had a laceration over his right eye about one inch long and took about two stitches to close that. I called Dr. Royster to see him and we took out a piece of bone about 2 inches by 4 inches in size. The skull was crushed and in very bad shape. I have an opinion satisfactory to myself that Mr. Williamson's death was caused by a blow by some dull instrument." The State offered in evidence a dogwood wagon standard.

Joseph Jiggetts, a witness for the defendant, testified in part: "I am the uncle of Clarence Bracy, *alias* David Jiggetts. His mother is in

Durham and she turned him over to me fourteen years ago. His mother was never married. He has been with me since that time. He has always been an easy boy and did not have much to say. I sent him to school and he would stop on the side of the road and eat up his dinner, and come back home and tell me he had been to school but he had not been. He never went to school but mighty little. He cannot read or write. When I corrected him he would go ahead and do what I asked him to do for a short while, and it seemed like he would get angry or some way, and do something contrary to what I told him to do. I could come home and bring anything from the store and put it down. He would go and move it. I would ask where it is and he would say he did not know. The only way I would find it would be crossing it some way; he would not tell me. He did not do any talking at home. He would not play with other children and did not act at home as do other children. He would act fine until I stormed at him, or say anything to him about some of his misdemeanors, then perhaps for one or two hours he would do much better. For years he had been hired out to other people and I collected his wages, because he could not count any great amount of money. I would do all of his buying that was over $10.00 or $15.00, such as buying him clothes. There was a charge brought against him in Warren County this year about some clothes. I sold his tobacco and gave him $40.00 of his tobacco money. He gave me back $20.00 of the money and told me to keep it for him. . . . When my wife and I left home we would leave David at home. He would say he did not want to go with us and would stay there and take care of the children while we were gone. He did not want to go with us to the church. As to whether he would go with girls—he would leave home but where he goes I really did not know; he did not talk much and did not tell me anything. Boys and girls in the neighborhood would come to the house but he would not have much to say to them. Whatever little talking he would do if there was any pranking with him he would cuss them out. . . . I have not been in any trouble except the trouble I got in by this boy bringing the stolen goods to my house. Sheriff Pinnell carried me to jail about it; said the stolen property was under the roof of my house. I did not know it was stolen at the time. Just as soon as David Jiggetts stole the stuff and carried it to my house he went out of the packhouse and did not come back before the next day and that is when they caught him. As soon as he got out of trouble in the recorder's court of Warren County he left and I did not see him any more."

The defendant testified, in part: "I was not mad with Mr. Williamson; he had not done anything to me. When the men took me in the car at Norlina and drove down the road and stopped they asked me was I the man named Clarence Bracy, and I told him 'Yes, sir.' Then they

asked me where did Mr. Hicks live and I told him in front of the lumber yard. They stopped before they got to the place and the one that was under the steering wheel turned around and told me, 'I want you to tell me the truth now about the thing, did not you hit Mr. Williamson with an axe?' and I told him, 'No, sir, I did not hit him with an axe. I hit him with the wagon standard.' . . . When Mr. Keeter came to see me in Raleigh he told me he was looking for me to tell him the truth about it and he would do all he could to help me. He said I knowed he had been helping me and I said 'Yes, sir,' and he said he was looking for me to tell him the truth about it. He did not say he would clear me if I would tell him the truth, he said he would do what he could for me. . . . When I hit Mr. Williamson I did not know what would be done to me about it if they caught me. The first time I knew they would do something to me for it was when I was in Raleigh. . . . I have known Mr. Keeter a long time. When I saw him in Raleigh and he told me to tell him the truth about how it happened, that is when I told him; everything I told him was the truth about how it happened. I changed my name from David Jiggetts to Clarence Bracy so I could get a job and get the money for my work. My uncle had been getting all of my money when I worked out anywhere and that is why I changed my name. I don't know how long the wagon standard had been setting there beside the barn. I don't know how long Mr. Williamson had been asleep when I hit him; I reckon he was asleep, he was laying down. I don't know where he had his hand; he did not have it under his head. I hit him over his head. He had the tobacco sack in his front pocket. I took it out and found he had three pieces of money and some silver. I did not have any money in my pocket before I hit Mr. Williamson. He did not do anything when I hit him; did not try to get up. He just turned over but did not fall off the plank he was on; he did not move. After I got the money out of the sack I left it lying there on the planks. I told Mr. Ollie Williamson where I had thrown the tobacco sack after I got the money out of it. Just as soon as I had done that and gotten his money I ran away. . . . I don't know what time of night it was that I hit Mr. Williamson; it was dark; I had not been to sleep. I do not know how long Mr. Williamson had been to sleep before I hit him. He was out the whole time I was out there and I do not remember him going to the house. . . . No member of Mr. Williamson's family had done anything to make me mad. The reason I hit him was to get the money and I was not mad at him or none of his folks. They had treated me all right. I had not asked him for money and did not know when I was to get my money. I did not want to kill him and did not thought I had hurt him."

R. J. Rivers testified for defendant, in part: "I live in Warren County. I have known David Jiggetts for the past two years. He worked for me off and on at different times. I think he is lacking something mentally. I could not say definitely that he knows right and wrong all the time but I judge from his general appearance and acts day by day that he is not totally developed in knowledge and brains. He worked for me at different times as day laborer on my farm. He was as good a hand as I have ever worked. Just tell him what to do and he will do the work. His uncle got the money for the work he did for me. He worked for me setting out tobacco in May of this year; he used a peg setter. He worked for me last year some too. I have known him for two years and know he will do what I tell him to do. I could not say whether he knows right from wrong all the time, but I do know he has sense enough to do what you tell him to do. He is very polite, comes to work on time. He got his meals at his home. I lived 200 or 300 yards from him."

P. E. Hilliard testified for defendant: "I have known David Jiggetts for two years. I have worked him some and he worked on the farm of his uncle. His uncle collected his wages when he worked for me. The uncle never told me how old he was. I did not see anything in his mental capacity when he worked for me to indicate he did not know right from wrong."

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

Jasper B. Hicks, J. H. Bridgers, and R. B. Carter for defendant.

CLARKSON, J. The question involved: *First.* Did the court err in instructing the jury, with respect to the insanity, or mental disease, or low order of intelligence to the extent that one is not responsible for his acts offered by the defendant as a defense in charging the jury? We think not. We think the charge correct.

The following is the complete charge on this aspect: "When insanity, or mental disease, or a low order of intelligence to the extent that one is not responsible for his acts is interposed as a defense in a criminal prosecution, the burden rests with the defendant who sets it up to prove such insanity or mental disease, or low order of intelligence, not beyond a reasonable doubt nor by the greater weight of the evidence, but merely to the satisfaction of the jury. Since a criminal intent is an essential element of murder, if by reason of insanity, or mental disease, or a low degree of intelligence, a person is incapable of forming any intent, he cannot be regarded by the law as guilty. The mental derangement must be such as to render the one afflicted therewith incapable of forming a

criminal intent. Every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proven to the satisfaction of the jury, not beyond a reasonable doubt nor by the greater weight of the evidence but merely to the satisfaction of the jury. To establish a defense on the ground of insanity, or mental disease, or a low degree of intelligence, it must be shown merely to the satisfaction of the jury from the evidence that at the time of committing the act the party accused was laboring under such a defect of reason, whether it is insanity, whether it is mental disease, or whether it is a low degree of intelligence, as not to know the nature and quality of the act he was doing, or, if he did know, that he did not know that he was doing wrong. The capacity of the accused to distinguish right from wrong in respect to the act charged as a crime at the time of its commission is made the test of his responsibility. . . . But the defendant's defense is not complete and he is not entitled to acquittal on the ground of insanity, or of mental disease, or a low degree of intelligence if at the time of the commission of the crime he had sufficient capacity to enable him to distinguish between right and wrong, to understand the nature and consequences of his act, and had mental power sufficient to apply that knowledge to his own case. Whatever may be his mental weakness, if a person has knowledge and consciousness that the act he is doing is wrong and will deserve punishment whatever may be his mental weakness, he is in the eye of the law of sound mind and memory, and subject to punishment. If the prisoner at the time he committed the alleged homicide was in a state to comprehend his relations to other persons, the nature of the act and its criminal character, or, if he was conscious of doing wrong at the time he committed the act, he is responsible. But if, on the contrary, he was under the visitation of God either in the form of insanity, or mental disease, or a low degree of intelligence, and could not distinguish between good and evil, and did not know what he did, he is not guilty of any offense against the law, as guilt arises from the mind and wicked will. The Supreme Court of North Carolina in one of its recent decisions has said, 'The insanity, or mental disease, or low degree of intelligence which would be available to a person as a defense, must be a mental disease such as renders the person incapable of knowing the nature and quality of the act he was committing. The test is, as to whether or not he was responsible, is a knowledge between right and wrong. If he knew the act he was engaged in was wrong and that it was unlawful, then in the eyes of the law he would be sane, and his plea would not avail him, but, if at the time of the act he did not know that his act was wrong, and did not know the difference between right and wrong, then in law he would not be responsible for the act that he did, but if he did know so at the

time of the act then his plea of insanity, or mental disease, or low degree of intelligence cannot avail him.' "

There was no exception or assignment of error to the above charge. The charge in substance is taken from *S. v. Jones,* 191 N. C., 753 (758-9). It is the rule laid down in *S. v. Potts,* 100 N. C., 457 (463-4): "That when such proof of the homicide is presented, matters in excuse or mitigation must appear, or be shown, not beyond a reasonable doubt, but to the satisfaction of the jury. The prisoner admitting the killing by means of a shot from a pistol, that instrument, thus used, is a deadly weapon, and the law implies malice, unless its absence is made to appear, and this must be to the satisfaction of the jury. The prisoner to be responsible for his act, must have legal capacity at the time to distinguish between good and evil, and to know what he was doing, to comprehend his relations towards others, the nature of his act, and a consciousness of wrong. In the inquiry as to the prisoner's mental condition he is assumed to be sane, that is, to have the degree of mind and reason required to constitute criminal responsibility for his acts, but he may prove the want of such legal capacity by evidence of the presence of insanity. . . . The measure of criminal responsibility is this: If the prisoner at the time of the homicidal act was in a state of mind to comprehend his relations to others, the nature and criminal character of the act, was conscious that he was doing wrong, he was responsible; otherwise, he was not, and such should be the verdict. . . . We think the law was fairly laid down, and as favorable to the prisoner as he could ask. Indeed, it would seem in one particular, more so. The charge appears to admit of a construction that puts upon the State the proof of sanity, when it becomes a matter of controversy, though it need not be such as to remove all reasonable doubt, but only sufficient to satisfy the minds of the jury. This burden, with this measure of proof, rests, however, upon the accused, according to the repeated adjudications of the Court. *S. v. Brittain,* 89 N. C., 481; *S. v. Payne,* 86 N. C., 609. The charge is strictly in accordance with *S. v. Haywood,* Phil., 376. . . . The test of accountability for crime is the ability of the accused to distinguish right from wrong, and that in doing a criminal act he is doing wrong. This is settled in *S. v. Haywood, supra.*"

In *S. v. Jenkins,* 208 N. C., 740 (741), speaking to the subject, it is said: " 'Low mentality is not the test of insanity.' *S. v. Spivey,* 132 N. C., 989, 43 S. E., 475. He who knows the right and still the wrong pursues is amenable to the criminal law. *S. v. Potts,* 100 N. C., 457, 6 S. E., 657. We are aware of the criticism of this standard by some psychiatrists and others. Nevertheless, the critics have offered nothing better. It has the merit of being well established, practical, and so plain 'that he may run that readeth it.' Hab. 2:2." *S. v. Edwards,* 211

N. C., 555 (557); *S. v. Alston,* 214 N. C., 93 (94); *S. v. Hawkins,* 214 N. C., 326.

In *S. v. Falkner,* 182 N. C., 793 (797), it is written: "In *Shepard v. Tel. Co.,* 143 N. C., 244, the present *Chief Justice (Clark)*, speaking for a unanimous Court, states the rule as follows: 'In criminal cases, when a homicide with a deadly weapon is proved or admitted, there is a presumption of law that the killing is murder, and the burden is on the prisoner to prove all matters in mitigation or excuse to the satisfaction of the jury. *S. v. Matthews,* 142 N. C., 621; and when a totally independent defense is set up, as insanity, which is really another issue, *S. v. Haywood,* 94 N. C., 847, the burden of that issue is on the prisoner." *S. v. Nall,* 211 N. C., 61.

Second. Is a defendant charged with a capital felony, whose defense is the lack of mental capacity to commit the crime of murder in the first degree, entitled to have the jury know the provisions of law contained in C. S., secs. 6237 and 6239, which provide for his detention in a State Hospital, and that his discharge therefrom can only be procured in the manner therein provided? We think not.

N. C. Code, *supra,* sec. 6237, relates to "persons acquitted of certain crimes or incapable of being tried, on account of insanity committed to hospitals." Sec. 6239—"Persons acquitted of crime on account of insanity how discharged from hospital."

The statement of case on appeal shows that the defendant's counsel argued to the jury that the defendant should be acquitted on the ground of insanity, and that, if he was acquitted on that ground, he would not go free, but would be put in the criminal insane department of the State Prison, and he read and explained to the jury sections 6237 and 6239, *supra,* of the Consolidated Statutes. No objection was made to this argument by the solicitor. The solicitor argued to the jury that the defendant would go free if the jury returned a verdict of not guilty on the ground of insanity. No objection was made to this argument by the defendant. The defendant's counsel requested the court to instruct the jury in accordance with his argument to them, but the court declined to give this instruction.

In *S. v. Walls,* 211 N. C., 487 (496), it is said: "Did the court err in refusing to tell the jury of the punishment attempt to commit second degree burglary would carry? We think not. In *S. v. Matthews,* 191 N. C., 378 (381), this Court has decided contrary to defendant's contentions: 'The jury has fully discharged its duty, and performed its functions, under the law of this State, when its members have sat together, heard the evidence, and rendered their verdict accordingly. As the judge must not invade the true office and province of the jury by giving an opinion in his charge, either in a civil or criminal action, as

to whether a fact is fully or sufficiently proven (C. S., 564), so the jury must be content to leave with the judge the grave responsibility imposed upon him to render a judgment, upon their verdict, according to law.'"

All the evidence was to the effect that the defendant was guilty of murder in the first degree. The killing was willful, deliberate and premeditated for the purpose of robbing the deceased. This was so found by the jury beyond a reasonable doubt. The question of insanity, the defense of defendant, was submitted to the jury upon a charge by the court below free from error.

The defendant was given a fair and impartial trial. In law we find No error.

IN RE THE MATTER OF THE WILL OF CORNELIUS R. WILLIAMS.

(Filed 22 March, 1939.)

1. Wills §§ 10, 24—Holograph will is found among valuable papers if it is found among papers regarded by decedent as valuable.

Testimony of witnesses that the paper writing propounded as the holograph will of deceased was found in his home in a washstand or bureau drawer in which he also kept deeds and receipts, is sufficient to be submitted to the jury on the question of whether the paper writing was found among his valuable papers and effects as required by C. S., 4144 (2), since the requirement of the statute is met if the paper writing is found among papers and effects regarded by decedent as valuable.

2. Wills §§ 9, 24—

Testimony of three witnesses that the paper writing propounded as the holograph will of decedent was in his handwriting, takes the case to the jury as to this requirement of the statute, C. S., 4144 (2), notwithstanding conflicting testimony of caveator.

3. Wills § 23a—

Where the paper writing propounded as a holograph will is attacked mainly on the grounds that it was not in the handwriting of deceased and was not found among his valuable papers, the introduction of the paper writing in evidence for the purpose of comparison of handwritings, C. S., 1784, and the admission of the record solely to show that it was probated in common form, will not be held for error.

4. Evidence § 17—

The trial court has the discretionary power to permit a party to cross-examine his own witness.

5. Wills § 25: Trial § 31—Instruction held not erroneous as containing expression of opinion by the court, it appearing that the exception related to the statement of evidence in the case.

An instruction of the court in stating the evidence that the propounder had offered three witnesses, beside herself, who had testified that they were familiar with the handwriting of deceased, and had compared the handwriting of the purported will, and had given it as their opinion that the paper writing and every part thereof is in the handwriting of the deceased, *is held* not erroneous as an expression of the opinion by the court on the weight of the evidence, C. S., 564, it appearing that the court, prior to this instruction, went into detail in citing caveators' testimony.

6. Wills § 25—Instruction as to requirement that paper writing be in decedent's handwriting held not error when construed as a whole.

In caveat proceedings of a paper writing propounded as a holograph will, an inadvertent instruction of the court to the jury that it was necessary for them to find by the greater weight of the evidence that the name of the decedent was subscribed to the paper writing or inserted in some part thereof in his handwriting, will not be held for error when it appears that the court repeatedly instructed the jury that it was necessary that the paper writing and every part thereof be in the handwriting of the deceased.

7. Trial § 36: Appeal and Error § 39e—

An instruction will be construed as a whole, and an exception thereto will not be sustained when the instruction, so construed, contains no prejudicial error.

8. Wills § 24—

Upon the evidence in this case the refusal of the court to give the peremptory instruction requested by caveator *is held* not error.

APPEAL by caveators from *Pless, Jr., Judge,* and a jury, at October Term, 1938, of YANCEY. No error.

This is a proceeding *in rem*—a caveat to the will of Cornelius R. Williams—under N. C. Code, 1935 (Michie), sec. 4159, etc. Williams left surviving him his widow, Daisy Williams, and the following heirs at law: W. H. Williams, Charlie Williams, Charlotte Byrd, and Jane Taylor; Mack Williams, now deceased, who left the following children: Edith Williams, Lula Williams, Troy Williams, Minnie Williams, Mae Williams, Faye Williams, and Thelma Williams, who are infants, and W. D. Adkins was appointed their guardian *ad litem.* Citation was duly issued for all the heirs at law of C. R. Williams and devisees and legatees under the purported will. In the caveat proceedings the record discloses "W. H. Williams, Charlie Williams, Charlotte Byrd and Jane Taylor, caveators, respectfully show to the Court," etc.

Jane Taylor and Charlotte Byrd for answer to the caveat say, in part: "These heirs at law of the late Cornelius Williams declare that the paper writing filed with the clerk of this court is the true and proper

will of their brother, Cornelius R. Williams, and each and every part of said will is in his own handwriting. That neither of these respondents ever authorized anyone to file a caveat to said will in their behalf, and now repudiate the said caveat so far as it relates to them. . . . It is not denied that W. H. Williams and Charlie Williams are brothers and Charlotte Byrd and Jane Taylor are sisters of the late Cornelius R. Williams. . . . That each, every and all of the allegations contained in paragraph 6 of the caveat are untrue, as these answering respondents are advised, and said allegations are denied. That these answering respondents verily believe the document in question to be the last will and testament of their brother, as he in his life time informed these respondents of his intention to leave his property just exactly as set out in the will. . . . These respondents being desirous that the true intention of their brother be carried out, pray that the court declare the document filed in the office of the clerk of the Superior Court, and purporting to be the last will and testament of their deceased brother, be declared to be his last and final testament and that he had sufficient mental capacity to execute the same, and that the same and every part thereof is his last will and testament."

Daisy Williams, the widow's answer, in part, says: "That each and all the allegations set forth in paragraph 6 of the caveat are untrue and therefore denied, except it is admitted that on the 23rd day of March, 1937, Daisy Williams presented herself before the clerk of the Superior Court of Yancey County and was appointed administratrix of the estate of her deceased husband, and at that time she did not know of the existence of his will or that he had ever made a will, and she, in absolute good faith, qualified as administratrix, but a few days after having qualified she found the paper writing which she later filed as the will of her late husband, Cornelius R. Williams. That after having been appointed administratrix as aforesaid, this answering respondent was advised that she should look through all the papers of her deceased husband and see if a will could be located. That pursuant to such advice she, in the presence of J. Will Higgins, her brother, Rex Miller and Brown Williams, went through all the papers of her late husband and found the paper writing which she afterwards presented to the clerk of this court and had same probated as the will of her late husband, and she surrendered her letters as administratrix, and the order appointing her administratrix was thereupon stricken out and annulled, and that each and every word and figure in said paper writing is in the handwriting of her deceased husband, and is in the exact form in which it was found, and was found among the valuable papers of her late husband, Cornelius R. Williams. In further answer to paragraph 6 of the caveat, this answering respondent says that on the 11th day of March,

1937, her husband complained of being ill, and went to the hospital in Asheville on the 17th day of March, and there was never a moment, in the opinion of this affiant, before March 12th, on March 12th and after March 12, 1937, when her husband was not in full possession of his mental faculties, thoroughly understood and comprehended everything he was doing, and the same condition on the part of her husband continued until his death; that he was physically able to write, and the paper writing exhibited as his will is in his own proper handwriting. And further, that up until the time he was taken to the hospital he was able to write. And further answer to paragraph 6, this answering respondent says that the disposition of the property under the will of C. R. Williams corresponds precisely as the said C. R. Williams had indicated several times to this answering respondent and to others, with the manner in which he desired to dispose of his property. Wherefore, this answering respondent prays the court for a judgment declaring the paper writing which has already been probated in common form, to be the last will and testament of the said C. R. Williams, her late husband, and that the same be probated in solemn form."

W. D. Adkins, guardian *ad litem* of Edith Williams, Lula Williams, Troy Williams, Minnie Williams, Mae Williams, Faye Williams and Thelma Williams, who, for answer to the caveat in this cause, says: "That in answer to paragraph 6 of the caveat, this guardian *ad litem* says that he has made an investigation and has examined the paper writing referred to as Exhibit 'A' and designated as the last will and testament of Cornelius R. Williams; that he has examined various papers bearing the signature of Cornelius R. Williams, and which the guardian *ad litem* verily believes to be the signature of the said Cornelius R. Williams, and having often seen the said Williams write and knowing his signature; and therefore this guardian *ad litem* avers that the said paper writing is the last will and testament of the said Cornelius R. Williams, and the allegations of paragraph 6 of the caveat inconsistent with the allegations contained in this paragraph are hereby denied. This guardian *ad litem* avers, however, upon information and belief, that the said Daisy Williams was appointed administratrix before she knew that any will existed and before the last will and testament of Cornelius R. Williams was found among his valuable papers. It is denied that the said Cornelius R. Williams was so sick and incompetent that he did not have sufficient mental capacity to execute said will, but, on the contrary, this guardian *ad litem* is advised, informed and verily believes, that the said Cornelius R. Williams was rational up until his death. That this guardian *ad litem*, before filing answer in this cause, made an investigation of the matters in connection with the last will and testament of Cornelius R. Williams in order that he might be in position to protect

the interests of the said minors, and this answer is the only answer that said guardian *ad litem* can in good conscience file in said cause. This guardian *ad litem* prays the court for a judgment declaring said paper writing referred to as Exhibit 'A' to be the last will and testament of the said Cornelius R. Williams and that said guardian *ad litem* recover the costs in this behalf incurred."

The purported will is as follows: Exhibit "A." "I, C. R. Williams, do hereby will and bequeath to Daisy Williams my wife all my personal property to use as her own. I also will and bequeath to Daisy Williams my wife all my real estate as long as she lives. At her death the real estate is to be divided between Brown Williams and Coy Williams equal. Give Coy Williams the place known as the School House place. Give Brown Williams the home place. Divide the mountain place equal between them. I request Daisy Williams my wife to pay Jane Taylor the amount due her as shown on my account book. Also pay Rexter Miller $100.00 one hundred dollars that I owe him. To this I set my hand and seal March 12th, 1937. C. R. Williams."

The evidence of the propounders was to the effect that the purported will of Cornelius R. Williams was made on 12 March, 1937. Dr. I. W. Bradshaw, an expert physician who had been the family physician for some twenty years and attended him in his last illness, testified, in part: "He went to the hospital about 16th or 17th of March. I have an opinion satisfactory to myself at the time I saw him and think his mental condition was good. At all times that I saw him I think he had physical and mental capacity sufficient to understand that he was making a will, and the manner in which he was disposing of his property and to whom it was going. (The 12th of March, the day on which the purported will was signed, was on Friday). His temperature was 100½ or somewhere along there. The way that I recall it is that on March 12th, according to the calendar, I saw him lying on the bed with his clothes on down here in Ramsaytown."

J. Will Higgins testified, in part: "Well, I think I know the handwriting of C. R. Williams. I have often seen him write. To the best of my knowledge that paper, the signature to it and the body of it is in Neely Williams' handwriting. C. R. Williams and Neely Williams is the same man. Well, I imagine that I lived 400 or 500 yards from him, just across the river. I lived that close to him 18 years. . . . . I went over there and she (Daisy Williams) requested me to go through the papers with her and she brought out a drawer; I don't know whether it was a washstand, bureau or what it was, and set it down at my feet and I was going through each separate parcel and examining the papers, and I found a bunch of deeds, this envelope was in there with it and four or five deeds in it; and I called over a receipt which Mr. Williams

had given his sister Jane Taylor. I called over that, and went over these receipts and the papers, and finally I told her I had found a will, and I don't think I went any further with the papers."

Richmond Bennett testified, in part: "I knew C. R. Williams, commonly known as Neely Williams. I knew him for something like 25 years. I have often seen him write. The paper writing handed me purporting to be his last will and testament and every part thereof, in my opinion, looks to be in his handwriting. Yes, the writing, as I said, compares with his handwrite."

Mr. Scott testified, in part: "I am cashier of the local branch of the Northwestern Bank, and have been for a total of more than 18 years. During that time I have had opportunity to compare and scrutinize handwritings. I could give an opinion satisfactory to myself upon comparison of handwritings as to whether or not it is written by the same man. . . . In my opinion these papers are in the same handwriting."

Daisy Williams testified, in part: "I am the widow of Neely Williams, and I lacked from the 18th of March until the 9th of September being married 20 years. At the time of his death, Coy Williams, Brown Williams, my husband and myself composed our household. Coy Williams and Brown Williams are the same Coy Williams and Brown Williams named in the will. Brown Williams has lived in our home for more than 5 years. We took Coy Williams when he was seven years old, took him on the 18th of December, 1927, and he is still a member of our family, but is in the army now. After my husband's death Coy went to the army. I think I know my husband's handwriting. He was postmaster at Ramsaytown at the time of his death. I have an opinion satisfactory to myself as to whose handwriting the signature and every part of the paper writing you hand me is; it is my husband's. . . . I sent for Squire Higgins. When he came in the room Rex told me to get the papers and I got the drawer that he kept his papers in and brought it to him. I never saw the paper that I hold in my hand until before Squire Higgins took it out of the drawer. . . . He (C. R. Williams) became sick in his last sickness on the 11th day of March, 1937. And he went to the hospital on the 17th of March. Dr. Bradshaw came to see him on the 12th of March. That was Friday and he came on Sunday the 14th. I took him to the hospital on the 17th, and he died on the 18th of March. I don't know of any time prior to the date of his death that my husband never had sufficient mental capacity to know what he was doing if he signed a paper writing (a will) and that he was actually disposing of his property, to whom he was disposing and what he was disposing. On the 12th of March my husband stayed in the postoffice; he was up and down but didn't attend the postoffice; he told me

Friday morning to get him some clean overalls and clean shirt so he could lie on the bed, so he was up and down all day. I attended the postoffice that day, and that required that I be away from the house a great deal of the time. I didn't know anything about his having left a will. The drawer that Mr. Higgins went through had a whole lot of different kinds of papers, this will in it, and some receipts for one thing that I know of. These papers that you have shown to witnesses were in the same drawer where the will was and some were not. I have looked over the sales tax receipts that have been shown to witnesses."

W. H. Williams, a witness for caveators and a brother of C. R. Williams, testified, in part: "I had often seen my brother C. R. Williams write his name. I think I know his handwriting pretty well. I have seen his signature to papers often. I have an opinion satisfactory to myself as to whether the name to the paper you show me is the signature of my brother C. R. Williams or not. My opinion is that it is not his signature. I have seen him write from time to time since he was small. Ever since he was a small boy." On cross-examination, he testified: "I asked you if the C. on the check is similar to the C. on the will? Ans.: It is a little bit similar to it. Q. How does the signature on the check compare with the signature on the purported will? Ans.: There is a little bit of similarity. Q. Mr. Williams, I will ask you to look at this check (check and will handed witness) and ask you if these two signatures are not similar? (Objection.) (Another check handed witness.) Mr. Williams, do you have an opinion satisfactory to yourself as to whose signature appears on the paper writing I hand you? Ans.: It appears similar. By the court: You didn't answer his question. Q. Do you have an opinion satisfactory to yourself as to whose signature appears on the paper writing I hand you? Ans.: Just like I tell you, the R. and the rest—(Interrupted by the court)—By the court: State whether or not you have such an opinion, Mr. Williams, and if you do say so, and if you don't say so. Q. And then you can make your explanation—what is your opinion? By the court: The question is do you have such an opinion? Ans.: I couldn't say point blank just whose, but it might be his. By the court: There is just one answer to that question and that is 'Yes' or 'No' as whether or not you have such an opinion. Ans.: Yes, it must be his signature, but I never saw him sign a C. like that." Later W. H. Williams testified, speaking of the will: "I don't believe that it is his handwriting." He further testified, "Jane Taylor and Charlotte Byrd were not here when I filed a caveat, but they agreed to it before I filed it."

Mr. Edwards testified to the effect that on March 11th, the day before the purported will was dated, the deceased, C. R. Williams, sent a special delivery letter to the wrong place, and upon inquiry about it by Edwards,

he told him that he might have made that mistake, that he was suffering so that he didn't know what he was doing, or words to that effect. The caveators elicited from one of the witnesses offered by the propounders, Mr. Lyon, the opinion that the writing appearing at the end of the paper writing purporting to be the will is not the signature of Mr. Williams.

The issue submitted to the jury and their answer thereto were as follows: "Is the paper writing propounded by Mrs. Daisy Williams, and every part thereof, the last will and testament of Cornelius R. Williams? Ans.: 'Yes.' "

The court below rendered judgment on the verdict. The caveators made numerous exceptions and assignments of error and appealed to the Supreme Court. The material ones and necessary facts will be set forth in the opinion.

Charles Hutchins and G. D. Bailey for caveators.
Anglin & Randolph and Watson, Fouts & Watson for propounders.

CLARKSON, J. In the present proceeding we are dealing with what is termed a holograph will—a creature of statute—N. C. Code, 1935 (Michie), sec. 4144 (2), which is as follows: "Wills and testaments must be admitted to probate only in the following manner: . . . (2) In the case of a holograph will, on the oath of at least three credible witnesses, who state that they verily believe such will and every part thereof is in the handwriting of the person whose will it purports to be, and whose name must be subscribed thereto, or inserted in some part thereof. It must further appear on the oath of some one of the witnesses, or of some other credible person, that such will was found among the valuable papers and effects of the decedent, or was lodged in the hands of some person for safe-keeping."

It will be noted that to make a valid holograph will it is necessary (1) that it must appear on the oath of some one of the witnesses or of some other credible person, that such will was found among the valuable papers and effects of the decedent or was lodged in the hands of some person for safe-keeping.

In *In re Westfeldt,* 188 N. C., 702 (709), it is written: " 'Valuable papers consist of such as are regarded by a decedent as worthy of preservation, and therefore in his estimation, of some value; depending much upon the condition and business and habits of the decedent in respect to keeping his valuable papers.' *Winstead v. Bowman,* 68 N. C., 170. 'What is meant by *valuable papers?* No better definition perhaps, can be given, than that they consist of such as are regarded by the testator as worthy of preservation, and, therefore, in his estimation, of

some value. It is not confined to deeds for land or slaves, obligations for money, or certificates of stock. Any others which are kept and considered worthy of being taken care of by the particular person, must be regarded as embraced in that description. This requirement is only intended as an indication on the part of the writer, that it is his intention to preserve and perpetuate the paper in question as a disposition of his property; that he regards *it* as valuable.' *Marr v. Marr,* 39 Tenn., 306. . . . *Ashe, J.,* in *Brown v. Eaton,* 91 N. C., p. 30, said: 'Where a person has two or more depositories of his valuable papers and effects, the *finding* in either will suffice. It is not necessary it should be found in that which contains the most valuable papers and effects. *Winstead v. Bowman,* 68 N. C., 170.' *Hill v. Bell,* 61 N. C., 122; *Hughes v. Smith,* 64 N. C., 493; *Cornelius v. Brawley,* 109 N. C., 542; *In re Sheppard's Will,* 128 N. C., 54; *Harper v. Harper,* 148 N. C., 453." *In re Will of Groce,* 196 N. C., 373 (375-6); *Dulin v. Dulin,* 197 N. C., 215 (220).

The purported will was found in a drawer—washstand or bureau—in the home of C. R. Williams. "The drawer that he kept his papers in." In the drawer was a bunch of deeds, four or five, and receipts, etc. We think the evidence was sufficient to have been submitted to the jury as to whether the purported will "was found among the *valuable papers and effects* of the deceased." *In re Will of Shemwell,* 197 N. C., 332.

(2) It must appear "on the oath of at least three credible witnesses, who state that they verily believe such will and every part thereof is in the handwriting of the person whose will it purports to be, and whose name must be subscribed thereto, or inserted in some part thereof."

J. Will Higgins testified, in part: "Well, I think I know the handwriting of C. R. Williams. I have often seen him write. To the best of my knowledge that paper, the signature to it and the body of it is in Neely Williams' handwriting." The testimony of Richmond Bennett, Daisy Williams and Mr. Scott was to the same effect. "A credible witness is one who is competent to give evidence; also one who is worthy of belief." Black's Law Dictionary, 3rd Ed., p. 475.

The purported will was a natural one. The widow—the primary object of the testator's bounty—was given the personal property "to use as her own" and a life estate in the real estate. At her death the real estate to be divided equally between Brown Williams and Coy Williams, who were practically raised by C. R. Williams and his wife, who had no children. The sisters of C. R. Williams, Charlotte Byrd and Jane Taylor, in their answer say "That the paper writing filed with the clerk of the court is the true and proper will of Cornelius R. Williams and each and every part of said will is in his own handwriting. . . . "As he in his life-time informed these respondents of his intention to leave

his property just exactly as set out in the will. That he had sufficient mental capacity to execute the same and that the same and every part thereof is his last will and testament." The answer of W. D. Adkins, guardian of the minor children, is to the same effect and further, "And this answer is the only answer that said guardian *ad litem* can *in good conscience* file in said cause." The answer of the guardian *ad litem* was filed after an investigation. The only real contestant seems to be W. H. Williams.

There was no probative evidence that the testator was not of sound and disposing mind and memory, and the only questions seriously presented in the trial below were as to the paper writing being in the handwriting of the deceased and the place where it was found. We see no error in the propounders introducing in evidence the paper writing purporting to be the will of C. R. Williams and marked "Propounders Exhibit 'A,'" or the record admitting probate solely to show it was probated in common form.

It is well settled that the probate of a will in common form is incompetent as evidence of its validity on an issue of *devisavit vel non,* raised by a caveat filed to said will. *Wells v. Odum,* 205 N. C., 110. N. C. Code, *supra,* sec. 1784, provides for the proof of handwriting by comparisons; this section is interpreted in *Newton v. Newton,* 182 N. C., 54. We do not think that the above statute was impinged. The cross-examination of John P. Lyon, witness for propounders, by the propounders, was in the discretion of the trial judge. The court below charged the jury: "The propounder, Mrs. Daisy Williams, has offered the testimony of three persons, in addition to herself, who have testified that they are familiar with the handwriting of the deceased, and have compared the paper writing purporting to be the will with other writing which the evidence tends to show is the handwriting of the deceased, and all have given it as their opinion that the paper writing and every part thereof is in the handwriting of the deceased, C. R. Williams."

After quoting the above portion of the charge, "the caveators insist that the court erred in giving its opinion in the trial of the cause." But the court, prior to the above excerpt, went into detail citing caveators' testimony and, taking the charge as a whole, we can see no expression of opinion as is prohibited by C. S., 564.

The caveators contend: "That the court erred in its charge to the jury concerning the requisites necessary to the probate of a will in solemn form, in that he stated, 'Now to make the case as plain as possible, the court instructs you again if you find, and find by the greater weight of the evidence, the burden being on Mrs. Williams, the propounder, that

the paper writing was found among the valuable papers of C. R. Williams and that the name subscribed thereto, or inserted in some part thereof, was in the handwriting of the deceased, Mr. C. R. Williams, then I instruct, gentlemen of the jury, as a matter of law, upon that finding by the greater weight of the evidence, it would be your duty to answer the issue, 'Yes.' "

Theretofore the court below had charged, "Now our statute (sec. 4131) defines very clearly what must be done before one can prove a last will," etc. The statute is set forth in the charge.

The court explained the law and gave fully the contentions of the caveators in every detail: "So the court instructs you that whether you shall or shall not find that the purported signature at the bottom is that of Mr. Williams, that if you find that the name appearing at the top of the paper writing is in his handwriting, then in that phase of the case that would be sufficient; however, in that connection *the court also instructs you that the paper writing and every part thereof must be in the handwriting of the deceased, and before you could answer the issue in favor of the propounders you must find, and find by the greater weight of the evidence, that the paper writing and every part thereof purporting to be his will is in the handwriting of C. R. Williams.*" (Italics ours.)

The court goes on, as to the will being found among the valuable papers and effects, and finally charges: "Now, gentlemen, I reiterate again as to the instructions given at the beginning of the charge, in stating the evidence offered by each side, and in stating the contentions given by each side the court doesn't intend to express or intimate any contention or evidence or intimate an expression on the part of the court as to whether any fact has or has not been proven, and if you find any act or expression of the court in favor of either side I instruct you that it is a mistake, the court has nothing to do with that, the finding of facts is a matter for the jury to determine. (Now to make the case as plain as possible, the court instructs you again, if you find and find by the greater weight of the evidence, the burden being on Mrs. Williams, the propounder, that the paper writing was found among the valuable papers of Mr. C. R. Williams, and that the name subscribed thereto and inserted in some part thereof was in the handwriting of the deceased, Mr. C. R. Williams, then I instruct you, gentlemen of the jury, as a matter of law that upon that finding by the greater weight of the evidence it would be your duty to answer the issue, 'Yes.') If, however, you do not so find, that is, if the propounders have failed to carry the burden imposed upon them by law and have not satisfied you by the greater weight of the evidence of sufficient facts to justify you in making

that finding, then, gentlemen of the jury, it would be your duty to answer the issue, 'No.'"

The above portion of the charge in parenthesis was excepted to and assigned as error. We cannot so hold. Taking the prior charge and this portion, there is no such conflict that could not be reconciled. On the whole charge we see no prejudicial or reversible error. The charge must be construed as a whole. We see no error in the "further charge" or the refusal to give the following prayer for instruction made by the caveators, viz.: "The court charges the jury that it is the duty of the jury upon all the evidence to answer the issue submitted, 'No.'"

Taking the entire record it seems that the heirs and widow of C. R. Williams, with the exception of caveators, were satisfied with the will in every respect. The jury has reached the same conclusion as the propounders, after a careful trial of the case free from prejudicial or reversible error.

In the judgment we find

No error.

STATE OF NORTH CAROLINA EX REL. AVERY COUNTY; SMITH EGGERS, CHAIRMAN; IRA M. VANCE; J. W. HUGHES; J. H. PRITCHARD AND F. P. GUINN, BEING AND CONSTITUTING THE BOARD OF COUNTY COMMISSIONERS OF AVERY COUNTY, v. J. D. BRASWELL AND AMERICAN INDEMNITY COMPANY.

(Filed 22 March, 1939.)

1. Pleadings § 20—

A demurrer admits the truth of every material fact alleged in the complaint, and upon demurrer the complaint will be liberally construed with every reasonable intendment and presumption in favor of the pleader, and the demurrer will be overruled unless the complaint is fatally defective, C. S., 535.

2. Public Officers § 7a—

A public officer must use the same reasonable skill and diligence in the performance of his official duties for the benefit of the public that careful men usually exercise in the management of their own affairs.

3. Principal and Surety § 5a—

The liabilities of a surety on the bond of a public officer for the faithful performance of his official duties are coextensive with those of the officer himself, and the bond covers all the statutory duties of the officer as though expressly inserted in it.

4. Counties § 7: Principal and Surety § 5a—Complaint alleging wrongful approval of county vouchers by county accountant held sufficient as against demurrer of accountant and his surety.

This action was instituted against a county accountant and the surety on his official bond, which was conditioned upon the faithful performance of his official duties, Michie's Code of 1935, sec. 1334 (69). The complaint alleged, in effect, that the accountant wrongfully approved vouchers in payment for services rendered by a company in the reorganization of the county finances, and that the vouchers so approved by the accountant and paid by the county greatly exceeded in amount the total contract price agreed upon with the company for such services, and that the sums were paid before the company was entitled to payment under the contract. *Held:* Under the provisions of the County Fiscal Control Act it is the duty of the county accountant to keep detailed accounts of appropriations and disbursements of county funds and to certify on each warrant or order drawn against the county that provision has been made for its payment and an appropriation duly made or a bond or note duly authorized as required by the County Fiscal Control Act, Michie's Code of 1935, sec. 1334 (15), (53), (59), (60), (66), (67), (68), (75), and defendants' demurrer to the complaint was properly overruled, Michie's Code of 1935, sec. 1334 (71).

5. Same—Liabilities of public officer and surety on his bond may not be defeated by claim that other officer had also breached his duty.

This action was instituted against the county accountant and the surety on his official bond for alleged wrongful approval of county vouchers by the accountant. Defendants contended that the board of county commissioners had general supervision over the county finances and that upon signature of the vouchers by the chairman of the county board, the certification of same by the accountant became a purely ministerial function. *Held:* The duties of the county accountant in certifying county vouchers is clearly set forth in the County Fiscal Control Act, which duties are special in character and are in addition to and not in substitution for the duties and functions of other county officers, and even if it be conceded that the signing of the voucher by the chairman of the board was malfeasance, defendants may not avoid liability on the ground that some other officer was guilty of negligence or malfeasance.

APPEAL by defendants from *Rousseau, J.*, at October Term, 1938, of AVERY.

Civil action to recover on bond of defendant J. D. Braswell and his surety, damages alleged to have been sustained by reason of malfeasance of county accountant of Avery County, heard upon demurrer to complaint.

The plaintiffs make substantially these allegations:

1. That plaintiff Avery County is a municipal corporation organized and existing for governmental purposes, under the laws of the State of North Carolina, and that the coplaintiffs are and constitute its board of county commissioners.

2. That on 3 December, 1934, defendant J. D. Braswell was appointed to the office of, and qualified as, and entered upon the discharge of the duties of county accountant of Avery County, to serve at the will of the board of commissioners of said county, or until the appointment of his successor; that he executed and filed a bond in the sum of five thousand dollars, payable to the State of North Carolina, with defendant American Surety Company as surety, conditioned upon the faithful performance by him of all the duties of such office; that he served as such county accountant until 1 January, 1937, at which time he was reappointed and qualified for a further period with another surety, to which the action of "State of North Carolina, on relation of Avery County *et al.*, *v.* J. D. Braswell and the Fidelity and Casualty Company of New York," relators, *post,* 279.

3. That on 8 September, 1933, plaintiff Avery County, by and through its board of county commissioners, entered into a written contract with Bray Brothers Company, which was approved by the Local Government Commission of North Carolina, relative to the issuance of $149,000 "Avery County, North Carolina, Funding and Refunding Bonds," to be exchanged for outstanding indebtedness of said county "in the form of bonds and notes of a like or greater face amount," by the terms of which contract Bray Brothers Company, in addition to preparing a financial statement of the county and a plan for readjusting the county's indebtedness and submitting same to the bond and note holders, agreed: (1) To do, at its own expense and cost, all things necessary and required by law for the completion and approval of said bonds, for which the county agreed to pay it an amount equal to 1¼ per centum of the par value of said bonds, payable $300 in cash and the balance when the bonds are completed; and (2) To use, at its own expense and cost, its facilities and best efforts to effect an exchange and to make exchange of said bonds, through and subject to the Local Government Commission of North Carolina.

4. That Bray Brothers Company did all things necessary for the preparation of the said $149,000 Avery County, North Carolina, Funding and Refunding Bonds, which when completed and executed by Avery County were deposited with the Local Government Commission of North Carolina for the purpose of exchange as planned, for which, under the terms of said written contract, it was entitled to receive $1,862.50, that is 1¼ per cent of the par value of said bonds; and that further pursuant to provisions of the written contract, Bray Brothers Company effected the exchange and delivery of only $59,000 of said bonds for which, under the terms of said contract, it was entitled to receive the further sum of $442.50, or ¾ of 1% of the par value of the bonds so exchanged, making a total of $2,305.00 due for all services rendered under said contract.

That the remainder of the bonds have been returned to Avery County, and, by reason of expiration of time limit for delivery, are now of no value.

The complaint further alleges:

"8. That from time to time while said contract was being carried out by said Bray Brothers Company, and for sometime thereafter, claims were filed with the county accountant by C. A. Bray, for and on behalf of Bray Brothers Company, for certain amounts to apply on services rendered on said contract, which claims and vouchers were in a negligent, careless and wanton manner approved for payment by the said county accountant, and thereupon paid by the board of county commissioners, on the dates and in the amounts as follows:

"1—December	27,	1933,	County Voucher	$300.00
2—April	22,	1934,	County Voucher	500.00
3—May	22,	1934,	County Voucher	800.00
4—August	21,	1934,	County Voucher	800.00
5—November	28,	1934,	County Voucher	500.00
6—May	6,	1935,	County Voucher	500.00
7—October	7,	1935,	County Voucher	500.00
8—May	22,	1936,	County Voucher	500.00
9—August	3,	1936,	County Voucher	600.00
10—October	3,	1936,	County Voucher	700.00
11—December	7,	1936,	County Voucher	700.00
12—January	10,	1937,	County Voucher	200.00
13—February	1,	1937,	County Voucher	902.50

"Making a total sum of $7,502.50, paid said Bray Brothers Company for services rendered on said contract.

"And plaintiff avers that the said amount paid by it to Bray Brothers Company being $7,502.50 was an overpayment in the sum of $5,197.50, which overpayment plaintiff alleges was wrongfully, knowingly and fraudulently collected from it, in that from time to time claims were presented purporting to be for 'part payment on services rendered,' and approved for payment by the defendant J. D. Braswell, County Accountant, which approval the plaintiff alleges was due to the careless, negligent and wanton manner and acts on the part of said County Accountant.

"9. That on the 3rd day of December, 1934, the date of the appointment of the defendant J. D. Braswell as County Accountant for Avery County, and the date on which he filed said bond for the faithful performance of the duties of said office, the plaintiff, Avery County, was

not indebted to said Bray Brothers Company in any amount whatever, for services rendered under said contract for the issuance and exchange of said Funding and Refunding Bonds, and plaintiff avers that on said date said Bray Brothers Company had been fully paid; that thereafter, and during said County Accountant's first term of office, which expired the 1st day of January, 1937, and while said bond was in full force and effect, said County Accountant carelessly, negligently and without regard to the faithful performance of the duties of his office, and the duty owed the plaintiff in passing upon claims filed against it, wrongfully, negligently and carelessly approved for payment claims filed by Bray Brothers, or by C. A. Bray on behalf of Bray Brothers Company, purporting to be for services rendered under said contract, and vouchers issued thereon, as follows:

"May	6, 1935,	County Voucher	$500.00
October	7, 1935,	County Voucher	500.00
May	22, 1936,	County Voucher	500.00
August	3, 1936,	County Voucher	600.00
October	3, 1936,	County Voucher	700.00
December	7, 1936,	County Voucher	700.00
			$3500.00

"And the plaintiff avers that by reason of the negligent, careless and wanton acts, and by reason of the unfaithful performance of the duties of said County Accountant, said Bray Brothers Company wrongfully, knowingly and fraudulently collected from the plaintiff the sum of $3500.00, for which amount the said J. D. Braswell, County Accountant, and the defendant American Indemnity Company, surety on his bond, are liable."

Upon the allegations, plaintiffs pray judgment against J. D. Braswell in the sum of $3,500, and against defendant American Indemnity Company in penal sum of the bond to be discharged upon payment of $3,500, and for costs.

Defendants demurred to the complaint for that it fails to state facts sufficient to constitute a cause of action against them or either of them jointly or severally.

From judgment overruling the demurrer, defendants appeal to the Supreme Court and assign error.

Charles Hughes for plaintiffs, appellees.

Byron E. Williams, Robertson Wall, and Harkins, Van Winkle & Walton for defendants, appellants.

WINBORNE, J. Does the complaint state a cause of action? On this question, we are in agreement with the ruling below.

It is generally held in this jurisdiction that, by demurring, a defendant admits as true every material fact alleged in the complaint. Both the statute and our decisions require that the complaint be liberally construed and every reasonable intendment and presumption must be in favor of the pleader. The complaint must be fatally defective before it will be rejected. C. S., 535. *Ins. Co. v. McCraw, ante,* 105, 1 S. E. (2d), 369, and cases there cited.

"Every public officer is bound to perform the duties of his office faithfully, and to use reasonable skill and diligence, and to act primarily for the benefit of the public. In other words, he is bound, *virtute officii,* to bring to the discharge of his duties that prudence, caution and attention which careful men usually exercise in the management of their own affairs." 22 R. C. L., 461, Public Officers, sec. 124.

Where a public officer is required to give a bond for the faithful performance of the duties pertaining to his office, the engagement of the surety executing the bond rests on the same legal obligation as is imposed by law upon the officer himself. Whatever is a breach of the conditions of the bond as regards the officer is equally so as to the surety. A bond for the faithful performance of official duty is as binding on the principal and his sureties as if all the statutory duties of the officer were inserted in it. 22 R. C. L., 497—Public Officers, sec. 176.

The office of county accountant was created under, and the duties pertaining thereto are prescribed by and defined in the County Fiscal Control Act. Public Laws 1927, ch. 146; Michie's Code of 1935, sec. 1334 (53), *et seq.* It is required that the county accountant shall execute and file bond "conditioned for the faithful performance of his duties under this act." Michie's Code of 1935, sec. 1334 (69). It is, therefore, appropriate to advert to the provisions of that act:

The declared purpose of the Act is "to provide a uniform system for all the counties of the State by which the fiscal affairs of the counties and subdivisions thereof may be regulated, to the end that accumulated deficits may be made up, and future deficits prevented, either under the provisions of this act or under the provisions of other laws authorizing the funding of debts and deficits, and to the end that every county in the State may balance its budget and carry out its functions without incurring deficits." Section 24. Michie's Code of 1935, sec. 1334 (75). The office of county accountant with prescribed duties was created with this special purpose in view. The duties are special in character, and are additional to but not in substitution for the duties and functions of other offices pertaining to the ordinary operation of county government. *Power Co. v. Clay County,* 213 N. C., 698, 197 S. E., 603.

The County Fiscal Control Act, in providing the machinery for gathering data for the "Budget Estimate" as basis for appropriation resolution to be subsequently adopted, designates the county accountant as the moving agency, and requires that he "shall prepare (a) his estimate of the amounts necessary to be appropriated for the next ensuing fiscal year for the different objects of the county and subdivisions, listing each object of disbursement under the appropriate class of functions as defined in Section two of the Act, . . .; (b) an itemized estimate of the revenue to be available during the ensuing fiscal year . . . and (c) an estimate of the amount of unencumbered and surplus revenues of the current fiscal year in each fund . . ." Section 6. Michie's Code of 1935, sec. 1334 (57). Upon the basis of these estimates and statements submitted by the county accountant, the appropriations are made by the board of county commissioners in the month of July, by the adoption of the appropriation resolution, "the form of which shall be prescribed by the county accountant." Section 8. Michie's Code of 1935, sec. 1334 (59).

Section 9 of the act requires that a copy of this appropriation resolution shall be kept on file both by the county treasurer and by the county accountant "for their direction in the disbursement of county funds." Michie's Code of 1935, sec. 1334 (60). This resolution thereby becomes the chart for the county accountant and the county treasurer in disbursing the county's funds. (See *Sing v. Charlotte,* 213 N. C., 60, 195 S. E., 271, as applied to municipalities.)

Thus whether he be, or not be the individual county accountant who prepared the budget and appropriation resolution, the incumbent has before him at all times the information as to what is contained therein.

The act, section 15, further provides that: "No contract . . . requiring the payment of money . . . shall be made, and no warrant or order for the payment of money shall be drawn upon the treasury of the county, unless provision for the payment thereof has been made by (a) an appropriation resolution as provided by this Act . . .; nor shall such contract, agreement or requisition be made unless the unencumbered balance of such appropriation or provision remains sufficient for such payment. No contract or agreement or requisition requiring the payment of money shall be valid unless the same be in writing, and unless the same shall have printed, written, or typewritten thereon a statement signed by the county accountant, as follows: "Provision for the payment of the moneys to fall due under this agreement has been made by appropriation duly made or by bonds or notes duly authorized, as required by the 'County Fiscal Control Act.' . . . Before making such certificate, the county accountant shall ascertain that a sufficient unencumbered balance of the specific appro-

priation remains for the payment of the obligation, . . . and the appropriation or provision so made shall thereafter be deemed unencumbered by the amount to be paid on such contract or agreement until the county is discharged therefrom." Michie's Code of 1935, sec. 1334 (66). "Unencumbered balance" is defined in section 2 of the act. Michie's Code of 1935, sec. 1334 (53).

Section 16 of the act also further provides: "No claim against the county . . . shall be paid except by means of a warrant or order on the county treasurer or county depository, signed by the head of the department for which the expense was incurred, nor unless the bill or claim for which the warrant or order is given shall have been presented to and approved by the county accountant, or in case of his disapproval of such claim or bill, by the Board of County Commissioners. The Board shall not approve any claim or bill which has been disallowed by the county accountant without entering upon the minutes of the Board its reason for approving the same in such detail as may show the Board's reasons for reversing the county accountant's disallowance. No warrant or order, except (not pertinent here) . . . *shall be valid unless the same shall bear the signature of the county accountant below a statement which he shall cause to be written, printed, or typewritten thereon containing the words: 'Provision for the payment of this warrant (or order) has been made by an appropriation duly made or a bond or note duly authorized, as required by the "County Fiscal Control Act."'*" Michie's Code of 1935, sec. 1334 (67).

By section 17 of the act the county accountant is required to keep accounts of each object of appropriation, showing "in detail the amount appropriated thereto, the amount drawn thereupon, the unpaid obligation charged against it, and the unencumbered balance to the credit thereof." Michie's Code of 1935, sec. 1334 (68).

Section 20 of the act provides: "If a county accountant shall knowingly certify any contract, agreement, or warrant in violation of the requirements of this act, or approve any fraudulent, erroneous, or otherwise invalid claim or bill, or make any statement required by this act, knowing the same to be false, or shall willfully fail to perform any duties imposed upon him by this act, he shall be guilty of a misdemeanor . . . and shall be liable on his bond for all damages caused by such violation or failure." Michie's Code of 1935, sec. 1334 (71).

While under the act the chairman of the board of county commissioners is required to sign the warrant of the character here designated as county voucher, the county treasurer is not authorized to cash same unless it bears the signature of the county accountant below the statement as therein specified. If the conditions do not admit of compliance with that requirement, it is the duty of the county accountant to dis-

approve the claim and to refuse to sign the required approval of the warrant or voucher, regardless of what may be the rights and duties of the board of county commissioners.

Defendants contend in effect that it is the duty of the board of county commissioners to exercise general supervision over the finances of the county, and that, therefore, when the chairman of that board signed a voucher payable to Bray Brothers Company, the duty of the county accountant became purely ministerial. This is not what the act prescribes. But, if it be conceded that the signing of the voucher by the chairman of the board be malfeasance in office, that would not justify the county accountant in signing the warrant in violation of law and of the duties imposed upon him by law, nor would such fact exculpate him and his surety from consequent liability. The plea of laches or wrongful acts of other officers is not available to the county accountant nor to his surety. This question has been discussed in decisions of other jurisdictions:

In *Hart v. United States,* 95 U. S., 316, 24 L. Ed., 479, the Supreme Court of the United States, speaking through *Waite, C. J.,* said: "The Government is not responsible for the laches or the wrongful acts of its officers. . . . Every surety upon an official bond to the Government is presumed to enter into his contract with a full knowledge of this principle of law, and to consent to be dealt with accordingly. The Government enters into no contract with him that its officers shall perform their duties."

In *State v. Pederson,* 135 Wis., 31, 114 N. W., 828, *Winslow, C. J.,* said: "The State is not ordinarily estopped by acts of misfeasance on the part of its officers, nor does it contract with the sureties on an official bond given to it that other public officers shall perform their public duties faithfully. Sureties upon such bonds are presumed to know this principle, and to consent to be bound by it," citing *Hart v. U. S., supra.*

In *Ramsay's Estate v. People,* 197 Ill., 572, 64 N. E., 549, 90 Am. S. R., 177, *Magruder, J.,* said: "It is also well settled that the sureties, in an action on an official bond, cannot be heard to say that some other officer has been negligent, or failed to perform some duty, and thus escape liability."

Construing the complaint liberally, as we must do, and in the light of these principles of law, we are of opinion and hold that sufficient facts are alleged to state a cause of action. The plaintiffs are entitled to an opportunity to make good, with proof, the charge of the wrong alleged.

We are not here dealing with the question of refusal, arbitrary or otherwise, of the county accountant to perform a purely ministerial duty for the requirement of which resort to *mandamus* may be had as in the cases of *Martin v. Clark,* 135 N. C., 178, 47 S. E., 397; *Audit Co. v.*

McKensie, 147 N. C., 461, 61 S. E., 283; *Wilson v. Holding,* 170 N. C., 352, 86 S. E., 1043; *Board of Education v. Walter,* 198 N. C., 325, 151 S. E., 718; and *Board of Education v. Burgin,* 206 N. C., 421, 174 S. E., 286, which are relied upon by the appellants. Those cases are clearly distinguishable, and are not decisive of the principles of law involved in the present action.

The judgment below is

Affirmed.

STATE OF NORTH CAROLINA EX REL. AVERY COUNTY; SMITH EGGERS, CHAIRMAN; IRA M. VANCE; J. W. HUGHES; J. H. PRITCHARD AND F. P. GUINN, BEING AND CONSTITUTING THE BOARD OF COUNTY COMMISSIONERS OF AVERY COUNTY, v. J. D. BRASWELL AND THE FIDELITY AND CASUALTY COMPANY OF NEW YORK.

(Filed 22 March, 1939.)

APPEAL by defendants from *Rousseau, J.,* at October Term, 1938, of AVERY.

Civil action to recover damages of defendant J. D. Braswell and his bondsman, alleged to have been sustained by reason of malfeasance in office of county accountant of Avery County, heard upon demurrer to complaint.

This is companion action to that entitled *Avery County v. Braswell, ante,* 270. The allegations of the complaint there set forth in substance are the same as in this action, except in these respects: (1) The term of office here begun 1 January, 1937, and terminated 1 July, 1937; (2) The surety here is the defendant The Fidelity and Casualty Company of New York; and (3) The amount paid Bray Brothers Company as alleged in paragraph 9 is $1,102.50, composed of county vouchers, one on 10 January, 1937, for $200, and the other, 1 February, 1937, for $902.50.

Upon these allegations plaintiffs pray judgment against J. D. Braswell in the sum of $1,102.50, and against defendant The Fidelity and Casualty Company of New York in the penal sum of the bond to be discharged upon payment of $1,102.50, and for costs.

Defendants demurred to the complaint for that it fails to state facts sufficient to constitute a cause of action against the defendants, or either of them.

From judgment overruling the demurrer, defendants appeal to the Supreme Court and assign error.

Charles Hughes for plaintiffs, appellees.

Byron E. Williams and Johnson & Uzzell for defendants, appellants.

WINBORNE, J. The decision in the case of *Avery County v. Braswell, ante,* 270, is determinative of this appeal.

The judgment below is

Affirmed.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES v. JOHN L. ASHBY.

(Filed 22 March, 1939.)

1. Insurance § 31b—

Written representations in answer to written questions in regard to previous hospitalization, treatment by a physician within the prior five years, and certain specified diseases, which induce insurer to assume the risk, are deemed material representations as a matter of law.

2. Same—

A policy not issued under the provisions of C. S., 6460, may be avoided for material misrepresentations which induce insurer to take the risk which it would not otherwise have taken, even in the absence of fraud, and therefore insurer need not prove that the misrepresentations were intentionally made.

3. Same: Insurance § 31c—Insured may not defeat forfeiture on ground that he was ignorant of misrepresentations in application signed by him.

The policy in suit provided that the statement of insurer's medical examiner, signed by insured, should be a part of the contract between the parties. It appeared that this statement contained representations that insured had not been treated in any hospital, had not suffered any disease of the nose, throat, or lungs, and had not consulted a physician for the prior five years, and that insured signed under a statement that the representations therein were true and made as an inducement for the issuance of a policy. This action was instituted to cancel the disability clause, which was not covered by the incontestability clause, for material misrepresentations, and insured admitted that less than five years prior to his application he had been treated in a hospital for pleurisy. Insurer contended that the tuberculosis causing insured's disability was a recurrence or continuation of the same disease. Insured contended that he was ignorant of the misrepresentations in the examiner's statement, that they were written by the examiner and that insured signed same without reading it because he was in a hurry. *Held:* The misrepresentations were material as a matter of law and insurer is entitled to forfeiture upon insured's admission that they were false, there being no evidence that insurer's examiner had any personal knowledge as to the truth or falsity of the representations, and it appearing that insured signed same and adopted the statements as his own, carelessly and negligently without reading it.

STACY, C. J., concurring.

CLARKSON, J., concurs in the concurring opinion.

APPEAL by defendant from *Clement, J.*, at September Term, 1938, of SURRY. No error.

Civil action to cancel and rescind the total and permanent disability and double indemnity provisions contained in a life insurance policy.

The plaintiff contends that the issuance of the policy containing said provisions was based upon representations made in the application for the policy and in the application, Part II, being statements made to the medical examiner; that certain of the representations in the application, Part II, were material and false and by reason thereof the total and permanent disability and the double indemnity clauses in said policy are void. Under the contract of insurance the application, Part I, being the application signed and delivered to the soliciting agent, and the application, Part II, being the statement signed and delivered to the medical examiner, became and are a part of the contract of insurance.

The plaintiff alleges that in his statement to the medical examiner the insured falsely represented: (1) That he had never been under observation or treatment in any hospital, asylum or sanatorium; (2) that he had never been treated for any disease or disturbance of the nose, tonsils, throat or lungs (hay fever or rose fever); (3) that he had never had any illness or injury not mentioned above; (4) that he had not consulted any physician or practitioner who had treated him during the past five years; and that in the written representations so made the following provision was incorporated: "I agree that the foregoing answers shall be part of my application, which shall consist of Parts I and II taken together, and that the foregoing answers shall also become part of any policy contract that may be issued on the strength hereof."

In respect thereto the plaintiff offered evidence tending to show that the defendant was a patient in the Martin Memorial Hospital at Mount Airy, N. C., from 31 August, 1928, to 6 October, 1928, and that following this he convalesced at his home for two or three weeks before he returned to work; that at the time he was confined in the sanatorium he was suffering from pleurisy with effusion on his left side; that he ran a temperature and it was necessary that he be aspirated and the fluid in the lung cavity drawn off; that he was treated by his brother, Dr. E. C. Ashby, and by Dr. P. A. Yoder, a tuberculosis specialist; that he developed tuberculosis, which was discovered in June, 1934; and that the attack of tuberculosis of 1934 was a different manifestation of the same trouble evidenced by the pleurisy attack in 1928.

In his answer the defendant admits that the application, Part II, was signed by him; that he was confined in the Martin Memorial Hospital in the year 1928 with an attack of pleurisy and that the application, Part II, signed by him, contained certain questions and answers thereto, but denies that he made answers to any questions propounded therein,

except to state to the examining physician that many years ago he had an operation. He alleges that the examining physician was the agent of the plaintiff in this cause and as such answered such questions without asking the defendant anything in relation thereto.

Issues were submitted to and answered by the jury as follows:

"1. Did John L. Ashby represent in his application for the insurance policy sued on that he had never been under observation or treatment in any hospital, asylum or sanatorium? A. 'Yes.'

"2. Was the said representation true? A. 'No.'

"3. Did John L. Ashby represent in his application for the insurance policy sued on that he had not been treated for any disease or disturbance of the lungs? A. 'Yes.'

"4. Was the said representation true? A. 'No.'

"5. Did the said John L. Ashby represent in his application for the insurance policy sued on that he had not had any illness or injury other than a tonsillectomy? A. 'Yes.'

"6. Was said representation true? A. 'No.'

"7. Did John L. Ashby represent in his application for the insurance policy sued on that he had not consulted or had not been treated by any physician or practitioner within five years prior to the signing of said application? A. 'Yes.'

"8. Was said representation true? A. 'No.'

"9. Was John L. Ashby a patient in the Martin Memorial Hospital at Mount Airy, North Carolina, from August 31, 1928, to October 6, 1928? A. 'Yes.'

"10. Did the said John L. Ashby, while a patient in the Martin Memorial Hospital from August 31, 1928, to October 6, 1928, receive treatment for any disease or disturbance of the lungs? A. 'Yes.'

"11. Did the said John L. Ashby, in September, 1928, suffer from an illness resulting from pleurisy? A. 'Yes.'

"12. Did the said John L. Ashby, during the year 1928, consult with and receive treatment from Dr. Edward C. Ashby or any other physicians or practitioners? A. 'Yes.'"

Thereupon judgment was entered decreeing that the provisions contained in the policy sued upon relating to total and permanent disability and for double indemnity for death by accident as contained on page 2-A, Policy No. 8707102, are void and of no effect upon the date of issuance of said policy, and rescinding said provisions. The defendant excepted and appealed.

Manly, Hendren & Womble, I. E. Carlyle, and Folger & Folger for plaintiff, appellee.

Woltz & Barber and E. C. Bivens for defendant, appellant.

BARNHILL, J. The medical examiner wrote in the answers to the questions contained in application, Part II. He testified as to a number of these questions that he received the information upon which he based the answer from the applicant. As to the particular questions and answers in issue he testified: "I must have received the information from the insured." The defendant denied that he gave the medical examiner the information upon which said answers were based, but testified that the medical examiner made a physical examination, asked him a few questions, filled in the answers and told him to sign the statement. He further stated that he signed the statement containing the answers without reading them because he was in a hurry. He makes no contention that the medical examiner knew that he had been confined in a sanatorium or that he had suffered an attack of pleurisy, or had been under the care of physicians. On the contrary, all the evidence tends to show that the medical examiner had no information as to the representations concerning which issues were submitted to the jury. So far as the record discloses the defendant does not contend to the contrary.

Is the falsity of the representations contained in application, Part II, which forms a part of the contract of insurance, made in a written statement which was signed but not read by the insured, sufficient cause for rescinding so much of the contract of insurance as is not protected by the incontestability clause?

The representations made were material to the risk. They are in the form of written answers made to written questions. In such case the questions and answers are deemed to be material by the acts of the parties to the contract. *Bryant v. Ins. Co.*, 147 N. C., 181, 60 S. E., 983; *Ins. Co. v. Woolen Mills*, 172 N. C., 534, 90 S. E., 574; *Inman v. Woodmen of the World*, 211 N. C., 179, 189 S. E., 496; *Petty v. Ins. Co.*, 212 N. C., 157, 193 S. E., 228.

Except in policies issued under provisions of C. S., 6460, material representations which are false need not be fraudulently made to invalidate the policy. "In cases where the misrepresentation is positive and of a fact actually material, it is not necessary to prove that the representation was fraudulently made; the materiality of the misrepresentation, and its proven falsity does away with the necessity of showing actual fraud." Joyce on Insurance, Vol. 3, Second Ed., page 3068. "The effect of a misrepresentation of a material fact has precisely the same effect as a concealment, it renders the policy voidable. The misrepresentation need not be fraudulent to have this effect. Falsity in fact is sufficient." Richards on the Law of Insurance, Fourth Ed., page 136. Such representations when false invalidate the policy without further proof of actual conscious design to defraud. *Mutual Life Insurance Co. v. Hilton-Green*, 241 U. S., 613, 60 L. Ed., 1202. The

decisions in this court are consistently to like effect. *Bobbitt v. Ins. Co.*, 66 N. C., 70; *Ins. Co. v. Woolen Mills, supra; Inman v. Woodmen of the World, supra; Petty v. Ins. Co., supra.*

An intentional misrepresentation of a material fact is fraudulent. It need not appear, therefore, that the representation was intentionally made. *Mutual Life Insurance Co. v. Hilton-Green, supra,* in which *Mr. Justice McReynolds,* speaking for the Court, said: "Considered in the most favorable light possible, the above quoted incorrect statements in the application are material representations; and, nothing else appearing, if known to be untrue by assured when made, invalidate the policy without further proof of actual conscious design to defraud." *Ins. Co. v. Woolen Mills, supra; Petty v. Ins. Co., supra; McEwen v. Life Insurance Co.,* 139 Pac., 242.

A representation of a fact may be false or untrue through mistake, ignorance, accident or negligence, in which case, if it induces the risk which the insurer would not otherwise have taken, it is material. . . . It is now well settled that in cases of the character above specified the misrepresentation of a material fact preceding or contemporaneous with the contract avoids the policy even though the assured be innocent of fraud or an intent to deceive or to wrongfully induce the assurer to act, or whether the statement was made in ignorance or good faith, or unintentionally. A mere inadvertent omission of material facts which the assured should have known to be material, will avoid the contract if false and relied on by the assurer. Joyce on Insurance, Vol. 3, Second Ed., page 3073. "The applicant did not read the application or request that it be read to him before he signed it. His failure to do either was not induced by any fraud on the part of the agent. When he signed the application, he knew that the agent had written answers to the questions contained in it. He represented to the defendant that these answers were true." *Inman v. Woodmen of the World, supra.*

As stated, it is settled law in North Carolina that answers to specific questions, like those asked in the instant case, where there has been a medical examination, are material as a matter of law. The defendant went to the medical examiner with the full knowledge of the purpose of his visit. He knew that the examiner had written answers to questions appearing upon the blank then being used by him and he makes no suggestion that the examiner had any knowledge of his former illness or his prior confinement to a sanatorium. Neither does he suggest that the examiner acted other than in the utmost good faith. He signed the instrument, knowing that by so doing he was adopting such answers as had been entered as his own, and that he was representing to the company that they were true. Thereafter he received the policy with a photostatic copy of the questions and answers attached, which policy he

kept in his possession for a period of years without discovering the falsity of the representations he had made, or, having discovered them, without advising the company of the misstatements therein contained. On the other hand, the plaintiff acted promptly to have the provisions of the policy not protected by the incontestability clause rescinded as soon as it acquired knowledge of the fact that the representations contained in the application were not true.

The defendant is a man of education and professional training, and it is not unreasonable to assume that he knew the company wished to know and was seeking to ascertain whether he had suffered any illness, such as that now disclosed, prior to the acceptance of the application. He cannot now successfully defend upon the only plea he now asserts—that the answers were made by the medical examiner and that he signed the statement without reading it because he was in a hurry. However innocently he may have acted, the present situation grows out of his own carelessness and negligence, through which he obtained a policy that otherwise would not have been issued. It would be inequitable and contrary to the consistent decisions of this Court to permit him to insist upon the validity of a contract thus obtained. As it is, he now has the benefit of the life policy benefits of the contract by virtue of the incontestability provisions of the policy, notwithstanding the fact that it was issued by the plaintiff without knowledge of facts which would have materially influenced it in accepting or rejecting the applicant.

It may be noted that the defendant makes no attack on the application, Part I, which he signed and delivered to the soliciting agent. Neither does he contend that he failed to read this instrument before signing it. He therein agreed "that no agent or other person except the president, a vice president, the secretary, the treasurer, or a registrar of the society, has power to make or modify any contract on behalf of the society or to waive any of the society's rights or requirements, and that no waiver shall be valid unless in writing and signed by one of the foregoing officers. All of the foregoing answers and all those contained in Part II hereof (the statements to the medical examiner) are true, and are offered to the society as an inducement to issue the policy, or policies, for which application is hereby made."

There was no conflict in the testimony as to the essential facts to be determined. The evidence tends to show, without contradiction, that the defendant signed and filed with the plaintiff a paper writing containing the representations referred to in the issues submitted; that they were false; that the medical examiner had no personal knowledge as to their truth or falsity; that the defendant carelessly and negligently signed the instrument without reading it and thereby adopted the statements as his own. They were material as a matter of law. Therefore,

we consider that the exceptions to the charge of the court are without merit. Nor can the defendant's exceptions to the admission of evidence be sustained.

No error.

STACY, C. J., concurring: It is provided by C. S., 6289, that statements or descriptions in any application for a policy of insurance, or in the policy itself, shall be deemed representations and not warranties, and a representation, unless material or fraudulent, will not prevent a recovery on the policy. *Howell v. Ins. Co.*, 189 N. C., 212, 126 S. E., 603.

Here, the plaintiff seeks to avoid the provisions of the policy relating to disability and double indemnity, *Smith v. Ins. Co.*, 209 N. C., 504, 184 S. E., 21, on the ground of false and material representations appearing in the application, and recovery has been allowed on this ground. *Schas v. Ins. Co.*, 166 N. C., 55, 81 S. E., 1014. Ordinarily, the falsity and materiality of such representations are for the jury to determine under proper instructions from the court. *Anthony v. Protective Union*, 206 N. C., 7, 173 S. E., 6; *Harrison v. Ins. Co.*, 207 N. C., 487, 177 S. E., 423, and cases there cited. In the instant case, however, the falsity of the statements being conceded, under the decisions applicable, their materiality may be determined as a matter of law. *Bryant v. Ins. Co.*, 147 N. C., 181, 60 S. E., 983; *Jeffress v. Ins. Co.*, 72 F. (2d) 874. The allegation of negligence or carelessness on the part of the examining physician is not sufficient to save the defendant from the consequences of the misrepresentations appearing in the application. *Inman v. Woodmen of the World*, 211 N. C., 179, 189 S. E., 496.

CLARKSON, J., concurs in this opinion.

MAMIE P. WOLFE ET AL. v. JAMES A. SMITH ET AL.

(Filed 22 March, 1939.)

1. Appeal and Error § 40d—

Admission of hearsay evidence will not be held for prejudicial error when it is merely cumulative of other competent evidence in the case, and another witness is permitted to testify to substantially the same fact without objection, and on cross-examination by appellant the same facts are again brought out in evidence.

2. Trusts § 17: Deeds § 10c: Mortgages § 12—

All the evidence in this case *is held* to show that the trustee of a resulting trust encumbered the lands to secure his own personal preëxisting

debt, and the evidence sustains an instruction that if the jury should find the facts to be as all the evidence tended to show, the grantees in the encumbrances would not be *bona fide* purchasers so as to defeat the rights of the *cestuis que trustent.*

3. Limitation of Actions § 4—Action to declare resulting trust held not barred, the possession of trustee being lawful.

This action was instituted by heirs of the wife, against the husband and the grantees in encumbrances on the land executed by him, to declare plaintiffs the owners of the land under a resulting trust upon evidence that the total purchase price for the land was furnished by money belonging to the wife's separate estate. *Held:* Since defendant husband was in lawful possession of the lands as tenant by the curtesy at the time of the institution of the action, neither the three- nor ten-year statutes of limitation bars the actions, there being no disavowal of the trust by the husband and nothing sufficient in law to put plaintiffs on notice of a claim adverse to them, the mere registration of the deeds of trust being insufficient for this purpose, and there being no competent evidence sufficient to show a foreclosure of any of the instruments.

APPEAL by defendants S. M. Davis, Trustee, and A. J. Davis from *Williams, J.,* at October Term, 1938, of WAYNE. No error.

The plaintiffs' evidence is substantially to the effect that James A. Smith purchased the lands described in the complaint with money belonging to his wife, Vivie E. Smith, the proceeds of the sale of certain lands belonging to her, which constituted the entire purchase price of the lands. As to the first tract, the title was taken in the name of J. A. Smith and Vivie E. Smith, although J. A. Smith paid none of the purchase price and had no interest in the lands; and the evidence tends to show that this was without the authority of Vivie E. Smith and unknown to her at the time. As to the second tract of land, the evidence tends to show that the title was taken in the name of J. A. Smith alone, without consideration on his part, the entire purchase price having been paid by Vivie E. Smith, which also was unauthorized by her. Subsequently it had been agreed between James A. Smith and Vivie E. Smith that the lands should be put in her name as the real owner. Vivie died before this was done, in December, 1929.

After Vivie E. Smith's death, James A. Smith became financially involved and confessed judgment in various large amounts to A. J. Davis, to Mount Olive Grocery and Hardware Company, Utility Hardware & Grocery Company, and others.

On the 13th day of February, 1930, J. A. Smith executed to the Utility Hardware and Grocery Company a note in the sum of $3,000.00, secured by a deed of trust upon the lands described in the complaint.

On the 30th day of September, 1931, J. A. Smith filed a petition in bankruptcy and received his discharge sometime prior to March, 1932.

Shortly after his discharge in bankruptcy, Smith again confessed judgment in favor of A. J. Davis for the sum of $1,157.00, and the further sum of $6,059.55, with interest.

There is in evidence a deed from A. J. Davis to J. A. Smith, purporting to convey to him the lands described, and the recitals purport to base this deed on a foreclosure sale of the lands. On the 31st day of May, 1932, Smith executed to A. J. Davis a note in the sum of $7,314.64, with interest, secured by deed of trust upon the lands in controversy. The evidence discloses no present consideration for the mortgages in question, but tends to show that they were executed to secure a preëxisting indebtedness, solely that of J. A. Smith.

On the trial, Mrs. R. Q. Brown was examined as a witness for the plaintiffs and, over the objection of the defendants, was permitted to say that Vivie E. Smith (deceased before the trial) had told her that she had got some money from her father's estate and was using it in the purchase of this land; that she had some money when they were married; that she had sold her place in Sampson which she had gotten from her daddy, and that "Jim (J. A. Smith), has bought that in his name and if he were to die first I wouldn't get any of that"; that she had sold her place her daddy had given her in Sampson County and they had invested it in the Hobbs place, and that she and Jim had been talking about changing the papers. Previously, A. J. Davis, who testified for the plaintiffs, had been permitted, without objection, to testify to substantially the same facts, and, upon cross-examination by these defendants, went into the same matter with some degree of particularity. (R., pp. 27-33.)

The following issues were submitted to the jury and answered as indicated:

"1. Does the defendant J. A. Smith hold title to the lands in controversy in trust for the heirs of Mrs. Vivie E. Smith, deceased? A. 'Yes.'

"2. Are the defendants S. M. Davis, Trustee, and A. J. Davis *cestui que trust, bona fide* purchasers of said land for value without notice of any trust affixed to the title thereto? A. 'No.'

"3. Is plaintiffs' cause of action barred by the three-years statute of limitations? A. 'No.'

"4. Is plaintiffs' cause of action barred by the ten-years statute of limitations? A. 'No.' "

The exceptions to the instructions on these several issues, important for consideration here, are as follows:

On the first issue the court charged the jury: "If you find by evidence clear, strong and convincing that the deceased Mrs. Smith furnished the purchase money with which to purchase the Hobbs land, and that title thereto was taken in the name of herself and husband, then the

court charges you that the law would create what is known as a resulting trust to her favor, and would be your duty, if you so find, to answer that issue 'Yes'; unless you so find you would answer it 'No.'"

On the second issue: "All the evidence in this case tends to show that the defendants S. M. Davis, Trustee, and A. J. Davis, hold under a deed of trust which by its terms secures an antecedent debt or a preëxisting debt. The court instructs you as a matter of law, if you find the facts to be as all the evidence tends to show, you would answer the second issue 'No.'"

On the third issue: "The court, being of the opinion on that question that the fact of registration of these various instruments did not constitute notice to the plaintiffs such as would be sufficient to bar their right of action under the three-year statute, instructs you as a matter of law, if you find the facts to be as all the evidence tends to show, you will answer that issue 'No.'

On the fourth issue: "Upon that, the court being of the opinion that the joint possession of the husband and wife is sufficient, as a matter of law, to protect her claim against the bar of the statute, there being no evidence of any intention on her part to abandon it, instructs you that if you find the facts to be as all the evidence tends to show, you will answer that issue 'No.'"

The court recapitulated the substance of its instructions to the jury as to the second, third, and fourth issues, in each instance instructing them, in substance, that if they found the facts to be as all the evidence tended to show, they would answer these several issues "No." The jury answered all these issues in favor of the plaintiffs, and from judgment upon the verdict defendants appealed.

D. H. Bland for plaintiffs, appellees.

J. Faison Thomson and Walter T. Britt for defendants, appellants.

SEAWELL, J. Conceding that there was evidence to go to the jury as establishing a resulting trust, and we think there was, for the purpose of our review, this case resolves itself into a few simple propositions, which are fairly stated as the questions involved in defendants' brief: Was the trial court justified in admitting the testimony of the witness, Mrs. R. Q. Brown, as to what Vivie E. Smith told her about the circumstances connected with the purchase of the land and the condition of the title? Was there sufficient evidence to go to the jury that defendants, or any of them, were innocent purchasers, for value, of the lands described in the complaint? Could any inference unfavorable to the plaintiffs be drawn from the evidence relating to the bar of the statute?

1. The testimony of Mrs. R. Q. Brown, standing alone, offends against the hearsay rule and its admission would have been error except for the

fact that J. A. Smith had been permitted, without objection, to testify to substantially the same effect, and moreover, on his cross-examination by the defendants, substantially the same facts were again brought out in evidence. The statement of the witness was merely cumulative and, considering the circumstances under which it was drawn out, its admission will not be held for reversible error. *Lambert v. Caronna,* 206 N. C., 616, 175 S. E., 303; *Nance v. Fertilizer Co.,* 200 N. C., 702, 708, 158 S. E., 486; *Bateman v. Brooks,* 204 N. C., 176, 185, 167 S. E., 627; *Shelton v. R. R.,* 193 N. C., 670, 674, 139 S. E., 232.

2. The evidence tends to show that the deeds of trust executed upon the land of J. A. Smith were for an antecedent indebtedness of his own. It is suggested that they were made in part for advancements or for some consideration thereafter to be supplied; but the evidence does not support this suggestion and the totals of the figures in the judgments and the deeds of trust executed therefor indicate strongly that the judgments were the entire consideration. J. A. Smith testified that the mortgages were given to secure a past due indebtedness, and we are not able to find in the record any substantial contradiction of this testimony. Since, in this respect, only one inference could be drawn from the evidence, and that favorable to the contention of the plaintiffs, the instruction given by the trial judge to the effect that if they found the facts to be as all the evidence tended to show they would answer this issue "No," is without error. *Bank v. Noble,* 203 N. C., 300, 165 S. E., 732; *Thomas v. Morris,* 190 N. C., 244, 129 S. E., 623.

3 and 4. We cannot find any fact or circumstance that would have a tendency to contradict the plaintiff's evidence to the effect that they had no notice of a claim adverse to them, or facts or circumstances from which such notice might be inferred such as would start the running of the statute.

The defendants rely upon the fact of registration of the deed of trust as putting the plaintiffs on notice that J. A. Smith claimed the lands adversely to the trust. The fact of registration, standing alone, however, is neither constructive notice nor is it a circumstance that would be considered in law as putting the plaintiffs on inquiry, under the evidence of this case.

The alleged fact of foreclosure of the deed of trust of 1930 is not supported in the evidence except by the recitals of the conveyance made by A. J. Davis to J. A. Smith purporting to be in consequence of such sale. The recitals in this deed are not sufficient evidence to establish the fact of such public sale, if this should be relied on as a circumstance in aid of the registration of the mortgage. *Ewbank v. Lyman,* 170 N. C., 505, 87 S. E., 348; *Tuttle v. Tuttle,* 146 N. C., 484, 59 S. E., 1008; *Modlin v. R. R.,* 145 N. C., 218, 58 S. E., 1075; *Latham v. Latham,* 184 N. C., 55, 113 S. E., 623.

For the entire period down to the institution of this suit the lands were in the continuous possession either of Vivie E. Smith and J. A. Smith, or, after her death, in the continuous possession of J. A. Smith, who was entitled to hold the same by virtue of his right as tenant by the curtesy. The case presents no circumstance, or combination of circumstances, which, without change of possession, might have been sufficient for the defendants in this action to rely on as notice that the trust had been violated and the trustee was asserting a claim of title in himself. Except for the conveyance in trust made after the death of Vivie E. Smith, there is no act of J. A. Smith appearing in the evidence to indicate that he did not regard the trust as binding upon him, and since the registration of that deed must stand alone as giving such notice, we do not regard it as sufficient in law.

In *Spence v. Pottery Co.,* 185 N. C., 218, 221, 117 S. E., 32, the Court said, per *Stacy, J.:* "It is further contended by appellants, who are judgment creditors of J. T. Spence, that plaintiff's right, if any she has, is now barred by the lapse of time, and they therefore pleaded the statute of limitations. The plaintiff and her husband have been in the continuous possession of said property since its purchase in 1906, without any apparent abandonment of plaintiff's right, and this, under the authorities, would seem to protect her claim against the bar of the statute. Speaking to a similar question in *Stith v. McKee,* 87 N. C., 391, *Ruffin, J.,* said: 'That one may preclude himself by his laches from asserting a right which otherwise the courts would help him to enforce, there are abundant authorities to show. But to do so in any case, there must be something on his part which looks like an abandonment of the right, or an acquiescence in its enjoyment by another, inconsistent with his own claim or demand, and accordingly we have searched in vain for a single instance in which a court has withheld its aid in the enforcement of an equity, on the ground of the lapse of time when the party seeking it has himself been in the continued possession of the estate to which that equity was an incident.' See, also, *Mask v. Tiller,* 89 N. C., 423; *Flanner v. Butler,* 131 N. C., 156; *Norton v. McDevit,* 122 N. C., 759. The husband's possession is considered to be the possession of the wife also, where they are living together. *Faggart v. Bost,* 122 N. C., 520."

We think the instructions given to the jury are fully sustained by the decisions of this Court.

We have examined the other exceptions in the record and do not find anything in them that would justify us in disturbing the result of the trial.

In the trial of this case, we find

No error.

CITIZENS BANK AND TRUST COMPANY v. IRVINE B. WATKINS AND TREVA G. WATKINS, HIS WIFE; ALEX S. WATKINS AND LUCY B. WATKINS, HIS WIFE; MRS. ELIZABETH W. CUMMINGS, WIDOW; HARRY G. WATKINS, BACHELOR; MRS. RUSHIA W. WATKINS, WIDOW; MRS. NANNIE T. WATKINS, WIDOW; MRS. REBECCA W. SINGLETON, WIDOW; MRS. NANNIE T. WATKINS, GUARDIAN OF EDWARD T. WATKINS, MINOR; S. M. WATKINS, ADMINISTRATOR, ESTATE OF NANNIE GUY WATKINS, DECEASED; MRS. MARY WATKINS McIVER AND ALTON McIVER, HER HUSBAND; S. M. WATKINS, WIDOWER; MRS. REBECCA W. RODWELL AND ROY O. RODWELL, HER HUSBAND; WILLIAM T. WATKINS, BACHELOR; EDWARD T. WATKINS, MINOR.

(Filed 22 March, 1939.)

1. Dower § 3—

Inchoate dower is a mere expectancy or probability standing upon the same footing with the expectancy of heirs apparent or presumptive before the death of the ancestor, except that the right of dower may not be defeated except with the wife's consent.

2. Dower § 6—Nature and incidents of dower consummate.

Upon the death of a husband, the widow's right of dower becomes consummate, and is a fixed and vested right of property in the nature of a chose in action, which, upon assignment of dower, becomes a life estate in the property assigned, which estate is subject to all the incidents of any other life estate, and is considered a continuation of the husband's estate. C. S., 4100.

3. Same: Partition § 1—Wife having a dower interest in property held by her husband as tenant in common may not defeat sale for partition.

A husband died seized of an interest in the *locus in quo* as tenant in common. His widow's dower was allotted in a one-eighth interest in the property. Plaintiffs, owning an undivided interest in the property, instituted this action for partition, and it was admitted that actual partition of the property could not be had. The widow objected to the sale of her dower interest. *Held:* Plaintiffs are entitled to sale of the property for partition upon the facts admitted, C. S., 3233, which right they could have enforced against the husband prior to his death, and which they are entitled to enforce against the widow's dower, since her estate in the land is but a continuation of his.

4. Same—

C. S., 4105, *et seq.*, providing a method for allotment of dower, does not preclude a court of equity from ordering a sale of the lands for partition, even though dower has been allotted in the husband's interest in the lands as tenant in common, since both remedies are equitable in their nature and the court may make such orders and decrees as become necessary to do justice between the parties.

5. Estates § 4—

Where a greater and lesser estate meet in the same person, in the same right, without any intermediate estate, the lesser estate is merged in the larger and ceases to exist.

6. Same—

The requirement that a person must own two estates "in the same right" in order for the estates to merge does not mean that they must be acquired in the same manner but that they be held by such person as his own without any equitable claims against them.

7. Same: Dower § 10—

Where a widow is allotted dower in lands and thereafter acquires the remainder interest by purchase, the dower is merged in the fee and ceases to exist.

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

APPEAL by defendant Rushia W. Watkins from *Parker, J.*, at October Term, 1938, of VANCE.

Special proceedings to sell lands for partition.

Samuel Watkins, Sr., died seized and possessed of the four several tracts of land described in the petition. Thereafter Samuel Watkins, Jr., one of his heirs-at-law, having died, his widow, the defendant Rushia W. Watkins, was allotted one-eighth interest in said property as her dower. She thereafter acquired the remainder interest, so that her dower interest and the interest acquired by purchase vests her with the fee in one-eighth interest.

Subsequent to the allotment of dower the plaintiff acquired a two-eighth undivided interest in tracts one, two and three and a one-eighth undivided interest in tract four. Whereupon, the plaintiff instituted this proceeding to have said land sold for partition.

It is alleged in the petition and admitted in the answer that an actual partition of the lands cannot be made owing to the nature and character of the real estate and the number of parties interested. The defendant Rushia W. Watkins, in answer to the allegation that a sale of said land would be more advantageous to all of the parties interested than an actual partition thereof, denies that a sale of said lands would be more advantageous to her and elects to stand on her right of dower and objects to any order of sale of her dower right.

An issue of fact having been raised as to the exact interest of the plaintiff in one of the tracts of land, the cause was transferred to the civil issue docket. A jury having answered the controverted issue of fact in favor of the plaintiff, the court entered judgment ordering sale of said tract of land, including the dower interest of Rushia W. Watkins. The defendant, Rushia W. Watkins, excepted and appealed.

Perry & Kittrell for plaintiff, appellee.

A. A. Bunn for Rushia W. Watkins, defendant, appellant.

BARNHILL, J. The inchoate right of dower is a mere expectancy or possibility standing upon the same footing with the expectancy of heirs apparent or presumptive before the death of the ancestor, except that the wife's expectancy may not be defeated by the husband without her consent. Upon the death of the husband the widow's right of dower becomes consummate. It is then a fixed and vested right of property in the nature of a chose in action—the right to demand an assignment of dower. After assignment she becomes a life tenant of the property assigned. "Every married woman, upon the death of her husband intestate . . . shall be entitled to an estate for life in one-third in value of all the lands, tenemants and hereditaments whereof her husband was seized and possessed at any time during the coveture." C. S., 4100. *Chemical Co. v. Walston,* 187 N. C., 817, 123 S. E., 196; *Holt v. Lynch,* 201 N. C., 404, 160 S. E., 469; *Creech v. Wilder,* 212 N. C., 162 (166), 193 S. E., 281; 19 C. J., 593, sec. 410. She has the usual title and rights, subject to the usual burdens, incident to a life estate. It is subject to be sold under execution, to assessment for taxation, to forfeiture for waste, and the like.

The seizin of a widow of the lands allotted to her as dower is considered as a continuation of her husband's, as derived from him and not from the heir. 9 R. C. L., 594. A widow's life estate by virtue of her dower right is nothing more than an elongation of the husband's estate. *Everett v. Newton,* 118 N. C., 919, 23 S. E., 961.

The statute, C. S., 3233, provides that whenever it appears by satisfactory proof that an actual partition of the lands held by tenants in common cannot be made without injury to some or all of the parties interested, the court shall order a sale of the property described in the petition. In commenting upon this statute it is said in *Barber v. Barber,* 195 N. C., 711, 143 S. E., 469: "A tenant in common is entitled as a matter of right to partition of the land held in common, to the end that he may have and enjoy his share therein in severalty. *Foster v. Williams,* 182 N. C., 632; *Haddock v. Stocks,* 167 N. C., 70; *Holmes v. Holmes,* 55 N. C., 334." An admission in the pleadings that an actual partition of the lands cannot be made without injury to some or all of the parties interested eliminates the necessity for further proof of the fact. When such admission is made in the pleadings the owner of an undivided interest is entitled as a matter of right to partition of said land to the end that he may hold and enjoy his said interest in severalty, and the court is authorized and empowered by statute, C. S., 3233, to order a sale of such land to the end that he may have such partition without injury to himself and to other parties to the proceedings, which would, upon the admission, result from an actual partition. He cannot

be denied his rights because of interests which others claim in the property. *Barber v. Barber, supra.* This right is paramount.

The owner of an undivided interest in land cannot be denied his right to have a partition, or sale in lieu of partition, because of interests which others may own in the common property. *Barber v. Barber, supra.* "Where the land or the interests are such that partition cannot be actually had by division, the fact that one of the parties has only a life interest does not prevent its being sold for partition, since the interests of the remainderman need not be thereby endangered. 12 A. L. R., 646. The seizin of a husband who acquires title to land as a tenant in common is subject to the paramount right of his co-tenants to demand partition; and therefore his wife's right of dower in such land is subject to be defeated by a sale of such land in proceedings instituted by one of the co-tenants for a partition. 19 C. J., page 520.

Under the doctrine of equitable conversion, dower may be recovered from the cash produced by the sale of real estate. This occurs when the land has been sold under some right or claim which is superior to the rights of both husband and wife, but which does not affect the wife's right as against her husband and his heirs. 17 Am. Jur., page 685. The right of dower is not paramount to the right in the husband's co-tenants to compel a partition; nor does it interfere with his authority to make a voluntary partition. 17 Am. Jur., 691.

Partition may be brought by a tenant in fee of one moiety against a tenant for life of the other moiety, under the statute of Henry VIII, 2 Lester, 1015. And such is the received doctrine at this day. *McEachern v. Gilchrist,* 75 N. C., 196.

"In this country parties having limited interests, as for example, tenants for life or years, may have a partition in equity, as well as at law, in respect of their own interests only. But if a complete partition be desired all parties interested may be brought before the court, and all estates, whether in possession or expectancy, including those of infants and of persons not *'in esse'* may be bound by the decree. Adams Eq., 230-2; *Jackson v. Edwards,* 7 Paige, 386; *Horne v. Falloner,* 4 Dessau, 86." *McEachern v. Gilchrist, supra.*

The appellant's husband at the time of his death was seized of a one-eighth undivided interest in the property described in the petition. His interest in the land was subject to the superior right of each of the other co-tenants to have the property sold—it not being subject to actual division—to the end that he might hold his interest in severalty. Upon the death of the husband, his interest in said land having been assigned to his widow as dower, her estate therein was merely a prolongation or extension of his estate for the life of the widow. While her life estate is superior to that of creditors and others claiming through the husband,

she could not obtain an interest in the land superior to, or which would defeat the existing rights of, other co-tenants. The interest of the deceased husband as continued in the wife for life is subject to be sold at the instance of any one of the other co-tenants, in like manner and to the same extent the right existed prior to the death of the husband.

The North Carolina cases to which we are advertent, which are more nearly in point, are *Holley v. White,* 172 N. C., 77, 89 S. E., 1061; *Kelly v. McLeod,* 165 N. C., 382, 81 S. E., 455, in which it was held that the fact that a tenant in common is entitled to a homestead against the judgment, will not prevent a sale for partition and that his share of the proceeds of the sale will be reserved and his homestead right therein protected by proper decree. *Valentine v. Granite Corp.,* 193 N. C., 578, 137 S. E., 668, and *Barber v. Barber, supra,* in which it was held that a wife by virtue of her inchoate right to dower must be heard upon the confirmation of a sale for division and upon an order for the distribution of the proceeds, but that she cannot resist the right of a co-tenant for partition or sale for partition, nor challenge the power of the court to order a sale for partition.

The statute, C. S., 4105, *et seq.,* providing a method for the allotment of dower, was not intended to deprive the Superior Court of its equitable jurisdiction in respect thereto. *Efland v. Efland,* 96 N. C., 488, 1 S. E., 858; *Campbell v. Murphy,* 55 N. C., 359; *Jones v. Gerock,* 59 N. C., 190. Both dower and sales for partition are equitable in their nature and the court should make such orders and decrees as become necessary to do justice between the parties. *Weeks v. McPhail,* 129 N. C., 73, 39 S. E., 732; *Seaman v. Seaman,* 129 N. C., 293, 40 S. E., 41.

When this cause reached the civil issue docket the court had jurisdiction to review the rights of the parties under the principles of equity and to make such order as was necessary to do justice between the parties. There is no showing that the proceeds of the sale of dower will not produce for the appellant income equal to that she now receives from the property itself, or that she would otherwise suffer any harmful effects from a sale. On the contrary, if the property is sold subject to dower in a one-eighth undivided interest in the property this will tend, in all probability, to materially depress the price and result in serious injury to the other co-tenants without commensurate benefit to the appellant.

The judgment of the court below may be sustained on the theory that it was necessary to protect the rights of the other co-tenants and prevent an unnecessary loss to them and to do justice between the parties.

So far, we have dealt with the controversy without regard to the evidence which tended to show that the appellant's dower interest in said land has become merged in the fee. It appears that after dower was

allotted to her she purchased the remainder in the one-eighth interest so allotted. Can she now claim any interest in the land as dowager?

Merger is the absorption of one estate in another, and takes place usually when a greater estate and a less coincide and meet in one and the same person without any intermediate estate, whereby the less is immediately merged or absorbed in the greater. To constitute a merger it is necessary that the two estates be in one and the same person at one and the same time and in one and the same right. 10 R. C. L., page 666. Generally, if a life estate and the remainder, reversion, or the like, become united in the same person the life estate is merged. Thus, . . . when a life tenant or lessee for years acquires the fee in remainder or reversion, or if the life tenant and the fee are both conveyed to a third person the estates are merged. 10 R. C. L., 667. Whenever a greater estate and a less coincide and meet in one and the same person, without any intermediate estate, the less is immediately annihilated, or, in the law phrase, it is said to be merged, that is, sunk or drowned in the greater. Thus, if there be tenant for years and the reversion in fee simple descends to or is purchased by him the term of years is merged in the inheritance and shall never exist any more. But they must come to one and the same person in one and the same right. Blackstone's Commentaries, Vol. 2, page 177.

The appellant, being the owner of a life estate in one-eighth of the property in controversy, acquired the remainder therein. The two estates were then vested in her at the same time in one and the same right. The life estate and the remainder immediately became merged and vested a fee simple title in her. "The same right" does not mean the same method of acquisition, but means that she claims both estates as her own and holds neither for another as trustee or otherwise. As the appellant at the time of the institution of this proceeding was the owner in fee of one-eighth undivided interest in the lands described in the petition she has lost any right that she may have had as dowager. The land, including the interest of the plaintiff, is subject to sale for partition among the tenants in common.

The rights of remaindermen to have the dower interest sold when it was allotted in lands formerly held by her husband under title of *sole seizin* is not presented or decided.

The judgment below is

Affirmed.

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

AVA LASSITER AND HUSBAND, A. T. LASSITER; R. A. YELVINGTON, EVA STRICKLAND AND HUSBAND, M. B. STRICKLAND; J. E. YELVINGTON, AND BETTIE R. JOHNSON AND HUSBAND, A. M. JOHNSON, HEIRS AT LAW OF J. W. YELVINGTON, DECEASED, *v.* J. E. JONES, CADMUS T. YOUNG, AND RUFFIN BARBOUR, SELF-STYLED TRUSTEES, AND THE WOODMEN OF THE WORLD, CAMP NO. .....

(Filed 22 March, 1939.)

1. Deeds § 14b—Deed in this case held to convey fee to trustees and not to create estate upon condition.

A deed conveying property to trustees and their successors in office and setting forth the purposes for which the property should be used without a clause of reverter, forfeiture, or reëntry upon condition broken, conveys the fee to the trustees, and the heirs at law of the grantor may not maintain an action for the recovery of the land upon the ground that it was no longer used for the purposes stipulated.

2. Trusts § 1d—

Where land is conveyed to trustees and their successors for specified charitable purposes, the court may appoint trustees upon failure of the successors to the original trustees, since equity will not permit a trust to fail for want of a trustee, but said trustees should be appointed by the court upon proper application.

APPEAL by plaintiffs from *Burgwyn, Special Judge,* at January Term, 1939, of JOHNSTON. Modified and affirmed.

This is a civil action by plaintiffs against the defendants to recover about two acres of land in Johnston County, N. C. The plaintiffs are the children and heirs at law of J. W. Yelvington, who died intestate in the year 1917.

The prayer of the complaint is as follows: "Wherefore, the plaintiffs pray for judgment in their favor and against the defendants: (1) That the defendants J. E. Jones, Cadmus T. Young and Ruffin Barbour are not the legal Trustees for said property described in the complaint and have no authority in connection therewith. (2) That the paper writing executed by said defendants to the defendant Woodmen of the World is void and of no effect and that the same be so declared and ordered surrendered up and canceled as a cloud against the plaintiffs' title. (3) For their costs in this action and for such other and further relief as they may be entitled to, including a Restraining Order upon notice."

The controversy is over the following deed, which was duly signed and recorded:

"STATE OF NORTH CAROLINA—JOHNSTON COUNTY.

"This deed made the 23rd day of November, 1891, by Jno. W. Yelvington and wife, Rebecca Yelvington, of Johnston County and State of

North Carolina, parties of the first part, to E. N. Booker, E. Robert Johnson, W. G. Parrish, Jno. W. Yelvington, and J. J. Young, Trustees of Polenta Academy of Johnston County and State of North Carolina, parties of the second part, *witnesseth:*

"That said John W. Yelvington and wife, in consideration of $100.00 to them paid by the said Trustees of said Polenta Academy, the receipt of which is hereby acknowledged, have bargained and sold and by these presents do bargain, sell and convey to the said Trustees and their successors in office that certain tract or parcel of land in Johnston County, State of North Carolina, adjoining the lands of said J. W. Yelvington, Dr. E. N. Booker, A. R. Weeks, and bounded as follows, viz.:

"Beginning on a gum in a small branch, E. R. Booker's line and runs South 70 W. 4.50 chains to the center of the Raleigh Road; thence S. 9 East 4.50 chains with the center of said road to John W. Yelvington's line; thence South 85 E. 1.60 chains to the center of the Smithfield Road; thence N. 50 East with said road 7.20 chains to the run of a small branch; thence up the run of said branch to the beginning, containing 2 acres more or less.

"The conditions of this deed are as follows: It is for the exclusive use of the Polenta Male and Female Academy; it shall be used exclusively for school purposes with the upper story of the building for the use of Freemasonry and Odd Fellowship, and occasionally preaching of any Protestant Denomination, if desired, and for no other purpose, the right and title of said cite shall remain vested in perpetuity to the above mentioned Trustees and their successors in office.

"To have and to hold the aforesaid tract or parcel of land and all privileges and appurtenances thereto belonging to the said Trustees and their successors forever, and the said J. W. Yelvington and wife covenant with said Trustees and their successors, that they are seized of said premises in fee simple, and that they will warrant and defend the said title to the sale against the claims of all persons whomsoever.

"In testimony whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

"Attest: J. W. YELVINGTON [SEAL]
F. T. BOOKER. REBECCA YELVINGTON [SEAL]"

It is alleged in the complaint and admitted by the answer that plaintiffs are heirs at law of John W. Yelvington, the grantor in the above deed to be construed in this controversy; that he was the last surviving trustee; that Polenta Academy ceased to exist about thirty years ago; that Polenta Masonic Lodge surrendered its charter about 15 years ago; that the Grand Lodge of Masonry never claimed any title to the prop-

erty; that the Odd Fellows have never used or claimed any interest in the property.

It was admitted in open court that the defendants were not appointed trustees by any court of competent jurisdiction, but were selected by the Masonic Lodge, which formerly met on the premises.

The court rendered the following judgment: "This cause coming on to be heard and being heard before his Honor, W. H. S. Burgwyn, upon the pleadings and exhibits, and the controversy between the parties being the construction of the deed mentioned in the complaint, and the court being of the opinion that the deed of J. W. Yelvington and wife conveyed a fee to the grantees in said deed, the court holds as a matter of law that the plaintiffs are not entitled to recover the lands conveyed by said deed: It is, therefore, considered, ordered, and adjudged that the plaintiffs recover nothing and that the action be, and the same is hereby dismissed at the costs of the plaintiffs. It further appearing to the court that the defendants J. E. Jones, C. T. Young and Ruffin Barbour, Trustees, admit in open court that they were not appointed by any court of competent jurisdiction, but were selected by the Masonic Lodge, which formerly met in the building on the lands, the court holds that the said Trustees were not properly selected and appointed; and it is ordered that the clerk of this court, within thirty days from the end of this term of court, appoint three new Trustees upon whom duties of the office shall devolve. W. H. S. Burgwyn, Judge Presiding."

The plaintiffs excepted, assigned error and appealed to the Supreme Court.

Parker & Lee for plaintiffs.
Otis L. Duncan and Leon G. Stevens for defendants.

CLARKSON, J. The questions involved: (1) Have the plaintiffs a right to maintain this action for recovery of property in dispute as heirs at law of grantor where deed does not contain clause of forfeiture or reverter? We think not. (2) Is title to trustees a fee when deed sets out that the property shall remain "vested in perpetuity to the above mentioned trustees and their successors in office"? We think so.

It will be noted that the deed says: (1) "Have bargained and sold and by these presents do bargain, sell and convey to the said trustees and their successors in office." (2) "The conditions of this deed are as follows: It is for the exclusive use of the Polenta Male and Female Academy; it shall be used exclusively for school purposes with the upper story of the building for the use of Freemasonry and Odd Fellowship, and occasionally preaching of any Protestant Denomination, if desired, and for no other purpose, the right and title of said cite shall remain

vested in perpetuity to the above mentioned Trustees and their successors in office." The *habendum:* (3) "To have and to hold the aforesaid tract or parcel of land and all privileges and appurtenances thereto belonging to the said Trustees and their successors forever."

The deed does not create an estate on condition subsequent for the reason that nowhere in the deed is there a reverter or reëntry clause. There is no language in the deed and no intention can be gathered from it that a reversionary interest exists and the grant is limited. There is no language in the deed that can be construed as a forfeit, that the property is either transferred to another or reserved by the original grantor.

We think the case of *Hall v. Quinn,* 190 N. C., 326, is decisive of this action. At pp. 328-9 it is said: "In the premises it is said that the grantors desired to establish and provide for this institution, which was a high school in the town of Kenansville, and that the Wilmington Presbytery had elected trustees by whom it was to be managed and controlled. Following the premises is the clause of conveyance to the 'trustees and their successors in trust for the Wilmington Presbytery to be used for the purposes of education.' And then the *habendum*—'to the said trustees, their successors and assigns in trust for the only use and benefit of the Wilmington Presbytery forever, and to be used for the purposes of education and for no other purposes.' The initial question relates to the quality of the estate described in this conveyance. The plaintiff contends that the deed passes to the trustees a fee simple, with the usual covenants of warranty, while the defendants contend that it conveys an estate in trust defeasible upon breach of a condition subsequent appearing upon the face of the instrument. An estate on condition expressed in the grant itself is where an estate is granted, either in fee simple or otherwise, with an express qualification annexed, whereby the estate granted shall either commence, be enlarged, or be defeated, upon performance or breach of such qualification or condition; and a condition subsequent operates upon an estate already created and vested, rendering it liable to be defeated if the condition is broken. 2 Bl., 154. 'Among the forms of expression which imply a condition in a grant,' says Washburn, 'the writers give the following: "on condition"—"provided always"—"if it shall so happen"—or "so that he, the grantee, pay, etc., within a specific time"; and grants made upon any of these terms vest a conditional estate in the grantee. And it is said other words make a condition if there be added a conclusion with a clause of reëntry, or without such clause, if they declare that, if the feoffee does or does not do such an act, his estate shall cease or be void.' Wash. Real Prop., 5 Ed., 3. The deed to the trustee contains none of these 'forms of expression'; no clause of reëntry; no forfeiture of the estate upon condition broken. *Brittain v. Taylor,* 168 N. C., 271; *Church v. Young,* 130

N. C., 8. . . . A clause in a deed will not be construed as a condition subsequent unless it expresses in apt and appropriate language the intention of the parties to this effect (*Braddy v. Elliott,* 146 N. C., 578), and a mere statement of the purpose for which the property is to be used is not sufficient to create such condition," citing numerous authorities. *Shields v. Harris,* 190 N. C., 520; *Shannonhouse v. Wolfe,* 191 N. C., 769; *Church v. Refining Co.,* 200 N. C., 469; *University v. High Point,* 203 N. C., 558 (560).

Defendants in their brief say: "That said deed conveys a fee simple title to the said trustees and their successors in office; that if said acting trustees are not legally appointed then in that event other trustees may be legally appointed by the proper court; that these trustees will have the right to lease said premises to the Woodmen of the World or any other lodge with a reservation for the use of the building for preaching, community gatherings, etc.; that should there never be any more school conducted there, the building could be continued serviceable for preaching, lodge meetings and general community meetings. . . . In the instant case the purposes for which the land was deeded has not ceased to exist and is ready for use as lodge purposes, Protestant religious worship or any other community gatherings, regardless of any surplus stipulation appearing in said deed."

In *Shields v. Harris,* 190 N. C., 520 (524-5), *Varser, J.,* for the Court, says: "A condition subsequent with a clause of reverter does not appear in the deed recited nor does it arise by clear implication. *Braddy v. Elliott,* 146 N. C., 578. No apt words are used to indicate an intention to create a condition subsequent which will work with a forfeiture. To every good expressed condition is required an external form, that is, sufficient words to declare an intent in the party to have the estate conditional, and an internal form, that is, such matter as whereof a condition may be made. Shep. Touchstone, Vol. 1, *126 (241); *Scantlin v. Garvin,* 46 Ind., 262. The proper subject matter exists, but the instant deed does not contain the 'sufficient words.' The usual and proper technical words, such as 'provided,' 'so as,' 'on condition,' or those mentioned by Lord Coke when he says: 'Words of condition are *sub conditione, ita quod, proviso,'* or the words *'si'* or *'quod contingat'* and similar terms with the clause of forfeiture or reëntry. Coke on Littleton, 203a, 203b, 204a; *Stanley v. Colt,* 72 U. S., 119; *Hall v. Quinn, ante,* 326. Conditions subsequent which work a forfeiture divesting estates are not to be raised readily by inference or argument, for they are not favored by the law. *Hall v. Quinn, supra,*" citing a wealth of authorities.

In the judgment of the court below is the following: "It is ordered that the clerk of this court, within thirty days from the end of this term of court, appoint three new trustees upon whom duties of the office shall

devolve." There is nothing in the pleading requesting new trustees to be appointed. No doubt, under proper application, a court of equity in certain cases can appoint trustees, as a trust never fails for want of a trustee. We doubt if this power can be delegated to the clerk. No law is cited and we know of none.

The judgment of the court below is

Modified and affirmed.

STATE v. PERRY DICKENS.

(Filed 22 March, 1939.)

1. Animals § 8—

A dog is a useful beast or animal within the meaning of the statute making it unlawful to willfully injure, needlessly mutilate, or kill any useful beast or animal. C. S., 4483.

2. Criminal Law § 2—

The word "willful" as used in criminal statutes signifies more than the mere intention to do a thing, and means the commission of the act "without just cause, excuse, or justification."

3. Animals § 9—Prior offenses committed by a useful animal does not justify the killing of the animal.

In a prosecution for needlessly killing a useful dog, C. S., 4483, evidence that a dog, not identified as the dog killed, had frequented the place where defendant was employed, resulting in unpleasant odors around the place, and that the dog had barked at night, is properly excluded from the evidence upon the State's objection, since the evidence does not tend to establish justification, the presence of the dog on the premises giving the defendant only the right to drive him away but not to injure him unnecessarily, and previous offenses committed by the dog not being justification for killing him, the right to kill being founded on the immediate necessity of protecting property, a person, or another animal.

4. Criminal Law § 52c—

Where a statute makes the willful commission of an act a criminal offense, so that the proof of a particular intent is not necessary, uncontradicted evidence that defendant did willfully commit the act, justifies an instruction that the jury should return a verdict of guilty if they should find the facts to be as shown by all the evidence.

5. Criminal Law § 81c—

A peremptory instruction using the phrase "if you believe all the evidence" rather than "if you find the facts to be from all the evidence," *held* an inadvertence not constituting prejudicial error.

6. Animals § 9—

Uncontradicted evidence that the defendant killed the prosecuting witness' pointer dog without just cause, excuse, or justification, *held* to sustain a peremptory instruction by the court.

APPEAL by defendant from *Parker, J.*, at November Term, 1938, of BERTIE. No error.

The defendant was charged with willfully and needlessly killing a dog in violation of C. S., 4483. The jury returned a verdict of guilty, and from judgment thereon defendant appealed.

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

H. S. Ward for defendant.

DEVIN, J. The statute, C. S., 4483, makes it unlawful to "willfully injure . . . needlessly mutilate or kill . . . any useful beast or animal." The willful killing of a dog is embraced within the prohibition of the statute. *S. v. Smith,* 156 N. C., 628, 72 S. E., 321; *S. v. Clifton,* 152 N. C., 800, 67 S. E., 751.

The manner and circumstances of the killing of the dog as disclosed by the evidence were not controverted. The defendant did not go upon the stand. The testimony showed that the defendant intentionally and without cause shot and killed a dog—a valuable pointer—the property of the prosecuting witness. It was testified that defendant went into a store, purchased two shells, and then proceeded to a place near where the dog was and at close range shot him through the hips and back legs. The dog was at the time about three feet from the back porch of the funeral home where defendant was employed. "The dog's head was facing the other way." The dog crawled under the back steps and died. The defendant carried the gun in the house. It was not disclosed what the defendant's duties were in connection with the funeral home.

The defendant offered to show by a witness that a dog—not identified as the dog of the prosecuting witness—had previously "bursted through the front door" of the funeral home, that he frequented the place and "made the place smell just like a dog . . . on the front and back porch and in the hall . . . barking at night." The State's objection to this evidence was sustained.

The court charged the jury as follows: "Gentlemen of the jury, if you believe all the evidence in this case, and beyond a reasonable doubt, the burden of proof being upon the State of North Carolina to so satisfy you, it will be your duty to return a verdict of guilty. If you have a reasonable doubt of his guilt, it will be your duty to acquit him."

The appellant's assignments of error relate to the ruling of the court in sustaining objection to the proffered testimony, and also to the charge of the court.

One of the essential elements of the offense with which the defendant is charged is that it be willfully done. The meaning of the word "willful" as used in criminal statutes was defined by *Ashe, J.*, speaking for the Court in the case of *S. v. Whitener,* 93 N. C., 590, as follows: "The word willful, used in a statute creating a criminal offense, means something more than an intention to do a thing. It implies the doing the act purposely and deliberately, indicating a purpose to do it without authority—careless whether he has the right or not—in violation of law, and it is this which makes the criminal intent without which one cannot be brought within the meaning of a criminal statute." This definition has been quoted and approved in numerous cases since. *S. v. Lumber Co.,* 153 N. C., 610, 69 S. E., 58; *Brittain v. R. R.,* 167 N. C., 642, 83 S. E., 702; *S. v. Falkner,* 182 N. C., 793, 108 S. E., 756; *Foster v. Hyman,* 197 N. C., 189, 148 S. E., 36; *West v. West,* 199 N. C., 12, 153 S. E., 600. Willful means "without just cause, excuse or justification." *S. v. Yelverton,* 196 N. C., 64, 147 S. E., 683.

The exclusion of the defendant's proposed testimony is fully sustained by the decisions of this Court in *S. v. Smith,* 156 N. C., 628, 72 S. E., 321, and the cases cited and discussed in the opinion by *Walker, J.* There was here no evidence offered that the dog of the prosecuting witness, at the time he was killed, was attempting to attack any animal or person, or threatening injury to property, so as to reasonably lead the defendant to believe that it was necessary to kill in order to protect the property of his employer. All the evidence was to the contrary. Nor would the defendant have been justified in executing the dog for a previous offense if such had been shown. *Morse v. Nixon,* 51 N. C., 293. The presence of the dog on the premises gave defendant the right to drive him away but not to injure him unnecessarily, although trespassing. *Scott v. Cates,* 175 N. C., 336, 95 S. E., 551; 2 Am. Jur., 762-764. The right to slay him cannot be justified by his previous act of bursting in through a door, or by the fact that his body emitted an odor peculiar to dogs, but is founded only on the right to protect person or property.

We think the trial judge correctly ruled that all the evidence in the case, if found by the jury beyond a reasonable doubt to be true, constituted a willful violation of the statute.

In *S. v. Neal,* 120 N. C., 613, 27 S. E., 81, the defendant was charged with violation of this statute in killing chickens which were destroying his peas. The trial court in that case erroneously placed the burden on the defendant to prove justification. The Court said: "But this error

in the charge was harmless error, for there was no evidence tending to show that the defendant was justified, and the court properly told the jury that the killing to prevent the destruction of the peas (the only matter in justification relied on) would not justify the defendant. The court might properly have told the jury that, if they believed the evidence, they should find the defendant guilty, for there was no conflict of evidence, and it amounted to that, since there was no evidence which made a legal defense."

In *S. v. Smith, supra,* where the defendant was charged with willfully killing a dog, justification was attempted on the ground that the dog had visited the premises before and turkeys had been killed. In the opinion in that case it was pointed out that at the time he was killed the dog was not in position to make danger to the turkeys appear imminent, and this language was used: "Upon the facts of this case we are of the opinion, and so decide, that the defendants were guilty, and that while the judge erred when he charged that if the dog was actually killing the turkeys it would be no defense or justification for the killing, this error was harmless, as there was no evidence that the danger to the turkeys was imminent and (that) the necessity to kill was apparent. . . . He (the dog) could have been driven away without resorting to extreme punishment, for it was nothing but punishment inflicted upon him for his supposed past transgressions, that is, resentment and retaliation. It was an act unlawful at common law and willful within the meaning of the statute as construed in *S. v. Clifton,* 152 N. C., 802 (800)."

In *S. v. Estes,* 185 N. C., 752, 117 S. E., 591, the defendant was charged with willfully interfering with or obstructing a sanitary inspector in the discharge of his duty. We quote from the opinion in that case, written by *Adams, J.,* as follows: "His Honor instructed the jury to convict the defendant if they had no reasonable doubt as to the truth of the evidence; and the appeal presents the question whether the evidence, if true, necessarily established the defendant's guilt. . . . It is a recognized principle that the trial judge is not justified in directing a verdict of guilty in a criminal action—a concrete application of the principle appearing in *Dixon's case,* 75 N. C., 275, in which the presiding judge said, 'I shall tell the jury to return a verdict of manslaughter.' *S. v. Dixon,* 75 N. C., 275; *S. v. Boyd,* 175 N. C., 791; *S. v. Singleton,* 183 N. C., 738. But where, as an inference of law, the uncontradicted evidence, if accepted as true, establishes the defendant's guilt it is permissible for the court to instruct the jury to return a verdict of guilty if they find the evidence to be true beyond a reasonable doubt. *S. v. Vines,* 93 N. C., 493; *S. v. Winchester,* 113 N. C., 642; *S. v. Riley, ibid.,* 648; *S. v. Woolard,* 119 N. C., 779."

We do not think the charge of the court upon all the evidence presented in the instant case is in conflict with the well-settled principle stated in *S. v. Williams,* 214 N. C., 682, and the causes there cited. In the *Williams case, supra,* it was held for error that the judge charged the jury, "It is your duty to convict this man either of rape or 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 assault."

In *S. v. Ellis,* 210 N. C., 166, 185 S. E., 663, the defendant was charged with possession of liquor for the purpose of sale. There was evidence of the possession of twelve and a half quarts of whiskey. The statute constituted this *prima facie* evidence of violation of law. The trial judge charged the jury if they found the facts to be as the evidence tended to show beyond a reasonable doubt to return verdict of guilty. This Court held the *prima facie* effect given this evidence by the statute did not warrant the instruction. *Stacy, C. J.,* delivering the opinion of the Court, used this language: "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." There the fact of possession did not necessarily establish possession for the purpose of sale.

In *S. v. Hill,* 141 N. C., 769, 53 S. E., 311, where the charge was assault with a deadly weapon and defendant pleaded self-defense, the judge stated in the presence of the jury that he would instruct them that the defendant was guilty upon his own statement. A new trial was granted, but this Court said that where there was no evidence tending to establish the plea of self-defense, and where in any aspect of the testimony the defendant's guilt was manifest, the judge might tell the jury if they found the facts to be as testified, they should render a verdict of guilty.

In *S. v. Riley,* 113 N. C., 648, 18 S. E., 168, the defendant was charged with sale of spirituous liquor in violation of the law. At the close of the evidence the judge instructed the jury that if they believed the evidence the defendant was guilty, and thereupon directed the clerk to enter a verdict of guilty, which was done. The Court, in granting a new trial, said: "The fartherest the court can go in a criminal action is to charge the jury that if they believe the evidence the defendant is guilty. Upon the evidence set out in the record there was a plain case against the defendant, if the evidence is to be believed, but of that a jury and a jury alone can judge."

The case under consideration is not one of those where the burden of proof is upon the State to establish a particular intent as a necessary

ingredient of the criminal offense charged. *S. v. Coy,* 119 N. C., 901, 26 S. E., 120; *S. v. Barrett,* 123 N. C., 753, 31 S. E., 731; *Blake v. Smith,* 163 N. C., 274, 79 S. E., 596; *S. v. Kirkland,* 178 N. C., 810, 101 S. E., 560; *S. v. Eunice,* 194 N. C., 409, 139 S. E., 774. There is a distinction between the rule established in those and other similar cases and that applicable to an offense where it is necessary to show that the act was willful as that word has been defined by this Court.

While the words used by the judge in charging the jury, "if you believe all the evidence," might be open to criticism (*S. v. Loftin,* 186 N. C., 205, 119 S. E., 209; *S. v. Green,* 134 N. C., 658, 46 S. E., 761; *S. v. Barrett,* 123 N. C., 753, 31 S. E., 731), this inadvertence was not prejudicial. *Merrell v. Dudley,* 139 N. C., 57, 51 S. E., 777.

From all the evidence, if the testimony adduced is to be taken as true, it was established that the defendant purposely and deliberately, in violation of law, "without just cause, excuse or justification," shot and killed the prosecutor's dog. If so, this would constitute a willful act within the meaning of the word as defined. The jury was instructed if they found beyond a reasonable doubt that this evidence was true to return a verdict of guilty, but if they had a reasonable doubt about it to acquit the defendant. The jury has accepted the evidence as true and by the proper degree of proof has found the defendant guilty. The facts have thus been determined. We perceive no just ground upon which we should set aside the verdict and judgment.

No error.

WALTER HOOPER v. CARR LUMBER COMPANY.

(Filed 22 March, 1939.)

1. Limitation of Action § 16—

Where defendant pleads the appropriate statute of limitations the burden is upon plaintiff to prove that the action is not barred.

2. Limitation of Action § 3—Action to recover damages for injury to lands from flooding, alleged to have been caused by negligent logging operations, held to accrue as of time of wrongful acts or omissions.

Plaintiff instituted this action to recover damages resulting from the overflow of waters of a river alleged to have been caused by the negligent acts and omissions of defendant in its logging operations in the improper construction of bridges across the river, the leaving of tree laps and debris along the river bank and the negligent failure to remove the bridges after cessation of logging operations, which negligent acts and omissions transpired over a period of years. *Held:* While ordinarily a cause of action in tort does not accrue until some injury results from the negligence of defendant, the running of the statute of limitation in the present case must be computed from the time of the alleged wrongful acts or omissions.

3. Limitation of Action § 6—Lower riparian owner alleging trespass from overflow of river on lands must show that upper proprietor was in possession and control within the statutory period.

Plaintiff instituted this action to recover for damages resulting from the overflow on his lands of waters of a river alleged to have resulted from the negligent acts and omissions of defendant in its logging operations. *Held:* Even if it be conceded that the alleged negligence constituted a continuing omission of duty toward the plaintiff by defendant, plaintiff must show that defendant was in possession and control of the upper lands within the statutory period, C. S., 441.

4. Limitation of Action § 18—Nonsuit on ground of bar of statute held proper upon failure of plaintiff to prove that action was not barred.

In an action to recover damages resulting from the overflow of waters of a river upon plaintiff's land alleged to have been caused by the negligent acts and omissions of defendant in its logging operations upon the upper lands of the river, the failure of plaintiff to show that the alleged negligent acts or omissions causing the injury transpired within three years of the instituting of the action, or, if the injury be considered the result of a continuing omission of duty owed plaintiff by defendant, the failure of proof that defendant had been in possession and control of the lands within the three-year period entitles defendant to judgment as of nonsuit on the ground of the bar of the statute. C. S., 441.

5. Appeal and Error § 41—

Where it is determined that judgment as of nonsuit is properly entered upon the plea of the bar of statute of limitations, whether the evidence is sufficient to sustain the allegations of negligence and proximate cause need not be determined.

APPEAL of plaintiff from *Cowper, Special Judge,* at August Term, 1938, of HENDERSON. Affirmed.

The plaintiff sued for recovery of damages for injury to his lands, caused by the overflow of Mills River, and the consequent flooding and washing of the lands, alleged to have been brought about by the negligence of the defendant in its logging operations on the banks and slopes of the river, and the improper construction of bridges across the river, and want of due care in the maintenance and subsequent removal of the same.

It is alleged that for a great number of years the defendant maintained a railroad for the transportation of its lumber which had been cut in the Pisgah National Forest and other boundaries above plaintiff's property; that in these operations the defendant built and operated a logging railroad, and negligently constructed trestles over the main stream of Mills River and its tributaries, which were not so constructed as to permit a sufficient clearance for the flow of water under them in the natural course of the river; that the manner of construction of these trestles or bridges was such as to obstruct the water, cause logs and

debris washed down the stream from flood water to be lodged against the trestles, allowing the water to strike with great force against them. It is further alleged that in addition to such negligent construction of its trestles and bridges defendant cut great trees on the river, leaving the tree laps on the banks of the river which, with accumulated debris and wreckage, floated down the river under ordinary circumstances, washed upon plaintiff's property, lodged against the banks of the river, caused the river to turn from its natural course and flow through plaintiff's land, to plaintiff's great damage. It is further alleged that defendant ceased its logging operations in Henderson County during 1937 and left remaining on the ground logs, timber, debris, and wreckage, which caused the damage complained of. Plaintiff alleges that the defendant knew, or had reason to expect, that as a natural consequence of its alleged negligent acts damage would accrue to the plaintiff; and asks as compensation the sum of $3,000.

The defendant denies that it was negligent in any respect, and sets up as a further defense that the property upon which its logging operations had taken place was acquired by the United States Government through a conveyance covering a large boundary of Henderson and Transylvania counties, and that under this contract the defendant ceased its operations and vacated the property in the year 1934, since which time it had no right to go upon any part of the land for any purpose; and specifically pleads that all things done by it in the premises occurred more than three years before the institution of the suit, and pleads the three-year statute of limitations.

The plaintiff's evidence tended to show that the defendant had conducted the logging operations described in the complaint and had left upon the location trees, tree laps and debris, as described in the complaint; that the construction of the trestles used by the defendant were of such a nature as to obstruct the natural flow of water, under certain conditions, and that defendant had left these trestles and portions thereof under such conditions as to obstruct the flow of water and divert it at flood times; that logs and laps left from the operations of defendant had washed down upon plaintiff's land, and that about ten acres of the bottom land was badly flooded and washed by reason thereof. Plaintiff himself testified: "The logs I have testified about looked like logs I have seen on the Government land when I was on the Government property hunting in 1936 and 1937."

The evidence tended to show that during high water in 1936 and 1937 logs and stumps came down upon plaintiff's land, and that plaintiff sustained damages therefrom during those years.

At the end of plaintiff's evidence, and again at the conclusion of the defendant's evidence, the defendant moved for judgment as of nonsuit, which was allowed, and from the judgment of nonsuit plaintiff appealed.

Arthur J. Redden and J. E. Shipman for plaintiff, appellant.
R. L. Whitmire and L. B. Prince for defendant, appellee.

SEAWELL, J. The statute of limitations having been pleaded, the burden was on the plaintiff to show that his cause of action against the defendant accrued within three years prior to the institution of the suit. *Southerland v. Crump,* 199 N. C., 111, 153 S. E., 845; *Phillips v. Penland,* 196 N. C., 425, 147 S. E., 731; *Rankin v. Oates,* 183 N. C., 517, 112 S. E., 32; *Marks v. McLeod,* 203 N. C., 257, 165 S. E., 693; *Aldridge v. Dixon,* 205 N. C., 480, 171 S. E., 777.

While the plaintiff could not have brought and maintained his action until some injury to his property had occurred by reason of the alleged negligent acts or omissions of duty of the defendant, it does not follow that the time of the injury marks the beginning point of the running of the statute of limitations.

Logically speaking, in a matter of tort at least, it takes both the negligent act or omission of duty, and the resultant injury, to constitute a cause of action; but since these may be widely separated in point of time, a closer analysis may be necessary in applying the statute of limitations. Whatever definition of "cause of action" may be adopted (see 1 Am. Jur., p. 404, sec. 2), and whatever distinction may be made between the "right of action" and "cause of action," it seems clear that in a case of this sort both reason and authority require that the running of the statute must be computed from the time of the wrongful act or omission from which the injury resulted. *Mobley v. Murray County,* 178 Ga., 388, 173 S. E., 680. If we view the negligence or wrongful conduct complained of as a continuing omission of duty toward the plaintiff in permitting the logs, laps, and trestles to remain in the condition described, and a source of probable injury to plaintiff's land by causing obstructions in the river and consequent overflow, in order to repel the bar of the statute of limitations it must affirmatively appear from the evidence that these conditions were under control of the defendant, and the breach of duty with reference thereto had taken place some time within the period of three years preceding the injury. C. S., 441.

The law will not permit recovery for negligence which has become *a fait accompli* at a remote time not within the statutory period, although injury may result from it within the period of limitation; nor will the fact that defendant failed to remedy conditions out of which plaintiff might have been damaged, but which conditions had passed

beyond his control more than three years prior to plaintiff's injury, be attributed to him as an omission of legal duty.

In this case, considering the evidence in its most favorable light to plaintiff, it does not affirmatively appear that the acts complained of—at least those to which plaintiff's injury under the evidence might have been attributable—had taken place within the three years prior to the institution of the suit; and if we should consider the leaving of the logs and laps and trestles in the condition described in the evidence in the aspect of a continuing omission of duty, plaintiff has not produced any evidence tending to show that the defendant had any further connection by way of ownership or lease with the premises or any circumstances from which control of these conditions at the time of plaintiff's injury or within the statutory period during which his cause of action must have accrued, might be inferred and thus repel the bar of the statute.

Under these circumstances, we need not inquire into the legal aspects of the controversy between the parties as to whether the evidence is sufficient to show negligence or wrongful conduct on the part of the defendant as the proximate cause of plaintiff's injury and damage.

The judgment of the court below is

Affirmed.

ROBERT HILL, MACK ALLEN HILL AND THEODORE HILL, BY THEIR NEXT FRIEND AND FATHER, W. M. HILL; W. M. HILL, INDIVIDUALLY; W. M. HILL, TRUSTEE FOR ROBERT HILL, MACK ALLEN HILL AND THEODORE HILL, v. GEORGE P. STREET; REALTY, INCORPORATED, J. H. YELTON; C. D. WEEKS, COMMISSIONER, AND W. E. DAVIS.

(Filed 22 March, 1939.)

1. Deeds § 10a—

An unregistered deed is good as between the parties.

2. Taxation § 40b—

Where it appears of record that the owner of land had executed a deed of trust on same which had not been validly canceled, the trustee and *cestui que trust* are necessary parties to an action to foreclose a tax sales certificate on the property, and the record is notice to those claiming under the tax foreclosure suit.

3. Mortgages § 28—

Where infants own the debt secured by deed of trust, cancellation of the deed of trust by the trustee therein named is void in the absence of authorization by them or by their guardian duly appointed.

4. Taxation § 41: Equity § 2—

Minors having a beneficial interest in lands will not be held guilty of laches in seeking to redeem the lands after judgment in the suit to foreclose the tax sales certificate, nor in failing to examine the docket to see that their interests appeared of record, nor will the laches of their father, to whom the lands were conveyed for their benefit, be attributed to them.

5. Taxation § 41—

Persons acquiring an interest in land subsequent to the tax sale are entitled to redeem same, even where the required notice has been duly advertised, at any time prior to the order that deed be made to the purchaser in the suit to foreclose the tax sale certificate, or within six months after notice.

6. Same—Infants having beneficial interest in lands held entitled to redeem same from foreclosure of tax sale certificate.

In a suit to foreclose a tax sale certificate, only the record owner was made a party defendant, although it appeared of record that she had mortgaged same prior to the tax sale and that the mortgage had not been properly canceled. Plaintiffs were minors who acquired a beneficial interest in the lands under an unrecorded deed to their father as trustee for them, executed subsequent to the tax sale but more than a year prior to the judgment in the suit to foreclose the tax sale certificate. Plaintiffs went into possession of the lands immediately upon the execution of their deed. It appeared that the purchaser at the tax sale had bid in the land for a grossly inadequate consideration. *Held:* Under the facts and circumstances of this case the right of plaintiffs to redeem the land from the sale under the foreclosure of the tax sales certificate is not barred, plaintiffs not having been parties and not having been served with summons in the tax foreclosure suit. The limitations on the right of redemption of lands sold for the nonpayment of taxes and the procedural changes made by the statutes, discussed by *Mr. Justice Devin.*

7. Same—Form of judgment where plaintiffs are entitled to redeem land sold for nonpayment of taxes.

Where plaintiffs have a right to redeem land sold for the nonpayment of taxes, judgment should be entered giving them a reasonable time to pay the purchaser at the tax sale the amount of the bid with interest plus taxes and penalties paid by him, with provision that upon compliance, the deed to the purchaser be set aside, and that upon non-compliance the right to redeem should be conclusively held to have been abandoned and the defendant adjudged to hold the land in fee simple, free of plaintiffs' claim. C. S., 8039.

APPEAL by plaintiffs from *Pless, J.*, at November Term, 1938, of HENDERSON. Error and remanded.

This was an action to redeem land which had been sold under foreclosure to enforce lien for unpaid taxes, and to restrain execution of writ of assistance. Plaintiffs tender payment of the amount due in the tax sale certificate and costs of proceeding. It was adjudged that the purchaser at the sale, the defendant Realty, Incorporated, was the owner

of the land in fee simple, and entitled to immediate possession thereof, and that writ of assistance issue to effectuate its possession. Plaintiffs appealed.

Arthur J. Redden for plaintiffs.
O. B. Crowell for defendants.

DEVIN, J. The material facts, upon which depend the rights of the parties with respect to the property in litigation, sufficiently appear from the admissions in the pleadings and the judgment of the court thereon.

The original owner of the property described in the complaint, consisting of a house and lot in Hendersonville, was Hattie E. Scott. By deed of trust duly recorded in 1927 she conveyed the property to a trustee to secure a debt of $3,120.00. The note evidencing the debt thus secured was subsequently assigned to W. M. Hill, the father and now next friend of the infant plaintiffs. On 3 May, 1934, Hattie E. Scott by deed conveyed the property to W. M. Hill as trustee for the benefit of the infant plaintiffs. A valuable consideration is alleged. This deed was not put to record at the time of the institution of this action. The plaintiffs have been in possession since the date of the deed.

In 1932, the property was sold for the unpaid taxes of 1930, and tax sale certificate in sum of $54.30 was issued to defendant Street. In March, 1933, tax foreclosure suit was instituted by Street against Hattie E. Scott to foreclose the tax certificate. Neither the trustee in the deed of trust, nor the holder of the note secured, nor any of the plaintiffs were at any time made parties, or served with summons or notice of this suit, nor was notice to other persons posted and published as required by the statute. Thereafter, in August, 1935, sale under judgment of foreclosure was had and the property bid off for $115.00. The defendant alleged in its answer that W. M. Hill was notified by letter of the advertisement of sale, but the court made no finding on this point. In January, 1936, order to make deed was entered, and in March, 1936, deed was executed to defendant Realty, Incorporated, by the commissioner named in the foreclosure judgment.

The infant plaintiffs in apt time instituted this action to redeem the land of which they became the beneficial owners prior to the judgment. Having had no notice of the suit, nor in any way made parties thereto, they contend their right to redeem has not been foreclosed.

The law recognizes the right of the owner to redeem land which has been sold for the non-payment of taxes, and the limitations upon that right were prescribed by C. S., 8038. This statute restricted the time within which the owner might redeem to one year from day of sale, but

with this proviso: "Infants, idiots and insane persons may redeem any land belonging to them within one year after the expiration of such disability on like terms as if the redemption had been made within one year from date of said sale."

In *Forsyth County v. Joyce,* 204 N. C., 734, 169 S. E., 655, this statute was interpreted in relation to foreclosure suits instituted to enforce the lien acquired by the purchaser at a tax sale, and it was there held that the provisions for foreclosure by suit of tax sale certificate afforded sufficient protection to infants who were made parties to the suit and who defended by guardian, either general or *ad litem.* The Court said: "The purchasers' right to demand a deed (under the former method) was summary and could successfully be resisted only at the active instance of the taxpayer. But in a proceeding to foreclose the certificate the rights and property of the minor were subject to the supervision and protection of the court. As long as the two methods were recognized, it was necessary to preserve the right of redemption, although it appertained to only one of them; and this, we apprehend, explains the retention of the last clause in section 8038 of the Consolidated Statutes. A radical change, however, was wrought by the act of 1927 and the amendments of 1929. They eliminate the purchaser's right to demand a deed and provide that relief shall be afforded only in an action in the nature of a suit to foreclose a mortgage. Public Laws 1927, ch. 221, sec. 4; 1929, ch. 334. The delinquent shall be made a defendant, and if a minor he must defend by a guardian, either general, testamentary, or *ad litem.* C. S., 451. The amendments referred to resulted in a change of procedure and of substantive rights. The minor's right to redeem his land annulled the inhibition against its sale for taxes, and the protection of his interests by the court in a suit by the purchaser to foreclose his certificate abrogated the minor's right of redemption after final judgment."

In *Hines v. Williams,* 198 N. C., 420, 152 S. E., 39, it was said: "The last clause of section 8038 evidently has no application to cases in which the certificate is foreclosed and the infants are properly before the court and protected by its judgment."

In *Guy v. Harmon,* 204 N. C., 226, a tax foreclosure suit, Virgie Harmon, in whose name the land was listed, and her husband were made parties. It later developed that Virgie had only a dower interest and that her minor children by a former marriage owned an interest in the land. This Court held the infants, not having been made parties, were not foreclosed. *Brogden, J.,* speaking for the Court in that case, said: "The minor owners of the land were not made parties to the suit unless newspaper publication be sufficient for such purpose. Foreclosure is an equitable proceeding and the law as interpreted and applied in this State has uniformly commanded a day in court for parties in interest."

Though the deed from Hattie E. Scott conveying the beneficial interest in the property to the infant plaintiffs was not recorded at the time, the deed was good between the parties and was followed by possession of the property by the grantees. It was found as a fact by the court that the infant plaintiffs were the grantees in the deed in which this property was conveyed to them on the date named, more than a year before the judgment against Hattie E. Scott was entered and before the property was sold. The effect of this deed under the circumstances was to invest the infant plaintiffs with an interest in the land sufficient to invoke the protection of the court and to give to those who have not had a day in court an opportunity to redeem. It will also be observed that at the time of the institution of the foreclosure suit, the deed of trust on the property, executed by Hattie E. Scott to a trustee to secure a debt, was on record. This gave notice to those claiming under the foreclosure suit that the trustee and the *cestui que trust* had an interest in the property. In the absence of proper notice to them their interest remained unaffected by the foreclosure judgment. *Beaufort County v. Mayo,* 207 N. C., 211, 176 S. E., 753. Subsequent to the execution of the deed to the plaintiffs in 1934, the deed of trust was marked cancelled. The court found this was done by W. M. Hill. Whether the attempted cancellation was entered in the manner prescribed by C. S., 2594 does not appear. It is apparent, however, that the cancellation was not authorized by the infant plaintiffs, or by any one empowered to act for them, since it is admitted that they were and are without guardian.

We do not think the infant plaintiffs or W. M. Hill should be held guilty of laches for not finding out about the foreclosure suit of which they had no notice, or for failure to examine the docket, wherein Hattie E. Scott alone was named as the defendant. Nor would laches on the part of W. M. Hill be attributable to the infant plaintiffs.

The facts here are materially different from those upon which the decision in *McMillan v. Hogan,* 129 N. C., 314, 40 S. E., 63, was based. There the land was sold for unpaid taxes under the Act of 1895. After the purchase by the plaintiff at the tax sale, the taxpayer died leaving minor children. There was no tender of payment of taxes or of repayment to the plaintiff. Under the statutes applicable to the instant case, however, the rights of owners are no longer to be fixed by their status at the time of the purchase at the tax sale. It is now provided that, even where the required notice has been duly advertised, other persons claiming an interest shall have right to set up claims at any time before the order to make deed is entered, or within six months after notice. Hence it would seem that where the prescribed notice was not given the rights of infant owners accruing before judgment will not be deemed foreclosed.

It sufficiently appears from the record in this case that in the foreclosure suit Hattie E. Scott alone was served with summons; that at that time she had only a slight equity in property mortgaged for more than it was worth; that none of those who had any substantial interest in the property were made parties or served with process or lawful notice, and that property found by the court to be worth more than $2,000 was bid off at the sale and conveyed to defendant Realty, Incorporated, for $115.00.

Under these circumstances the effort of the defendant to cut off the right of the infant owners to redeem does not commend itself to a court of equity. In *Buncombe County v. Arbogast,* 205 N. C., 745, 172 S. E., 364, *Stacy, C. J.,* aptly decries a similar effort made in that case, saying: "Equity pursues the right, abhors the wrong, and enjoins upon all persons 'to live honestly, to harm nobody, to render to every man his due.' Justinian."

There was error in the ruling of the court below, and this cause is remanded with directions that judgment be entered that plaintiffs be entitled to redeem upon condition that the plaintiffs, within a reasonable time to be fixed by the judgment, pay to the defendant Realty, Incorporated, the full amount bid and paid for the property, and interest thereon, and also reimburse this defendant for such taxes and penalties due as have been since paid by it on the described property, and that if this be done defendant's deed be set aside; and if these amounts be not paid within such reasonable time, the right to redeem will be conclusively held to have been abandoned and the title of the defendant Realty, Incorporated, thereupon adjudged in fee simple, freed from plaintiffs' claim. C. S., 8039.

Error and remanded.

STATE v. TED AIKEN.

(Filed 22 March, 1939.)

1. Criminal Law § 48c—

Where the trial court fully instructs the jury that it should not consider evidence admitted but subsequently withdrawn by the court, the admission of the evidence cannot be held prejudicial, and the denial of defendant's motion for a new trial will not be held error.

2. Homicide § 18—

An alleged dying declaration, even when proper predicate is laid for its admission, is not competent unless it relates to the act of the killing, or to the circumstances so immediately attendant thereon as to constitute a part of the *res gestæ.*

3. Criminal Law § 79—

In order to present for review the ruling of the trial court upon the admission of evidence, defendant must bring forward his exception to the evidence in his brief.

4. Homicide § 18—Alleged dying declaration held not to relate to the res gestæ and its admission in evidence was error.

The State contended and offered evidence tending to show that the defendant inflicted wounds on deceased, resulting in his death, in a fight occurring at a filling station some distance from the railroad track where deceased was found in an unconscious condition the following morning. Defendant offered evidence of the schedule of trains passing over the tracks near which deceased was found, and the State offered evidence as to the construction of trains and the topography of the land to rebut the conjecture that deceased had been struck by a passing train. The trial court admitted in evidence testimony of an alleged dying declaration of the deceased that he had not been hit by a train. *Held:* The State's evidence and contentions were that the fight occurred at the filling station and that the fatal wound was there inflicted, and the evidence of defendant introduced to raise the conjecture that the deceased had been struck by a passing train was wholly irrelevant and immaterial, and therefore the alleged dying declaration in nowise related to the *res gestæ* and was likewise irrelevant, and its admission was erroneous.

5. Criminal Law § 81c—

Since the State in a prosecution for homicide is not required to negative the mere possibility that deceased received his fatal wound other than at the hands of the defendant, the admission of testimony of a declaration of deceased that he had not been struck by a train has no bearing on the question of the guilt or innocence of the defendant and its admission, though erroneous, is harmless.

APPEAL by defendant from *Rousseau, J.*, at January Term, 1939, of MCDOWELL. No error.

Criminal action in which the defendant was tried under a bill of indictment charging him with the murder of one Dennis Gibbs.

The defendant was employed by one Joe Hensley, who operated a filling station near Nebo. From about 6:00 p.m. until 9:00 p.m. on the night of 5 September, 1938, the defendant, Joe Hensley, the deceased and others were at the filling station matching coins to determine who would pay for playing the piccolo. The State offered evidence tending to show that the defendant had been drinking and was somewhat under the influence of intoxicating liquor; that some of the parties dropped out of the matching game and left; that Hensley and another went off to get some potatoes; that while he was gone an argument ensued between the defendant and the deceased, in which epithets were exchanged; that the defendant struck the deceased and pushed him into an adjoining room which was not lighted; that he then picked up a blackjack and

monkey wrench and beat the deceased with these for several minutes; that the clothes of the deceased were torn and he was bloody on his back and face; that Joe Hensley returned and carried the deceased to a point near the railroad crossing about 100 yards from the home of the deceased and that the deceased was thereafter found in a dazed condition lying practically at right angles to the railroad track with his head in between two of the crossties. It also offered evidence tending to show that the defendant had stated that about ten or fifteen minutes of the time during the evening his mind went blank and he did not remember what occurred; that he did not believe he could have inflicted such a wound. There was other testimony tending to support and corroborate this evidence.

The defendant denied the assault and offered evidence tending to impeach the character of the State's principal witness, Natallie Bradley, and to show that when Hensley carried the deceased away from the station he was not injured. He also offered evidence as to the schedule of trains passing over the railroad track at the point where the deceased was lying during the period between the time he was carried away from the filling station and the time his body was found. In rebuttal the State offered evidence as to the topography of the land at the railroad crossing; the position of the body when found; the location of the steps and handrails to the coal car or tender, the physical makeup of a box-car and other parts of a train. It likewise offered, as a dying declaration, statements of the deceased that a train did not strike him.

The jury returned a verdict of "Guilty of manslaughter." From judgment thereon the defendant appealed.

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

G. F. Washburn for defendant, appellant.

BARNHILL, J. All of the evidence tends to show that the proximate cause of the death of deceased was a wound in his lower back which broke two ribs, and that he was bruised about the face and head; that the wound in the back "bruised itself through the tissue," and the wound was filled with dirty grease. The doctor testified that the wound in the back was the primary cause of death and that internal hemorrhage and traumatic pneumonia which developed were the immediate cause.

The court below admitted a statement of the deceased that the train had not hit him, made at the time he was found at the railroad track. Thereafter the court withdrew this testimony and instructed the jury that they should eliminate it from their minds entirely and not consider it at all. The defendant moved that a juror be withdrawn and a mis-

trial ordered. The motion was denied. In view of the full instruction of the court to the jury in withdrawing this testimony, we can see no error in its refusal to allow the motion for a new trial.

The court likewise admitted evidence of a statement by the deceased, made at the hospital, that he would be a dead man in thirty minutes and that the train did not strike him. The State's evidence tends to show that this statement was made in the emergency room of the hospital; that the deceased later repeated the statement on several occasions; and that he thereafter told his sister that he had been beaten about the head with a blackjack. Except for this latter statement the deceased did not undertake to tell how he received the injuries from which he was suffering. The defendant assigns as error admission of the statements of the deceased, and this constitutes one of the exceptions principally relied upon.

Stacy, C. J., speaking for the Court, and citing numerous authorities, states the rule governing admissibility of dying declarations in *S. v. Beal,* 199 N. C., at page 296, as follows: "The general rule is, that, in prosecutions for homicide, declarations of the deceased, made while sane, when *in extremis* or *in articulo mortis,* and under the solemn conviction of approaching dissolution, concerning the killing or facts and circumstances which go to make up the *res gestæ* of the act, are admissible in evidence, provided the deceased, if living and offered as a witness in the case, would be competent to testify to the matters contained in the declarations." He further says: "We have a number of decisions to the effect that dying declarations are admissible in cases of homicide when they relate to the act of killing, or to the circumstance so immediately attendant thereon as to constitute a part of the *res gestæ,* and appear to have been made by the victim in the present anticipation of death, which ensues." It is the prevailing rule which has not been departed from by any court, so far as we know, that the alleged dying declaration, to be admissible, must "relate to the act of killing, or to the circumstances so immediately attendant thereon as to constitute a part of the *res gestæ.*" In considering this rule, it may be conceded that if an affirmative statement of the deceased as to how he received the wound from which he died is admissible, then a negative statement would likewise be admissible. In either event, however, the statement must relate to or constitute a part of the *res gestæ.*

There is a total absence of evidence in the record tending to show that any train struck the deceased. The evidence offered by the defendant as to the schedule of trains passing over the track near which the deceased was found was wholly irrelevant to the issue being tried and was immaterial and incompetent. However, the State "took the bait" and proceeded to offer other evidence about the makeup or construction of

trains and the topography of the land near the crossing. It thus departed from the real issue and engaged with the defendant in chasing rabbits on an issue entirely foreign to the trial, and aided the defendant in constructing a bogey-man that might persuade the jury to conjecture and surmise that the deceased had been struck by a passing train. All of this evidence was entirely foreign to the question being tried.

Even if it be conceded that if the defendant's testimony had tended to show that the difficulty between the deceased and the defendant occurred at or near the railroad crossing the statements of the deceased, when a proper foundation was laid, would be competent in rebuttal to negative competent evidence that the deceased had been struck by a train, such is not the case here. The State's evidence tends to show, and it contended, that the fight occurred at the filling station some considerable distance from the railroad, and that the fatal wound was there inflicted. The evidence offered by the defendant as to the schedule of trains, as heretofore stated, was irrelevant and immaterial. In view of this fact the statements of the deceased, conceding that the foundation was properly laid, in no wise related to the *res gestæ* and was likewise irrelevant and inadmissible. In this connection, we may note that while the defendant excepted to the evidence of the sister of the deceased to the effect that the deceased told her that he was beat about the head with a blackjack, the defendant did not bring forward this exception, and any question as to its relevancy and materiality is not before us.

From a careful examination of the record we are convinced that if the statements of the deceased were in any event competent, they were competent only in rebuttal, and for the reason that the defendant had undertaken to shift the scene of the alleged controversy, and thus make material what occurred at the place where the deceased was struck. As there is no competent evidence tending to show that there was any conflict between the defendant and the deceased at or near the railroad, and the evidence in respect to trains fails to show that the deceased was struck by a train, and any such conclusion is a mere surmise or conjecture, the statements of the deceased, which are the subject of one of the defendant's exceptive assignments of error, were wholly unrelated to the *res gestæ* and were inadmissible in evidence.

The State was not required to negative the mere possibility that the deceased received his fatal wound in some manner other than at the hands of the defendant. The statement of the deceased could have no substantial bearing upon the question of the guilt or innocence of the defendant. Therefore, the admission of this evidence, though erroneous, was harmless.

In the trial below we find

No error.

MOLLIE JOHNSON, ADMINISTRATRIX OF DALLAS D. JOHNSON, v. W. LESLIE SMITH.

(Filed 22 March, 1939.)

1. Abatement and Revival § 6—

Objection on the ground of another action pending between the same parties on the same cause may be taken by answer, C. S., 511, 517.

2. Abatement and Revival § 9—Where action does not abate and administratrix is made party upon defendant's death, the action bars subsequent action by administratrix arising out of same transaction.

In an action instituted to recover damages resulting from an automobile collision, defendant died prior to service of process. Thereafter defendant's administratrix was joined as a party and duly served with process. The administratrix started this action in another county to recover damages for the death of intestate based on the same automobile collision. Defendant in the present action filed answer pleading pendency of the former action and moved to dismiss the present action. *Held:* Prior to his death intestate might have set up a counterclaim in the prior action, to which right his administratrix succeeded, C. S., 461, 521 (1), and in contemplation of law the two actions are identical as to subject matter and parties and the second action was properly dismissed upon defendant's plea.

3. Abatement and Revival § 11: Pleadings § 10—

An action for damages resulting from an automobile collision does not abate upon the death of the defendant, C. S., 461, but may be continued upon the joinder of defendant's personal representative as a party, and the personal representative may set up therein a counterclaim for damages for the death of her intestate arising out of the same accident, C. S., 521 (1).

4. Abatement and Revival § 9: Venue § 1b—Venue is governed by the status of the parties at the time of the institution of the action.

Plaintiff instituted an action in the county of his residence to collect damages resulting from an automobile collision. C. S., 469. The defendant died prior to service of process and thereupon defendant's administratrix was joined as a party defendant. *Held:* The administratrix may not claim that the action is not properly pending because not instituted in the county in which she had given bond, C. S., 465, since venue is governed by the status of the parties at the commencement of the action, but defendant administratrix may move for a removal of the cause to the county of her residence and the scene of the collision involved for the convenience of witnesses and the promotion of the ends of justice. C. S., 470 (2).

APPEAL by plaintiff from *Williams, J.*, at September Term, 1938, of HARNETT. Affirmed.

Dupree & Strickland and L. M. Chaffin for plaintiff, appellant.

Ruark & Ruark for defendant, appellee.

SCHENCK, J. This is an action by an administratrix to recover damages for the wrongful death of her intestate wherein it is alleged in the complaint that such death was due to a collision between an automobile operated by said intestate and an automobile operated by the defendant, which said collision was caused by the negligence of the defendant. In the answer negligence of the defendant is denied, and contributory negligence of the intestate is pleaded, and by way of a second further answer and defense motion to abate the action is made for the reason that there is "another action pending between the same parties for the same cause."

The salient facts are these: On 13 May, 1938, there was a collision between an automobile operated by the intestate and an automobile operated by the defendant on State Highway No. 210 in Harnett County, from injuries received in which the intestate died 5 June, 1938. On 2 June, 1938, W. Leslie Smith, defendant in this action, commenced action against Dallas D. Johnson in Pitt County for personal injuries and property damage suffered in said automobile collision which he alleged was caused by the negligence of said Johnson, summons in which action was returned unserved due to the death of the defendant therein named. At the time of the issuance of summons in that case the plaintiff therein received an order from the clerk allowing him until 21 June, 1938, in which to file complaint. The plaintiff duly qualified as administratrix of Dallas D. Johnson, and on 29 July, 1938, procured summons in this case to issue from the Superior Court of Harnett County, which was duly served, with copy of complaint, on the defendant, and on 25 August, 1938, defendant filed answer denying the material allegations of the complaint, alleging contributory negligence of the decedent, and also lodging motion to abate plaintiff's action on the ground that another action between the same parties, involving the same subject matter, was pending in the Superior Court of Pitt County. On 17 September, 1938, plaintiff filed reply to defendant's second further answer and defense and motion to abate in which denial was made of another action pending between the same parties, involving the same subject matter.

On 22 August, 1938, W. Leslie Smith procured an order making the administratrix of Dallas D. Johnson, deceased, a party defendant in the action he had theretofore instituted against said decedent in Pitt County, and had summons to issue to said administratrix, C. S., 462, and filed complaint wherein it is alleged that plaintiff suffered personal injuries and property damage in a collision between an automobile of said Smith and an automobile of said decedent on 2 June, 1938, caused by the negligence of said decedent.

At the September Term, 1938, of Harnett County, the motion to abate was heard and allowed, and a judgment entered dismissing the action, and from this judgment the plaintiff appealed, assigning errors.

"The purpose of The Code system is to avoid a multiplicity of actions by requiring litigating parties to try and dispose of all questions between them on the same subject matter in one action. Where an action is instituted, and it appears to the court by plea, answer or demurrer that there is another action pending between the same parties and substantially on the same subject matter, and that all the material questions and rights can be determined therein, such action will be dismissed." *Alexander v. Norwood,* 118 N. C., 381; *Construction Co. v. Ice Co.,* 190 N. C., 580; *Morrison v. Lewis,* 197 N. C., 79.

The defendant was authorized to make the objection of "another action pending between the same parties for the same cause" by answer. C. S., 511 and 517.

The plaintiff in the Pitt County case is the defendant in this case and is therefore the same party; and the plaintiff in this case is the administratrix of the defendant in the Pitt County case, and is, in our opinion, in contemplation of law the same party. The administratrix succeeded to all the rights and assets of her intestate and is subjected to all of his debts and liabilities, and the right to maintain an action for the wrongful death of her intestate is but a statutory continuation, extension and enlargement of the right that existed prior to his death in favor of her intestate to maintain a cross action or counterclaim for personal injuries in the action instituted against him in Pitt County. "No action abates by the death . . . of a party . . ." and "the court may allow the action to be continued by or against his representative or successor in interest." C. S., 461. Thus is recognized the continuity of the parties to actions instituted by or against a decedent prior to his death with the parties to such actions continued by or against his personal representative after his death. *Latham v. Latham,* 178 N. C., 12. The two actions, the Pitt County action and the Harnett County action, are substantially on the same subject matter, namely, damages suffered by reason of one and the same negligently caused automobile collision. All the material questions and rights involved in the Harnett County case, namely, as to whose negligence caused the collision and the *quantum* of damage suffered, may be determined in the Pitt County case, by the defendant therein (plaintiff herein) denying the allegations of negligence of her intestate, and filing a cross action or counterclaim for the wrongful death of her intestate, as she is permitted so to do by C. S., 521 (1), since such counterclaim arises out of the transaction set forth in the complaint as the foundation of the plaintiff's claim and is connected with the subject of the action. "A counterclaim connected with plaintiff's cause of action or with the subject of the same will nearly always take its rise before action brought, but we hold that neither the statute nor the reason of the thing require that such counterclaim should

necessarily or entirely mature before action commenced, nor even before answer filed, if the provisions of The Code permit, and right and justice require that an amendment be allowed which will enable parties to end the same controversy in one and the same litigation." *Smith v. French,* 141 N. C., 1.

In an action for damages arising out of an automobile collision between the plaintiff and defendant, this Court said: "The entire spirit of The Code is to avoid multiplicity of suits, and, therefore, Rev., 481 (1), (C. S., 521 [1]), authorizes a defendant to plead as a counterclaim any 'cause of action arising out of the contract or transaction set forth in the complaint as the foundation of plaintiff's claim, or connected with the subject of the action.' This was intended to authorize the claim and counterclaim to be settled in one action, when there is another contract or a matter 'arising out of the same contract or transaction,' which could not have been pleaded at common law, but it was not intended to divide into two actions and authorize two suits to be brought upon the same contract or transaction, which would be the case here if after the defendant had sued the plaintiffs for the collision the defendants in that case could sue the plaintiff therein for the same collision. In fact, however, the defendant herein has not pleaded a counterclaim nor did the defendants in the former case. The defendant in this case has pleaded the 'pendency of the former action for the same cause,' as authorized by Rev., 477 (C. S., 517). The cause is identical, for it is on the same acts, by the same parties. What the remedy will be and whether the verdict and judgment will be for the plaintiff or the defendant is to be determined in that suit." *Allen v. Salley,* 179 N. C., 147.

The contention of the plaintiff that the Pitt County case is not now properly pending because it is against her in her official capacity as administratrix and was not instituted in the county (Harnett) in which she had given her bond, as required by C. S., 465, is untenable. At the time the action was commenced it was against the decedent who was then alive and a resident of Harnett County and the plaintiff was a resident of Pitt County, under which circumstances the plaintiff was authorized to commence the action in Pitt County. C. S., 469. "The question of venue is governed by the *locus* 'at the commencement of the action.'" *Hannon v. Power Co.,* 173 N. C., 520. In construing C. S., 465, in connection with C. S., 461, relative to the continuance of actions after the death of a party, and C. S., 462, relative to the procedure on the death of a party, it is said: "These sections clearly recognize the continuity of the action and the right to have it tried where instituted, and to avoid delay the personal representative must appear before the clerk and answer so that the issues may be tried at the next term, thus showing that no right of removal was contemplated, because of the requirement

to answer and be ready for trial before the term at which he would have to make his motion to remove." *Latham v. Latham, supra.*

We are of the opinion, and so hold, that the judgment of the Superior Court is in accord with apposite statutes and decisions of this Court. Should it be made to appear, however, upon motion properly lodged in the Pitt County case, that the convenience of witnesses and the ends of justice would be promoted by a removal of the case to Harnett County, the residence of the administratrix and the scene of the collision involved, such removal may be had. C. S., 470 (2).

Affirmed.

DANIEL D. DAVENPORT ET AL. V. Z. H. PHELPS.

(Filed 22 March, 1939.)

1. Reformation of Instruments § 1—

A deed absolute on its face may be corrected into a mortgage upon allegation and proof that the clause of redemption was omitted by reason of ignorance, mistake, fraud, or undue advantage.

2. Reformation of Instruments § 10—

In order to correct a deed absolute on its face into a mortgage on the ground of ignorance, mistake, fraud or undue advantage, the grounds of relief must be established, not merely by the declarations of the parties or the unaided memory of witnesses, but by facts and circumstances *dehors* the instrument which are inconsistent with an absolute conveyance.

3. Reformation of Instruments § 8—

In order to correct a deed absolute on its face into a mortgage on the ground of ignorance, mistake, fraud or undue advantage, plaintiff is required to prove the ground of reformation by clear, strong, and convincing proof.

4. Reformation of Instruments § 10—Evidence held sufficient to overrule nonsuit in this action to reform deed into a mortgage.

In this action to correct a deed absolute on its face into a mortgage, plaintiffs' evidence, supported by proper allegation, tended to show that plaintiffs applied to defendant for a loan to refinance their home to save it from foreclosure, that defendant agreed to lend them the money upon a deed of trust, that a deed was prepared by a draftsman at the direction of the defendant, that neither of plaintiffs could read or write, which fact was known to defendant and the draftsman, that the draftsman did not read the deed in full although requested to do so by plaintiffs, that plaintiffs signed the deed, which was absolute in form, thinking that they were signing a deed of trust, that plaintiffs' daughter was working for defendant at the time, that the amount of the consideration was grossly inade-

quate, and that plaintiffs remained on the land after execution and delivery of the deed. *Held:* The allegations and evidence were sufficient to be submitted to the jury, and the granting of defendant's motion to nonsuit was error.

APPEAL by plaintiffs from *Bone, J.*, at October Term, 1938, of WASHINGTON.

Civil action to reform deed on ground of fraud or mistake and to redeem.

There is allegation and evidence tending to show that in March, 1936, the plaintiffs applied to the defendant for a loan of $435.00 to refinance an encumbrance on their home, which was about to be sold; that the defendant agreed to lend the money and take a deed of trust on plaintiffs' farm as security; that the farm was then worth $1,500; that a deed was prepared by Edgar Woodley at the direction of the defendant and had it in defendant's home when the plaintiffs arrived; that neither of the plaintiffs can read or write, which fact was known to the defendant and to the draftsman; that the draftsman did not read the deed in full, though requested to do so; that when the plaintiffs signed the deed "they understood they were signing a deed of trust"; that plaintiffs' daughter was working for defendant at the time, and that plaintiffs remained on the land after the execution and delivery of the deed.

From a judgment of nonsuit entered at the close of all the evidence, the plaintiffs appeal, assigning errors.

W. M. Darden and H. S. Ward for plaintiffs, appellants.
Carl L. Bailey and W. L. Whitley for defendant, appellee.

STACY, C. J. In actions to convert a deed absolute on its face into a mortgage or security for a debt, the authorities are one in holding that upon proper preliminary allegation, as that a clause of redemption was intended to be inserted in the instrument, but was omitted by the ignorance or mistake of the draftsman, or by some fraud or circumvention of the opposite party, or some oppression or advantage taken of plaintiffs' necessities, equity will afford relief by considering the clause thus shown to have been omitted, as if it had been set out in the instrument, provided the matter can be and is established, not merely by the declarations of the parties or the unaided memory of witnesses, but by facts and circumstances, *dehors* the instrument, which are inconsistent with the idea of an absolute purchase and such as are more tangible and less liable to be mistaken than mere words. *Kelly v. Bryan,* 41 N. C., 283; *Muse v. Hathaway,* 193 N. C., 227, 136 S. E., 633.

Speaking to the subject in *Sowell v. Barrett,* 45 N. C., 50, *Pearson, J.*, delivering the opinion of the Court, said: "Since *Streator v. Jones,* 10

N. C., 423, there has been a uniform current of decisions, by which these two principles are established in reference to bills which seek to correct a deed, absolute on its face, into a mortgage or security for a debt:

"1. It must be alleged, and of course proven, that the clause of redemption was omitted by reason of ignorance, mistake, fraud or undue advantage;

"2. The intention must be established, not merely by proof of declarations, but by proof of facts and circumstances, *dehors the deed*, inconsistent with the idea of an absolute purchase. Otherwise, titles evidenced by solemn deeds would be, at all times, exposed to the 'slippery memory of witnesses.' "

This has been quoted with approval and applied in many later cases, notably *Newton v. Clark*, 174 N. C., 393, 93 S. E., 951; *Porter v. White*, 128 N. C., 42, 38 S. E., 24; *Watkins v. Williams*, 123 N. C., 170, 31 S. E., 388; *Bonham v. Craig*, 80 N. C., 224. The same principle has been stated in different language in *Newbern v. Newbern*, 178 N. C., 3, 100 S. E., 77; *Sprague v. Bond*, 115 N. C., 530, 20 S. E., 709; *Norris v. McLam*, 104 N. C., 159, 10 S. E., 140; *Egerton v. Jones*, 102 N. C., 278, 9 S. E., 2; *Briant v. Corpening*, 62 N. C., 325; *Campbell v. Campbell*, 55 N. C., 364; *Brown v. Carson*, 45 N. C., 272; *Kelly v. Bryan*, *supra*.

It is also held for law in this jurisdiction that "a written deed, absolute in terms, cannot be changed into a mortgage except upon allegation and proof that the clause of redemption was omitted by reason of ignorance, mistake, fraud, or undue advantage." *Williamson v. Rabon*, 177 N. C., 302, 98 S. E., 830; *Waddell v. Aycock*, 195 N. C., 268, 142 S. E., 10; *Green v. Sherrod*, 105 N. C., 197, 10 S. E., 986; *Sprague v. Bond*, *supra*; *Frazier v. Frazier*, 129 N. C., 30, 39 S. E., 634; *Egerton v. Jones*, *supra*.

"It is well settled 'that in order to convert a deed absolute on its face into a mortgage, it must be alleged, and of course proved, that the clause of redemption was omitted by reason of ignorance, mistake, fraud, or undue advantage' "—*Shepherd, J.*, in *Norris v. McLam*, *supra*.

Nor is this all. In such cases the *quantum* of proof required is, that the evidence shall be clear, strong and convincing. *Ray v. Patterson*, 170 N. C., 226, 87 S. E., 212.

These safeguards have been adopted and thrown about written instruments lest in the effort to prevent frauds, greater wrongs be done to those who trust the written word, which abideth and changeth not, rather than the memory of witnesses. *Williamson v. Rabon*, *supra*. To this end, the statute of frauds was enacted. C. S., 988. Of all the sins for which philosophy can find so little excuse it is the sin of intellectual pride.

Chilton v. Smith, 180 N. C., 472, 105 S. E., 1. On the other hand, some people of limited experience are able to remember what to them is an important transaction in its minutest detail. Unlike others of large affairs, they have nothing of equal or greater importance to think about or to blur their recollections. This is especially true among our unlettered population. They may be illiterate, but they are not ignorant. The old Negro tenant, who was being sued by his landlord over a cotton crop, made a wise observation when he said to the jury: "Please understand, I am not 'faulting' Mr. A., or suggesting that he is 'storying' about this matter. He would not do that. It has simply slipped his memory. He is a very busy man. Other matters have crowded from his mind the details of the transaction, while I have not had anything on my mind for the past year but this cotton crop." No wonder the jury understood his meaning, and decided with him.

Many cases fully establish the law to be, that "provided it appear to have been the real intent of the parties to have the clause inserted and the instrument was put in the form of an absolute deed by ignorance, mistake, fraud, or undue advantage," equity will treat the instrument as if the clause were inserted. *Kelly v. Bryan, supra; McDonald v. McLeod,* 36 N. C., 221.

In *Streator v. Jones,* 10 N. C., 423, the circumstances *dehors* the instrument relied upon were gross inadequacy of price; the possession being retained by the plaintiffs and the payment of interest; and there was the preliminary allegation of oppression to account for the clause of redemption not being inserted. The plaintiff was hard pressed for money, and was forced to consent to the omission of the clause, the matter being cut short by the declaration of the defendant: "Here take the money you want, and trust to my word."

The allegations and facts of the instant case seem to bring it within the doctrine of *Streator v. Jones, supra.*

Perhaps it should be observed that the case is not one of a deed absolute on its face, with contemporaneous written agreement or option for repurchase by grantor. *O'Briant v. Lee,* 214 N. C., 723; *Perry v. Surety Co.,* 190 N. C., 284, 129 S. E., 721; *Watkins v. Williams,* 123 N. C., 170, 31 S. E., 388; Annotations, 79 A. L. R., 937, and L. R. A., 1916-B, p. 101.

Reversed.

W. P. HOLLAND AND WIFE, ANNIE HOLLAND, AND MARTHA HOLLAND, *v.* WALTER L. WHITTINGTON AND WIFE, GLADYS M. WHITTINGTON, AND J. L. HOLLAND.

(Filed 22 March, 1939.)

1. Arbitration and Award § 1b: Fraud § 1—Plaintiffs having equal knowledge with defendants of facts forming basis of agreement may not maintain that execution of agreement was obtained by fraud.

Where an agreement to arbitrate the disputed line between the lands of the parties provides that the line should be run in accordance with old deeds, papers, plats, and titles, in accordance with corners as contended by plaintiffs, plaintiffs may not maintain that they were induced to execute the agreement to arbitrate by fraudulent misrepresentation, and demurrer to plaintiffs' cause of action to set aside the agreement to arbitrate on the ground of fraud is properly sustained.

2. Pleadings § 16—Where the several causes do not affect all the parties and do not constitute a connected series of transactions, demurrer is proper.

As plaintiffs' first cause of action it was alleged that one of plaintiffs had title to the first tract of land and that each of defendants was in wrongful possession of a portion of said tract; that both plaintiffs owned a second tract and that one of the defendants was in wrongful possession of a portion of the second tract: As a second cause of action it was alleged that two of defendants had induced one of the plaintiffs and his wife to sign an agreement to arbitrate the disputed boundary between their lands and that the award rendered thereunder was void for that the arbitrators violated the terms of the agreement and for fraud. *Held:* The ruling of the court in dismissing the second cause of action upon defendants' demurrer for misjoinder of parties and causes is without error, it appearing that the several causes of action alleged do not affect all the parties of the action as required by C. S., 507, and that the second cause of action does not affect all the parties plaintiff or defendant, and that the facts alleged in the several causes do not constitute a connected series of transactions tending to one end.

APPEAL by plaintiffs from *Williams, J.*, at September Term, 1938, of JOHNSTON. Affirmed.

Two causes of action are alleged in the amended complaint, the first to recover the possession of land wrongfully withheld by defendants, and second to set aside an arbitration agreement and award on the ground of fraud. The defendants Whittington and the defendant J. L. Holland, separately, demurred to the second cause of action. The demurrers were sustained and plaintiffs appealed.

R. L. Godwin for plaintiffs.

Dupree & Strickland for defendants.

DEVIN, J. The demurrers to the second cause of action alleged in the complaint were sustained by the court below upon two grounds: (1) That facts sufficient to constitute a cause of action on account of fraud were not alleged, and (2) that there was a misjoinder of parties and causes of action. The plaintiffs assign error in the ruling of the court, and bring the question here for review. This requires an examination of the allegations of the amended complaint challenged by the demurrers.

The plaintiffs are W. P. Holland and wife, Annie Holland, and Martha Holland. In the first cause of action they allege title in the plaintiff W. P. Holland in and to a tract of land therein described, containing 35 acres, and allege that the defendants Whittington and J. L. Holland are in wrongful possession of separate portions of the eastern edge thereof, and plaintiffs allege title in W. P. Holland and Martha Holland in and to a second tract of land containing 18 acres, and that J. L. Holland is in the wrongful possession of a portion of the eastern edge of the second tract.

In the second cause of action the plaintiffs allege in substance that the defendants Whittington fraudulently induced plaintiffs W. P. Holland and wife to sign an agreement to submit to arbitration the question of the location of the eastern boundary of plaintiffs' land, which was the line between the lands of plaintiff W. P. Holland and those of defendants Whittington; that said plaintiffs agreed to sign provided a good surveyor be employed, "and that the disputed line be run according to all the old deeds, papers, plats and titles, and that they run by the old white oak corner as described in this complaint"; that it was agreed by the defendants Whittington "that the survey should be made as contended by" the said plaintiffs; that the plaintiffs were induced to sign the arbitration agreement by the false and fraudulent representations of the defendants Whittington, made with intent to defraud, and relied on by plaintiffs.

It was also alleged in substance, as we gather from the pleading, that the attempted submission of the controversy to arbitration and the purported award thereunder were void, that the arbitrators violated the terms of the agreement between the parties, and, in disregard of its provisions and conditions, attempted to establish a new and different line, in the absence of plaintiffs and their evidence, with intent to defraud plaintiffs, and "that these acts of flagrant and gross violation of said void and fraudulent paper make the whole transaction for the establishment of said line null and void."

While the paper writings purporting to be an arbitration agreement and an award, which are attacked by the plaintiffs in the second cause, are not attached to or set out in the complaint, and therefore are not before the court for the consideration of the demurrers, it is apparent

that the court below has correctly held that the allegations of fraudulent misrepresentation upon the part of defendants Whittington as an inducement to the plaintiffs W. P. Holland and wife to sign an arbitration agreement, are insufficient, under the rule laid down in *Colt v. Kimball,* 190 N. C., 168, 130 S. E., 505, and *Griggs v. Griggs,* 213 N. C., 624, 197 S. E., 165.

Whether the remaining allegations of the complaint sufficiently allege that the purported award was void and of no effect for the reasons therein set forth need not now be determined, as an examination of the amended complaint leads us to the conclusion that the demurrers on the ground of misjoinder of parties and causes of action were properly sustained.

It will be noted that plaintiffs allege title in W. P. Holland to the first tract of 35 acres and wrongful possession of a portion thereof by defendants Whittington, and also of a small portion by defendant J. L. Holland. As to the second tract of 18 acres, it is alleged that title is in W. P. Holland and in Martha Holland, and that a portion of this tract is wrongfully withheld by defendant J. L. Holland alone.

The second cause of action is for the purpose of setting aside an arbitration and award. There a cause of action is attempted to be set up in favor of plaintiffs W. P. Holland and wife against the defendants Whittington to declare the arbitration agreement and award void on the ground of fraud perpetrated upon them by defendants Whittington or for misconduct of the arbitrators. Defendant J. L. Holland is not charged with fraud, has no connection with the arbitration, and his name is not mentioned in the second cause of action. He is unaffected by it. The plaintiff Martha Holland has no interest in the suit as to the first tract of land and is only concerned with the second tract. She is not alleged to be in any way concerned with or affected by the second cause of action. Defendant J. L. Holland is alone charged with unlawful possession of a portion of the second tract. Defendants Whittington have no connection with and are not charged with wrongful possession of this tract, but of the first tract only.

It is apparent that different causes of action are attempted to be set up against different defendants. The several causes of action set out in the complaint do not affect all the parties to the action as required by C. S., 507, nor does the second cause of action as therein alleged affect all the parties plaintiff or defendant.

"It is well settled in this jurisdiction that separate and distinct causes of action set up by different plaintiffs and against different defendants may not be incorporated in the same pleading." *Wilkesboro v. Jordan,* 212 N. C., 197, 193 S. E., 155; *Williams v. Gooch,* 206 N. C., 330, 173

S. E., 342; *Sasser v. Bullard,* 199 N. C., 562, 155 S. E., 248; *Rose v. Warehouse Co.,* 182 N. C., 107, 108 S. E., 389; *Roberts v. Mfg. Co.,* 181 N. C., 204, 106 S. E., 664.

The facts alleged in the complaint do not constitute a connected series of transactions, all tending to one end, so as to invoke the rule laid down in *Trust Co. v. Peirce,* 195 N. C., 717, 143 S. E., 524; *Barkley v. Realty Co.,* 211 N. C., 540, 191 S. E., 3; and *Leach v. Page,* 211 N. C., 622, 191 S. E., 349.

The ruling of the court below in dismissing the second cause of action set out in the complaint must be affirmed. *Bank v. Angelo,* 193 N. C., 576, 137 S. E., 705.

Affirmed.

STATE v. JAMES PAGE.

(Filed 22 March, 1939.)

1. Rape § 7—Testimony that prosecutrix was widowed and was working to support herself and young son held irrelevant.

In a prosecution for rape the issue is whether defendant committed the act charged upon the prosecutrix, and her testimony tending to show that she was widowed and had accepted employment as a model in a show in order to support herself and young son when the crime was alleged to have been committed by a Negro follower of the show, is irrelevant, and since the testimony might have aroused sympathy for the prosecutrix or prejudice against the defendant in the minds of the jurors, its admission must be held prejudicial.

2. Criminal Law § 81c—

The admission of irrelevant evidence is not necessarily prejudicial, but when the evidence may have the effect of creating prejudice against defendant or sympathy for the prosecutrix in the minds of the jurors, its admission must be held for reversible error, especially where defendant has been convicted for a capital crime.

APPEAL by defendant from *Cowper, J.,* at November Term, 1938, of BEAUFORT. New trial.

The defendant was convicted of rape, and from a judgment of death by asphyxiation appealed to the Supreme Court, assigning errors.

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

H. S. Ward, L. H. Ross, and W. B. Carter for defendant, appellant.

SCHENCK, J. The prosecutrix, Mary McGann, on her direct examination and before any other witness had testified, was allowed, over objection and exception of the defendant, to testify substantially that she now had a living child born to her after the death of her husband, that she and her husband were not divorced and were living together at the time of his death, that she, the prosecutrix, had a job in New York first as an usherette in a theatre and then in a fur factory making coats, that this last job was a seasonal one and expired in March, 1938, and that she got a job with a show in April following because there was no other work for her to be had in New York, and she had to make a living for herself and her one-year-and-eight-months-old son, who was then living with her mother in Chicago; that she came to Washington, N. C., with the show and that her act therein was posing as a model of famous paintings.

This evidence is irrelevant. "The criterion of relevancy is whether or not the evidence adduced tends to cast any light upon the subject of the inquiry." Wharton's Criminal Evidence (11 Ed.), Vol. 1, par. 224, p. 268. "The subject of inquiry" was whether rape had been committed upon the prosecutrix by the defendant, and whether she was widowed and had herself and a young son to support, and for the reason work could not be had in New York she had accepted employment by a show as a model cast no light upon this subject.

However, the mere irrelevancy of the testimony under consideration cannot be held for reversible error, and we are confronted with the question as to whether its admission was harmful and prejudicial. Under the facts and circumstances of this case we are constrained to answer in the affirmative, upon the theory that such testimony was calculated to warp the judgment of the jury by creating sympathy for the prosecutrix and exciting prejudice against the defendant.

The prosecutrix is a young white woman, twenty-two years old, and was allowed to picture herself as being away from home, working in a show to support herself and infant son, and the defendant is a thirty-year-old Negro man, a follower of the show. It would take little under these circumstances to arouse in the minds of the jury sympathy for the prosecutrix and to excite therein prejudice against the accused, and we cannot but feel that the admission of the testimony assailed had a tendency to and may have brought about such a result, and for that reason was prejudicial to the defendant.

In speaking of the result of the admission of irrelevant testimony, *Smith, C. J.*, in *S. v. Mikle,* 81 N. C., 552, quotes *Patton v. Porter,* 48 N. C., 539, in reference to a civil case, as follows: "This was, of course, improper, and as the jury *may* have been misled, we think the plaintiffs

are entitled to a *venire de novo*," and adds, "Much more forcibly does the rule apply to a conviction of a capital crime, when the verdict *may* have resulted from the prejudicial effect of the evidence."

In *S. v. Jones*, 93 N. C., 611, *Ashe, J.*, in referring to the result of the admission in evidence, over objection, of writs of *capias* with the sheriff's return "not to be found," when there was no evidence that the defendant ever resided in the county to which the writs were issued, says: "We are of the opinion that the evidence was improperly admitted. It was no evidence of flight. It was therefore irrelevant, and may have exerted a prejudicial effect upon the minds of the jury, and when that is so, it is a ground for a new trial."

"Evidence which is offered solely for the purpose of creating sympathy for the accused, or which is offered for the sole purpose of improperly appealing to the prejudice of the jury against the accused, should be excluded." Wharton's Criminal Evidence (11 Ed.), Vol. 1, par. 230, p. 274.

"The minds of the jurors should not be diverted from the precise questions in issue by the introduction into the case of collateral and irrelevant matters, especially such as are calculated to prejudice one of the parties and prevent a fair and impartial trial; and especially is this so where, as in this case, the defendant is charged with the commission of a fraud." *Shepherd v. Lumber Co.*, 166 N. C., 130.

"It is true that the trial judge should exclude evidence which is foreign to the issues, or insufficient for legitimate use, or illegal as tending only to excite passion, arouse prejudice, awaken the sympathy, or warp the judgment of the jury." *Dellinger v. Building Co.*, 187 N. C., 845; *S. v. Galloway*, 188 N. C., 416.

In a New York case wherein the defendant was on trial for murder, the wife of the deceased was allowed, over objection, to testify that she had sat at the crib and sung the infant child of the deceased to sleep on the night of the homicide, and the Court, in sustaining the objection and granting a new trial, says: "All this had no materiality upon the issues before the jury. The object of the State is clear. Although, doubtless, the result of 'well intentioned though misguided zeal,' it was an 'unseemly and unsafe' appeal to prejudice. Nor here can we overlook it as probably unheeded." *People v. Caruso*, 246 N. Y., 437. See, also, *Hutchins v. Hutchins*, 98 N. Y., 56; *Anderson v. Rome W. & O. R. R. Co.*, 54 N. Y., 334.

"Error in the admission of evidence which apparently affected the jury in their verdict is ground for reversal. . . . So the admission of evidence which tends to distract the attention of the jury from the real issues in the case is harmful error and ground for reversal. Likewise, the admission of evidence which, although immaterial, tends to

mislead the jury, or to provoke sympathy for the party offering the evidence, is ground for reversal, . . ." 4 C. J., par. 2953, pp. 972-3-4. See, also, 5 C. J. S., Appeal and Error, par. 1724 (2), p. 971.

While there was other testimony and other evidence, the determinative question presented to the jury in the instant case was whether the facts were substantially as testified by the prosecutrix, or were substantially as testified by the defendant. The prosecutrix testified in effect that the rape was accomplished by the defendant in her tent by placing her in fear of her life if she resisted, and that the act of *coitus* extended continuously and uninterruptedly for a space of one hour and forty-five minutes to two hours. The defendant admitted that he was present in the tent of the prosecutrix at the time charged for the purpose of getting back money she had gotten from him, but denied that he had, or attempted to have, carnal knowledge of the prosecutrix. It cannot be said with assurance, under the facts and circumstances of this case, that the verdict of the jury was entirely free from the baneful influence of irrelevant and immaterial evidence, and for that reason there must be a

New trial.

ROBERT VINCENT v. LEGH R. POWELL, JR., AND HENRY W. ANDERSON, RECEIVERS OF SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 22 March, 1939.)

1. Pleadings § 20—

The office of a demurrer is to test the sufficiency of a pleading, admitting for the purpose the truth of the allegation of fact and, ordinarily, relevant inferences of fact necessarily deducible therefrom, but the complaint will be liberally construed upon demurrer and must be fatally defective before it will be rejected as insufficient. C. S., 535.

2. Principal and Agent § 10: Corporations § 25—Complaint liberally construed held sufficient to charge that slander was uttered by agent within scope of authority.

The complaint in this action for slander against the receivers of a corporation alleged that defendants' agent, while on duty, uttered the alleged slander. *Held:* The term "while on duty" means acting within the general scope of the employment, and is sufficient to admit of proof that the specific act complained of was within the agent's express or implied authority, and the allegation is sufficient as against demurrer.

APPEAL by defendants from *Parker, J.*, holding courts of Third Judicial District, 7 September, 1938, at Chambers in HALIFAX.

VINCENT *v.* POWELL.

Civil action to recover damages for alleged slander, heard upon demurrer of defendants to amended complaint filed by plaintiff.

Pertinent portions of the complaint as basis for alleged damages are: "5. That on the 24th of April, 1938, the plaintiff was at Roanoke Junction, N. C., to meet a relative who was coming in on a train at 6:30 o'clock a.m. A bundle of *New and Observers,* in the custody or possession of defendants, were scattered on the ground and the plaintiff picked up one and was reading it when the night ticket agent of the defendants, while on duty, spoke of and concerning the plaintiff in the presence of divers and sundry people, in substance, the following false, malicious, and defamatory matter, to wit: Said ticket agent asked the plaintiff what he was doing, to which the plaintiff replied, 'I was reading a newspaper,' to which said agent stated, 'No, you are just stealing' (meaning a newspaper).

"6. The defendants intending by said matter to charge the plaintiff with the crime of larceny or embezzlement."

Defendants demur thereto for that the complaint does not state facts sufficient to constitute a cause of action, in that "(1) It is not alleged therein that the night ticket agent of the defendants was engaged in the defendants' business, or that he was acting within the scope of his employment when he uttered the alleged slanderous language.

"(2) It is not alleged therein that the act of the night ticket agent of defendants was expressly authorized by defendants or was ratified by defendants.

"(3) The facts alleged in the complaint show that the night ticket agent of the defendants was not engaged in the defendants' business and was not acting within the scope of his employment in uttering the alleged slanderous language."

The court, being of opinion that the amended complaint states a cause of action, decreed that the demurrer be overruled, from which ruling defendants appeal to the Supreme Court and assign error.

J. Winfield Crew, Jr., and Geo. C. Green for plaintiff, appellee.
Murray Allen for defendants, appellants.

WINBORNE, J. The appellants present this question: Does the complaint to which the defendants demur contain allegations sufficient to state a cause of action against the master for slander by a servant?

In considering this question we are of opinion that the court below followed the reasoning and reading of decisions of this Court.

"The office of demurrer is to test the sufficiency of a pleading, admitting for the purpose the truth of the allegations of fact contained therein, and ordinarily relevant inferences of fact, necessarily deducible

therefrom, are also admitted . . ." *Stacy, C. J.*, in *Ballinger v. Thomas*, 195 N. C., 517, 142 S. E., 761. *Andrews v. Oil Co.*, 204 N. C., 268, 168 S. E., 228; *Toler v. French*, 213 N. C., 360, 196 S. E., 32; *Pearce v. Privette*, 213 N. C., 501, 196 S. E., 843; *Insurance Co. v. McCraw*, *ante*, 105.

Both the statute and decisions require that the complaint be liberally construed and every reasonable intendment and presumption must be in favor of the pleader. The complaint must be fatally defective before it will be rejected. C. S., 535. *Insurance Co. v. McCraw, supra,* and cases there cited.

"It is the accepted principle here and elsewhere that corporations may be held liable for both the willful and negligent torts of their agents, and that the principle extends to actions for slander when the defamatory words are uttered by express authority of the company or within the course and scope of the agent's employment." *Hoke, J.*, in *Cotton v. Fisheries Products Co.*, 177 N. C., 56, 97 S. E., 712. *Sawyer v. Gilmers*, 189 N. C., 7, 126 S. E., 183.

The question debated on this appeal is with respect to the application of the law. Do the words *"while on duty,"* in the connection here used, as a pleading, inferentially charge that the acts complained of were done "within the course and scope of the agent's employment?" If they are susceptible of that interpretation, the pleading is sufficient. If they are not, the pleading is lacking in an essential aspect.

In *Cook v. R. R.*, 128 N. C., 333, 38 S. E., 925, *Clark, C. J.*, speaking to the subject, said: "'Acting within the general scope of his employment' means while on duty, and not that the servant was authorized to do such acts." This definition is brought forward and applied in *Munick v. Durham*, 181 N. C., 188, 106 S. E., 665; *Gallop v. Clark*, 188 N. C., 186, 124 S. E., 145; *Elmore v. R. R.*, 189 N. C., 658, 127 S. E., 710; *Ferguson v. Spinning Co.*, 196 N. C., 614, 146 S. E., 597. The principle may be conversely stated: While on duty means acting within the general scope of his employment, and not that the servant was authorized to do such acts. When thus considered, the present allegation that "when the night ticket agent of defendants, while on duty," spoke defamatory words of and concerning the plaintiff with respect to newspapers in the custody or possession of the defendants, when given liberal interpretation, is sufficient as a pleading to admit of proof that the duty of caring for and protecting the newspapers was encompassed in the course of the agent's employment, and that, at the time, the agent was acting within the general scope of his employment.

The subject of liability of the master or principal for the torts of a servant or agent, in the line of duty and in the scope of his employment, as well as of implied authority of the agent, has been recently discussed

by *Barnhill, J.*, in the cases of *Robinson v. McAlhaney*, 214 N. C., 180, 199 S. E., 26, and *West v. Woolworth, ante*, 211. The decision here is consistent and consonant with well established principles there restated.

The judgment below is

Affirmed.

ANNIE LEE BERRY v. EARL BERRY.

(Filed 22 March, 1939.)

Contempt of Court § 5: Divorce § 14—Record and findings held insufficient to support judgment for contempt for willful disobedience of court order.

Upon the hearing of this order to show cause why defendant should not be attached for contempt for failure to pay alimony and counsel fees as required by the prior judgment, defendant pleaded his inability to pay. The court found defendant had earned $140.00 since the original order, and adjudged defendant to be in contempt. *Held:* Since the judgment for contempt was not dated and fails to show the length of time during which defendant earned the sum stated, and fails to find any facts on the defendant's plea of disavowal, the record and findings are insufficient to support a judgment for contempt for "willful disobedience" of a court order. C. S., 978. Whether the matter was properly before the resident judge "at chambers" is not decided. C. S., 986.

APPEAL by defendant from *Bivens, J.*, at Chambers, 10 December, 1938. From SURRY.

Motion in the cause to attach defendant for contempt in failing to pay alimony and counsel fees as ordered.

At the September Term, 1938, Surry Superior Court, an order was entered in this cause requiring the defendant to pay to the plaintiff the sum of $20.00 per month, commencing 15 October, 1938, as alimony, and $25.00 on attorney's fees.

Thereafter, application was made to the resident judge of the district, at chambers, for an order requiring the defendant to show cause why he should not be attached for contempt in failing to comply with said order.

Upon the hearing before the resident judge, at chambers, the defendant undertook to purge himself of any contempt, and pleaded his inability to pay. However, "the court finds as a fact that the defendant has no real or personal property, but that he has earned the sum of $140.00 since the original order was signed and that he has not paid to his wife, the plaintiff in this cause, any sum whatsoever and has failed to comply with the judgment of Judge Clement."

Whereupon, the defendant was adjudged to be in contempt, and it was ordered "that he be confined in the common jail of Surry County until he complies with said judgment."

From this ruling, which bears no date, the defendant appeals, assigning errors.

No counsel appearing for plaintiff.
Barker & Hampton for defendant.

STACY, C. J. It does not appear within what time "the defendant has earned $140.00 since the original order was signed," as the judgment bears no date, and there is no finding on the defendant's plea of disavowal. *In re Odum,* 133 N. C., 250, 45 S. E., 569. Hence, under authority of *Vaughan v. Vaughan,* 213 N. C., 189, 195 S. E., 351, it would seem that the record is wanting in sufficiency to support a judgment for contempt or "willful disobedience" of the court's order. C. S., 978; *West v. West,* 199 N. C., 12, 153 S. E., 600; *S. v. Clark,* 207 N. C., 657, 178 S. E., 119.

The case is unlike *Dyer v. Dyer,* 213 N. C., 634, 197 S. E., 157, or *Pain v. Pain,* 80 N. C., 322.

Whether the matter was properly before the resident judge "at chambers" is not decided. C. S., 986; *In re Brown,* 168 N. C., 417, 84 S. E., 690; *May v. Ins. Co.,* 172 N. C., 795, 90 S. E., 890.

Error and remanded.

MAMIE B. OLINGER v. HORTON CAMP ET AL.

(Filed 22 March, 1939.)

1. Physicians and Surgeons § 15e—

Held: Even conceding that evidence of negligence of defendant in his operation on and treatment of plaintiff while in the hospital was insufficient, the evidence of defendant's negligence in failing to properly care for plaintiff in the subsequent treatment of the case, *is held* sufficient, and requires the submission of the cause to the jury.

2. Execution § 25—

In an action to recover for malpractice of defendant, execution against the person of defendant may not issue in the absence of allegation and evidence of actual malice. C. S., 673, 768.

OLINGER *v.* CAMP.

APPEAL by defendant from *Williams, J.*, at October Term, 1938, of CHATHAM.

Civil action for damages, tried upon issues raised by the pleadings, on allegations and denials that plaintiff suffered great injury by reason of the negligence of the defendant in operating upon the plaintiff and thereafter in failing properly to care for her in the subsequent treatment of the case.

Of the four issues submitted to the jury, two were answered in favor of the defendant, and the following in favor of the plaintiff:

"2. Was the plaintiff injured by the negligence or want of skill of the defendant, as alleged in the complaint? Answer: 'Yes.'

"3. What compensatory damages, if any, is plaintiff entitled to recover of the defendant? Answer: '$250.00.'"

From judgment thereon, the defendant appeals, assigning errors.

J. H. Scott and W. R. Clegg for plaintiff, appellee.

W. P. Horton, Wade Barber, Walter D. Siler, F. C. Upchurch, and Daniel L. Bell for defendant, appellant.

STACY, C. J. Conceding without deciding that the evidence of what transpired in the hospital is not sufficient to carry the case to the jury on the issue of any negligence there committed, it does appear that the evidence of negligence in the subsequent treatment of the case is good as against a demurrer and requires its submission to the jury. *Nash v. Royster,* 189 N. C., 408, 127 S. E., 356. This is not seriously questioned.

There is error, however, in that portion of the judgment which authorizes the arrest of the defendant. *Coble v. Medley,* 186 N. C., 479, 119 S. E., 892; *Short v. Kaltman,* 192 N. C., 154, 134 S. E., 425. This will be stricken out. The allegations, C. S., 673, and findings, C. S., 768, are not sufficient to warrant an execution against the person. *Crowder v. Stiers, ante,* 123; *Little v. Miles,* 204 N. C., 646, 169 S. E., 220, and cases there cited. As thus modified, the verdict and judgment will be upheld.

Modified and affirmed.

TOWN OF WARRENTON v. WARREN COUNTY.

(Filed 29 March, 1939.)

Taxation § 19—Property owned by a municipal corporation and used for business purposes is not exempt from taxation.

Defendant municipality acquired a hotel within its corporate limits by purchase at the foreclosure sale of a deed of trust on the property in order to protect its investment which it had made in the hotel corporation, which investment had been ratified by a majority of its qualified voters. After acquiring the property the municipality rented it for use as a hotel at a stipulated monthly rental. *Held:* The provision of Art. V, sec. 5, of the State Constitution, exempting from taxation property belonging to the State or to municipal corporations, applies to property so owned which is used for governmental or public purposes, and the property of defendant municipality used for business purposes is not exempt from taxation by the county in which it is situated.

STACY, C. J., concurring.

BARNHILL and WINBORNE, JJ., concur in this concurring opinion.

CLARKSON, J., concurring, agreeing with STACY, C. J.

DEVIN, J., dissenting.

SEAWELL, J., dissenting.

APPEAL by plaintiff from *Parker, J.*, at September Term, 1938, of WARREN. Affirmed.

Frank H. Gibbs for plaintiff, appellant.
Banzet & Banzet for defendant, appellee.

SCHENCK, J. This is a controversy submitted without action under the provisions of C. S., 626, *et seq.* The facts upon which the controversy depends are substantially as follows:

The town of Warrenton is a municipal corporation located in Warren County; Warren County is a body politic under the statutes of North Carolina; the board of town commissioners is the governing body of said town; the charter of said town (ch. 201, Private Laws 1915) confers upon said town the power to "own and purchase stock in any corporation or enterprise or industry for the purpose of its welfare, government and improvement, or for the comfort and convenience of its citizenship"; on 10 July, 1919, the Warren Hotel Company was incorporated with an authorized capital stock of $60,000, of which $10,000 was subscribed and paid in by citizens of said town, and at said time the only hotel in said town was a two-story wooden residence, built prior to the Civil War,

and used as a combination hotel and boarding house, and the population of said town at said time was 927; on 16 June, 1919, at an election duly held an ordinance duly passed by said board of commissioners authorizing the issuance of bonds in the sum of $20,000 to acquire stock in an equal amount in said hotel company was ratified by a vote of the majority of the qualified voters of said town, and on 1 October, 1919, bonds in the sum of $20,000 were issued and subsequently sold, and with the funds raised from the sale thereof $20,000 of the capital stock in said hotel company was purchased; that the total capital stock of said hotel company then issued and outstanding was $35,360; on 19 December, 1919, the Warren Hotel Company purchased a lot in the town of Warrenton for the purpose of erecting and furnishing a modern hotel thereon, and the erection of such hotel was commenced in the spring of 1920, but due to lack of funds work thereon ceased in the summer of said year; on 3 August, 1920, said board of commissioners passed an ordinance authorizing the purchase of preferred stock in said hotel company in the sum of $75,000 in order that the hotel building might be completed, "which will materially promote the comfort and convenience of the citizenship of said town"; on 7 September, 1920, another election was held and the ordinance of the board of commissioners authorizing the issuance of bonds in the sum of $75,000, to raise funds to be used in the purchase of a similar amount of preferred stock of said hotel company, was ratified by a majority of the qualified voters of said town; bonds in the sum of $74,000 were issued on 1 October, 1920, and subsequently sold and from the funds derived from such sale preferred stock in said hotel company was purchased to the amount of $74,000; work on the hotel building was resumed in the spring of 1921, and the building was completed in 1922; on 1 April, 1923, bonds were issued by the Warren Hotel Company in the sum of $30,000 to procure funds to build an annex to the hotel, which bonds were secured by a deed of trust upon the real and personal property of said hotel company; in March, 1927, in order to protect its investment, the town of Warrenton purchased bonds of the Warren Hotel Company which were in default, in the sum of $4,000; that subsequently all of the bonds of the Warren Hotel Company were in default and the hotel property was sold under the deed of trust securing them on 29 January, 1934, at which sale the town of Warrenton became the last and highest bidder, and the purchaser of the hotel property for $16,500; and since 10 February, 1934, the date on which deed was delivered to it, the town of Warrenton has been the owner in fee simple of the hotel property; at the time of the foreclosure sale the entire property of the Warren Hotel Company consisted of the hotel and its furnishings, and a small amount of cash which was levied upon and taken by judgment creditors, and the liabilities of said com-

pany aggregated $148,860, in addition to past-due interest and taxes, that no dividends were ever paid on the common or preferred stock of the Warren Hotel Company and no officers of said company received any remuneration from said company; since 10 February, 1934, the town of Warrenton has received $10,521.41 in rentals from the hotel, and has expended $10,885.21 in repairs, replacements, insurance and county taxes, and the hotel is being rented for $200 per month, plus a small amount from a certain per cent of the rental received from rooms; the rental contract provides that the town of Warrenton may cancel the lease if the hotel is not operated in a manner satisfactory to it; all taxes on the hotel property were paid at the time the town of Warrenton took title to the same, and since then the town of Warrenton has paid Warren County taxes for the years 1934, 1935 and 1936; the town of Warrenton is the county seat of Warren County and the hotel built by the Warren Hotel Company is the only hotel in said town; Warren County has assessed said hotel property for taxation for the year 1937, and has levied a tax against the same of $312.50, which the town of Warrenton refuses to pay, and the tax collector of said county has advertised said property to be sold for said tax; the plaintiff, town of Warrenton, denies that the defendant, Warren County, is permitted to tax said hotel property while it remains vested in it, a municipal corporation.

The question presented by the agreed facts is whether the tax levied and assessed for the year 1937 against the property held and used by the town of Warrenton as a hotel is a valid and collectible tax. The judge below held that such tax was valid and collectible and so adjudged, and from this judgment the plaintiff appealed, assigning as error the signing of the judgment. We are of the opinion, and so hold, that the judgment of the Superior Court should be affirmed.

The case is governed by *R. R. v. Commissioners,* 75 N. C., 474; *Board of Financial Control v. Henderson County,* 208 N. C., 569; and *Benson v. Johnston County,* 209 N. C., 751. The agreed facts divulge that the town of Warrenton owns hotel property and that it leases such property for $200 per month, plus a certain other contingent amount, to be used as a hotel. The property is neither held for nor used for governmental or necessary public purposes, but merely for business purposes, and in competition with any other hotel that may be established in the town of Warrenton or vicinity. "If a municipal corporation can go into a rental business and escape taxation, it would have a special privilege not accorded to others who are in a like business." *Board of Financial Control v. Henderson County, supra.* The words "Property belonging to the State or to municipal corporations, shall be exempt from taxation," used in sec. 5, Art. V, of the State Constitution, have been interpreted in this jurisdiction since 1876 as meaning property

used for governmental or public purposes, and not including property used for business purposes for the benefit of certain individuals or communities. After stating that the Capitol and other property used for public purposes are exempt from taxation by the quoted section of the Constitution, this Court, in *R. R. v. Commissioners, supra,* states: "But when the State steps down from her sovereignty and embarks with individuals in business enterprises, the same conditions do not prevail. The State does not engage in such enterprises for the benefit of the State as a State, but for the benefit of individuals or communities, . . ." This case was followed in *Board of Financial Control v. Henderson County, supra,* and in *Benson v. Johnston County, supra,* and in our opinion supports the holding of the judge of the Superior Court in the instant case.

The instant case is distinguishable from *Andrews v. Clay County,* 200 N. C., 280, and *Weaverville v. Hobbs, Comr.,* 212 N. C., 684, relied upon by the appellant, in that in both of these cases the property sought to be taxed was owned and used for governmental or public purposes, in the former case for the erection of a power plant to generate electricity to light, and otherwise serve the owner, a municipality, and in the latter case for the purpose of assisting World War veterans in the acquisition of homes. *Hinton v. State Treasurer,* 193 N. C., 496.

The judgment of the Superior Court is

Affirmed.

STACY, C. J., concurring: It must be conceded that the current of authority on the question here presented is wanting in clarity, if not in consistency. A definitive decision is perhaps devoutly to be wished. But again it is discovered that we have studied the same books and learned different lessons; read the same lines and construed them not alike.

The focus of the eye has much to do with the range of vision. If we fix our gaze on a single tree, we may not perceive the forest. If we look intently at the fly on the window, we may not see the window. If we rivet our attention on a single sentence, we may not observe its surroundings or setting. The Constitution deals with governmental matters. Counties, cities and towns are created for the benefit of the public and charged with the administration of community affairs. *Wells v. Housing Authority,* 213 N. C., 744, 197 S. E., 693; *Southern Assembly v. Palmer,* 166 N. C., 75, 82 S. E., 18; *Comrs. v. Webb,* 160 N. C., 594, 76 S. E., 552; *Smith v. School Trustees,* 141 N. C., 143, 53 S. E., 524. It was never contemplated that they should engage in competitive, private business. *Williamson v. High Point,* 213 N. C., 96, 195 S. E., 90. Public funds may be expended only for a public purpose. *Briggs v. Raleigh,* 195 N. C., 223, 141 S. E., 597; *Ketchie v. Hedrick,* 186 N. C., 392, 119 S. E., 767.

The reason municipal property is granted immunity from taxation is, that it is supposed to be dedicated to a public use. *Corporation Com. v. Const. Co.,* 160 N. C., 582, 76 S. E., 640. To exempt it for any other reason would run counter to the rule of fair play or the principle of equality. Such a purpose is not to be imputed to the framers of the Constitution. Rather a contrary implication should be indulged. It will be implied that the intention was to exempt such property only when devoted to a public purpose. Notes, 3 A. L. R., 1439, and 101 A. L. R., 787. When "the State steps down from her sovereignty and embarks with individuals in business enterprises," its property so employed is not exempt from taxation under Art. V, sec. 5, of the Constitution. This was the pronouncement in *R. R. v. Comrs.,* 75 N. C., 474.

Nor is it a solution of the problem simply to rest upon the *ipse dixit* of the Constitution that "Property belonging to the State, or to municipal corporations, shall be exempt from taxation," and let it go at that, without looking any further into the matter. We should see the Constitution steadily and see it whole. *Stedman v. Winston-Salem,* 204 N. C., 203, 167 S. E., 813. Let us suppose, for example, that a municipal corporation of a neighboring state should acquire a water shed or other property within the boundaries of this State. Would anyone contend that such property, though owned by a municipal corporation, and perhaps used for a public purpose, would be exempt from taxation under the all-inclusive clause we are now considering? *S. v. Holcomb,* 85 Kan., 178, 116 Pac., 251, 50 L. R. A. (N. S.), 243; Ann. Cas., 1912-D, 800; *Catholic Society v. Gentry,* 210 N. C., 579, 187 S. E., 795; *Rich v. Doughton,* 192 N. C., 604, 135 S. E., 527. *Cf. French Republic v. Jefferson County,* 200 Ky., 18, 252 S. W., 124. Language is but a vehicle of thought and it may vary in color and content according to the circumstances of its use. *Opinion of the Justices,* 204 N. C., p. 813, 172 S. E., 474; *Cole v. Fibre Co.,* 200 N. C., 484, 157 S. E., 857.

It is pointed out that the framers of the Constitution were fully aware of the difference between an absolute exemption and one depending upon the "purposes" for which the property is held, as witness the very next sentence: "The General Assembly may exempt . . . property held for educational, scientific, literary, charitable, or religious purposes"; etc. The answer to the suggestion is, that both the General Assembly, ch. 291, sec. 600, Public Laws 1937, and the Court, *R. R. v. Comrs., supra,* have interpreted the language of this section according to the circumstances of its use, as not importing tyrannical power or unrestrained caprice, and they have imputed to the framers an intention to deal fairly and equitably with those who are required to pay taxes upon their property, and at the same time, to meet competition in the field of private business. The power of unequal competition in commercial

matters was not intentionally granted. The framers intended to say, and did say, in respect of these matters as they affect the citizen, "equal rights to all and special privilege to none." 26 R. C. L., 332, *et seq.*

Perhaps the difficulty would be obviated if municipal corporations were required to operate strictly as local units of government, as was originally intended. *Webb v. Port Commission,* 205 N. C., 663, 172 S. E., 377; *Wells v. Housing Authority, supra; Smith v. School Trustees, supra.* It is only when they step over into the field of private enterprise that the question of taxation arises, and another section of the Constitution is thought to be applicable: "The power of taxation shall be exercised in a just and equitable manner. . . . Taxes on property shall be uniform as to each class of property taxed." Art. V, sec. 3. So long as the exemption is applied to circumstances to which it was originally intended, there is no occasion for interpretation, *Latta v. Jenkins,* 200 N. C., 255, 156 S. E., 857, but when new conditions arise and other provisions of the organic law are brought into play, the question occurs whether the reason underlying the exemption is overborne by the opposing reasons. *Beardsley v. City of Hartford,* 50 Conn., 529, 47 Am. Rep., 677.

In this situation, when two sections of the Constitution are to be harmonized, which shall be favored, the one which provides for uniformity of taxation or the one which grants immunity? The basic idea of the Constitution is equality. It eschews discrimination. Taxation is the rule; exemption the exception, with strict construction applicable to the latter. *Benson v. Johnston County,* 209 N. C., 751, 185 S. E., 6; *Loan Assn. v. Comrs.,* 115 N. C., 410, 20 S. E., 526; *Redmond v. Comrs.,* 106 N. C., 122, 10 S. E., 845; *Building Assn. v. Board of Review,* 217 Iowa, 1181, 251 N. W., 76. In the circumstances, should not the pervading purpose of the Constitution control? *Hospital v. Rowan County,* 205 N. C., 8, 169 S. E., 805. Exemption is granted in the capitol and in the city hall. Taxation is required in the market place. 26 R. C. L., 332. "A constitution should not receive a technical construction as if it were an ordinary instrument or statute. It should be interpreted so as to carry out the general principles of the government, and not defeat them"—*Brown, J.,* in *Jenkins v. Board of Elections,* 180 N. C., 169, 85 S. E., 289.

Whether property owned by a church, *United Brethren v. Comrs.,* 115 N. C., 489, 20 S. E., 626, or a school, *Trustees v. Avery County,* 184 N. C., 469, 114 S. E., 696, is exempt from taxation depends upon the purpose for which it is held. Ch. 291, sec. 600, Public Laws 1937. This is the effect of all the decisions. *Southern Assembly v. Palmer, supra; Davis v. Salisbury.* 161 N. C., 56, 76 S. E., 687. And even if the business income derived from church or school owned property be exempt

from taxation, because devoted exclusively to religious or educational purposes, this would not perforce relieve the property itself of an *ad valorem* assessment and taxation. *United Brethren v. Comrs., supra.* The same may be said of property belonging to a charitable or eleemosynary institution. *Hospital v. Rockingham County,* 211 N. C., 205, 189 S. E., 494; *Hospital v. Rowan County, supra.* Likewise, whether municipal property is immune from taxation depends upon its use, where, as here, the municipal corporation has leased its property for operation as a private enterprise. *Board of Financial Control v. Henderson County,* 208 N. C., 569, 181 S. E., 636; *Benson v. Johnston County, supra.* Such is the express language of the statute: "The following real property, and no other, shall be exempted from taxation: . . . real property lawfully owned and held by counties, cities, townships, or school districts, used wholly and exclusively for public or school purposes." Ch. 291, sec. 600, Public Laws 1937.

Immunity granted to an institution, though expressed in absolute terms, will not extend beyond the purposes for which the institution was created at the time of the grant. When the entity thus clothed with immunity departs from the land of its immunity and goes into the imperative field of taxation, it sheds its immunity, for, in this latter country, it operates neither in the territory nor in the character of its immunity. *Stiles v. Newport,* 76 Vt., 154, 56 Atl., 662. A privilege of immunity extends no farther than the reason on which it is founded. *Cessante ratione, cessat ipsa lex.* This is the rationale of the entire section. The permissible exemptions provided for in the second sentence may be made applicable only to property held for one or more of the designated purposes, and not to property held for any other purpose. The section has back of it the history of mortmain. *Allen v. Regents of University System,* 304 U. S., 430—rehearing denied, 304 U. S., 590.

When the reason for an exemption ceases, the exemption ceases, for no exemption can survive the reason on which it is founded. A privilege bereft of its basic reason is regarded as lifeless in the law. If need be, the letter gives way to promote the equity of the spirit, but in the instant case the exemption was never intended to extend to property leased for use in a private venture. The meaning of the words, simply considered, is clear enough; the state of things upon which they are to operate is the circumstance which calls for an interpretation of the constitutional provision. The reason of the law is more potent in its interpretation than the language used to express it. Reason is its soul; language its outward form.

BARNHILL and WINBORNE, JJ., join in this opinion.

CLARKSON, J., concurring: I agree with the result, to wit, that a hotel owned and rented by a town is subject to taxation by the county in which it is located, but I do not agree with the theory and reasoning of the majority opinion. (1) In my opinion, the first sentence of Art. V, sec. 5, N. C. Constitution: "Property belonging to the State, or to municipal corporations, shall be exempt from taxation"—should be so interpreted that it applies alike to the property of the State and of municipal corporations. The most recent cases stated two disparate rules. See *Benson v. Johnston County,* 209 N. C., 751 (municipal property), and *Weaverville v. Hobbs, Comr.,* 212 N. C., 684 (State property). (2) In my opinion, the rule of absolute exemption announced in *Weaverville v. Hobbs, Comr., supra,* reversed such cases as *Benson v. Johnston County,* 209 N. C., 751; *Board of Financial Control v. Henderson County,* 208 N. C., 569; *Andrews v. Clay County,* 200 N. C., 280; and *R. R. v. Comrs. of Carteret,* 75 N. C., 474; which cases should have been treated as the controlling authorities in the *Weaverville case, supra,* and in the instant case. There is abundant case authority in our reports to support a single, consistent interpretation as to the meaning of this section of our Constitution, to wit, that *only State and municipal property directly employed in a public use and for a public purpose is wholly exempt from taxation.* See the cases cited immediately above.

(1) *Two Inconsistent Interpretations of Same Sentence in Constitution.* The opinion of the majority stops short of the demands of the present state of the law on the subject. It attempts to distinguish the *Weaverville case, supra,* from the instant majority opinion by pointing out that in the *Weaverville case, supra,* the money received from the property went to the World War Veterans' Fund and in the present case the receipts are put into the Warrenton treasury. In the *Weaverville case, supra,* the dwelling was rented by the State; here the hotel is rented by the town. The distinction appears to be one without a difference. Certainly the factual similarity of the two cases is striking, and one inviting the application of the same rule. In dissenting in the *Weaverville case, supra,* I there urged the application of the rule of the instant case; the *Chief Justice,* and the *Justice* who here speaks for the majority, indicated views in the *Weaverville case, supra,* in accord with those which I there urged and now repeat. I am more strongly convinced than ever, in the light of facts of the instant case, that the result here reached is correct and that the decision in *Weaverville v. Hobbs, Comr., supra,* was incorrect.

"Property belonging to the State, or to municipal corporations, shall be exempt from taxation" clearly means that property belonging (1) to the State, or (2) to municipal corporations, shall be exempt from taxation, on the same basis and by the same rule. Here is a sentence with

one subject, one verb, one verb phrase, and one participle, the latter taking two prepositional phrases as objects, the one relating to the "State" and the other to "municipal corporations." Elementary rules of grammar and composition compel the admission, it seems to me, that this sentence in our Constitution laid down a single, fundamental proposition, equally applicable to the State and to municipal corporations. The expressed intent to "feed out of the same spoon" the State and all municipal corporations seems clear. However, our cases do not so hold. The rule of *Benson v. Johnston County, supra,* permits the taxation of municipal property not used for a public purpose, while the rule of *Weaverville v. Hobbs, Comr., supra,* exempts all State property from taxation, irrespective of the character of the use. To speak boldly, this is discrimination, and discrimination of a type for which I can find no justification within our Constitution. See *Benson v. Johnston County, supra,* at bottom p. 757. In my opinion, the majority opinion here should so amplify the rule of *Benson v. Johnston County, supra,* as to make it plain that the soundness of the rule of *Weaverville v. Hobbs, Comr., supra,* is open to serious question, and thus put officials and taxing authorities on notice that the rule in the *Weaverville case, supra,* may hereafter be the subject of a close scrutiny at the hands of this Court. The classes of property here discussed—that of the State and of municipal corporations—represent the only property exempted from taxation by the Constitution itself (*Building and Loan Assn. v. Comrs.,* 115 N. C., 410); since this section of the Constitution is self-executing (*Hospital v. Rowan County,* 205 N. C., 8), and does not require enabling legislation which might aid the Court in arriving at the proper interpretation of the section, it is imperative that a clear, concise, fair and practicable meaning be assigned to it by this Court.

(2) *No Absolute Exemption from Taxation.* The meaning of the mandate "property belonging to the State or to municipal corporations, shall be exempt from taxation" was first interpreted in *R. R. v. Comrs. of Carteret,* 75 N. C., 474. There the fundamental distinction between public purposes and "business enterprises" was recognized, and the property of a railroad in which the State owned two-thirds of the stock was held to be subject to taxation as if entirely privately owned. It is because of more recent failures to recognize the soundness of this distinction that the present confusion in the case law of this subject now exists. As we have noted above, this decision as to the exemption of State property likewise should, logically, have been regarded as determinative also of the meaning of the exemption as applied to the property of municipal corporations. It is interesting to note in passing that *Justice Rodman,* who did not dissent from the view in the *Carteret case, supra,* served on the Finance Committee which drafted this particular

sentence of our Constitution and signed the committee report recommending its inclusion in our Constitution. Journal of the Constitutional Convention, 1868, p. 305. Had the opinion in the *Carteret case, supra,* done violence to the clear intention of the framers of our Constitution, certainly *Justice Rodman,* who had assisted in drafting the provision and had sponsored its adoption, would have spoken out sharply in dissent. For half a century (so long as any of the original framers of the Constitution of 1868 remained alive) the interpretation of the Constitution given in the *Carteret case, supra,* was unquestioned. Nothing said in *R. R. v. Comrs.,* 84 N. C., 504, is to the contrary, as there the Court was dealing with a *statutory,* not a *constitutional* exemption. The permissive range of exemption by statute is much broader than the area of mandatory exemption by the Constitution. Any statement in the opinion in that case apparently contrary to the *Carteret case, supra,* in my opinion, is to be interpreted only to be an incidental explanation of *legislative* motive and not the statement of a constitutional principle.

Meanwhile, the principle of the *Carteret case, supra,* became woven into the texture of the law of this and of other jurisdictions. It was cited with approval by the New York Court in *Village of Watkins Glen v. Hager, County Treasurer,* 252 N. Y. S., 146, 140 Misc., 816, and by the Supreme Court of the United States in *Power & Light Co. v. Seattle,* 291 U. S., 619, 636, 78 L. Ed., 1025, 1036. It was also cited in 3 A. L. R., 1439, 1441-42, and in The Constitution of North Carolina, Annotated, Connor and Cheshire, p. 277. "When publicly owned property is used for a private purpose a majority of jurisdictions refuse to allow the exemption; but courts almost without exception hold such property exempt when used for public or governmental purposes, by reason of constitutional or statutory provisions." Riddle in 16 N. C. L. R., at p. 310, citing 3 A. L. R., 1439; 81 A. L. R., 1439; 81 A. L. R., 1518; 99 A. L. R., 1143. The opinion in the *Carteret case, supra,* has been criticized because the principle there laid down was broader than was necessary for the disposition of that case; that is a fair comment, but that fact does not weaken the force of that case as an authority, since that pronouncement represented the solemn judgment of a unanimous Court. The opinion in that case can scarcely be labeled *dicta,* either *obiter* or *judicial.* If a Court—contrary to the usual practice and by reason of the general public interest in the determination of the question —deliberately adopts a broad view which will settle many legal questions facing public officials, the case does not for that reason become any less binding as an adjudicated authority. The Court, in passing upon the question at its first opportunity, served both the interests of certainty and of justice, the former by establishing a simple, practicable rule of determining exemptions and the latter by formulating a rule which ultimately was accepted in nearly every American jurisdiction.

In *Andrews v. Clay County,* 200 N. C., 280 (electric power plant for street and other lighting, *held* for a public purpose—exempt from taxation), the *Carteret case, supra,* was not mentioned, although it was authority for the position there taken. In *Board of Financial Control v. Henderson,* 208 N. C., 569 (rented office building acquired in bank settlement, *held* for business purpose—taxable), and in *Benson v. Johnston County, supra,* 751 (rented dwelling and hatchery acquired by tax foreclosure, *held* not for public purpose—taxable), the *Carteret case, supra,* was relied upon and followed. In *Weaverville v. Hobbs, Comr., supra* (rented dwelling acquired by State Commissioner through mortgage foreclosure, *held* State property—absolute exemption from taxation), the majority opinion stated that the *Carteret case, supra,* was distinguishable, but three dissenting *Justices* regarded it as controlling. Here, the majority opinion holds that a rented hotel acquired by mortgage foreclosure is not held for "governmental or necessary public purposes" and is, therefore, taxable under the doctrine of the *Board of Financial Control,* the *Benson,* and the *Carteret cases, supra;* the *Andrews* and *Weaverville cases, supra,* are treated as distinguishable. I am in complete accord with the *result* reached, but I cannot accept fully the theories of the opinion. It lays down a third, and new, test to add to the confusion caused by the two conflicting tests already in existence, to wit, that property must be held for a "governmental or necessary purpose" to be exempt. The previous test (where the absolute exemption has not been applied) has been merely that the property be used for a "public use and purpose," not necessarily for a mandatory and necessary governmental function. Under the majority rule here stated, the property in the *Andrews case, supra,* would have been declared taxable; that case I regard as close but sound and I think the opinion in that case is consistent with the *result* in the instant case. Further, I cannot agree with the view that when the State goes into the realty business to the extent that it maintains and rents residence property, as in the *Weaverville case, supra,* such property is "owned and used for governmental or public purposes"; it does not follow from the mere fact that the Veterans' Loan Fund was created for a public purpose that when those funds are converted into residence real estate to be used for rental purposes, such a venture is not a "business enterprise." If the ultimate use of income is to be the test of whether the property is held for a "public purpose," the State and every city, town and county could enter every field of commercial activity in competition with taxpayers and discharge every claim for taxes by gayly announcing that "whatever money we make, beyond our salaries and operating expenses, eventually will be used for a public purpose." In my opinion the developed philosophy of our cases does not support such a test. I am

in accord with the views expressed herein in the concurring opinion of the *Chief Justice*. As to the settled policy of strictly interpreting exemptions, see *Bryant v. Carrier,* 214 N. C., 174.

Since I have previously stated my views as to the proper application of the rules of construction to the present question and have likewise commented at some length on the social and legal policy of the view here advocated (dissent in *Weaverville v. Hobbs, Comr., supra*), no real purpose can be served by their repetition.

See *Ohio v. Helvering, Comr. of Internal Revenue,* 292 U. S., 360, 78 Law Ed., 1307, decided 21 May, 1934, where it was held: (1) Whenever a state engages in a business of a private nature it exercises nongovernmental functions, and the business, though conducted by the state, is not immune from the Federal taxing power. (2) Where a state engages in the business of distributing and selling intoxicating liquors, though pursuant to a legislative enactment providing a system of liquor control, it is not immune from the Federal tax imposed on liquor dealers by R. S., sec. 3244. Following *South Carolina v. United States,* 199 U. S., 437. (3) Though the Eighteenth Amendment outlawed the liquor traffic, it did not have the effect of converting what had always been a private activity into a governmental function. (4) As applied to business activities, the police power is the power to regulate those activities, not to engage in carrying them on.

Suffice it to say that there appears to be no debate among those who have studied the question of tax exemption of government-owned property as to the desirability of eliminating the rule of absolute exemption. The division of this Court is purely one as to constitutional interpretation. The choice is that between a literal interpretation and a liberal one. My vote is for the latter. "The letter killeth, but the spirit giveth life." II Corinthians, ch. 3, v. 6.

The literalists would have us believe that the words of the Constitution here under consideration are crystal clear and necessarily import an absolute exemption as to property of the State and a partial exemption as to property of municipal corporations. Yet, when I find that the contemporary meaning judicially assigned to the words of the framers of the Constitution is to the contrary and further find that such meaning has been accepted and followed for more than half a century by our courts, with the silent acquiescence of our people, I am constrained to cast my lot with those who favor a strict exemption policy in matters of taxation. Our primary duty is to face the compelling demands of today and I am unwilling to curb the powers of our citizens to meet these complex demands by the eleventh-hour issuance of a new constitutional dictionary.

DEVIN, J., dissenting: In addition to what has been so well said by *Justice Seawell,* I desire to record my disagreement with the views expressed by the majority in the disposition of this case.

In *Weaverville v. Hobbs,* 212 N. C., 684, 194 S. E., 860, the facts were almost identical with those in the case at bar. There, upon failure to repay a loan made from the North Carolina Veterans' Loan Fund, the deed of trust was foreclosed, and, in order to protect the investment, the property was bought in and title conveyed to the State for the use and benefit of the Veterans' Loan Fund. Thereafter the property, consisting of a house and lot, was rented to private persons and the rents derived applied to the use of said fund. This was held to be for a public purpose. It was said: "Whether the real property, the subject of this controversy, is used directly by the State, or the rents derived therefrom are held and applied by the State as additions to the State Veterans' Loan Fund is immaterial since its use is exclusively for governmental purposes." The exemption of the house and lot from taxation under Art. V, sec. 5, of the Constitution was upheld by this Court.

In the instant case the town of Warrenton purchased at foreclosure sale the described hotel property in order to protect an investment of a hundred thousand dollars, an investment which had been duly approved by the voters of the town. Title was conveyed to the town and thereafter the rents derived from the property were and are appropriated exclusively to the public purpose of the town. Thus the property belonging to the town is devoted to a governmental purpose in the same manner and to the same extent as in the *Weaverville case, supra.* The similarity in the facts of these two cases may not be avoided by attempts to distinguish them. It seems to be conceded if the town were to use the property as a town hall or a municipal court it would be exempt from taxation under Art. V, sec. 5, of the Constitution. Would not the same principle apply if the income from the property were to be used to rent a town hall or a municipal courtroom, or for any other governmental purpose?

The argument based upon expediency and the possible consequences which might result from a strict adherence to Art. V, sec. 5, of the Constitution, is beside the question. These are not considerations by which the Court should be swayed in the face of the definite language of the Constitution. If need be, let the Constitution be amended in the manner prescribed by that instrument, but not by judicial decision. If it be thought by some to be wise to permit the levy of *ad valorem* taxes upon city property, not in exclusive use at the time for governmental purposes, and if this be a reason urged on the Court for so interpreting the Constitution as to add a qualifying clause to its positive mandate, in the effort to bend its meaning to fit a temporary need, or to conform to what

some might think as interpretive of its undefined spirit, I fear this might constitute a precedent in other times and by other hands to interpolate phrases and to insert amendments by judicial construction in other portions of the Constitution and to weaken its authority.

The language of Art. V, sec. 5, is inelastic. It permits no addition or qualification contrary to the clear expression of the purpose of the framers of the Constitution. All the interpretative refinements of judicial language, all the arresting phrases inserted in judicial opinions cannot add to or change one word of this mandatory injunction of the Constitution binding upon all alike. "Property belonging to municipal corporations shall be exempt from taxation."

SEAWELL, J., dissenting: Article V, section 5, of the Constitution declares briefly, plainly, and pointedly: "Property belonging to the State or to municipal corporations shall be exempt from taxation." The effect of the majority opinion in the case at bar is to insert after the words "municipal corporations" the words "and held for a governmental or public purpose." The question of real importance raised here is whether this is judicial interpretation or judicial amendment. The only argument advanced in the majority opinion to support the theory of legitimate interpretation is the naked authority of supposed precedent in *R. R. v. Comrs.*, 75 N. C., 474, and the recent cases (1935, *et seq.*), which adopted it. This holding, as far as I can discover, is supported only by the principle to be comprised in the following statement: "But where the State steps down from her sovereignty and embarks with individuals in business enterprises, the same considerations do not prevail"—referring to embarrassment to the State Government by taxing its property. The conclusion is reached: "We do not think the exemption in the Constitution embraces the interest of the State in business enterprises, but applies to the property of the State held for State purposes." The Court has recently revived this doctrine, if it may be called a doctrine, holding in *Board of Financial Control v. Henderson County*, 208 N. C., 569, 181 S. E., 636 (1935); *Benson v. Johnston County*, 209 N. C., 751, 185 S. E., 6 (1936), and now in the case at bar, that property belonging to municipalities and not "held for governmental or public purposes" is subject to taxation.

Since none of the later cases goes more deeply into the subject than the cited precedent, nor assigns any other reason to support the conclusion reached than may be found therein, I am not willing, upon the evidence they afford, to impose, *nunc pro tunc*, upon the minds of the makers of the Constitution of 1868 and 1875, a mere ideology of government, however commendable it may seem to those who advance it, and thereby attribute to them an intention not found in the language em-

ployed, and give an interpretation to the Constitution inconsistent with its natural and obvious meaning and contrary to the facts of history.

It may be a good policy to limit tax exemptions to property used for governmental and public purposes only. A number of states have thought so and such restrictions have been clearly expressed in their Constitutions—in some cases by original adoption, but in most cases by amendment. Naturally, I do not object to that mode of expressing and enforcing the popular feeling upon the subject, but I insist that this Court has no right to engraft such a policy upon the present Constitution, which speaks otherwise.

"The Court in construing a constitutional provision may not substitute for the clear language of the Constitution its own notions of what the provision should have been." *Woessner v. Bullock,* 176 Ind., 166, 93 N. E., 1057.

"The power of construction is so great that if it were not restrained by settled rules, the effect of a plainly worded statute would be practically uncertain. It was *Chief Justice Pemberton* in the time of Charles II who boasted that he had entirely outdone Parliament in making law." *Spencer v. State,* 5 Ind., 41.

The main opinion, the concurring opinion, and the two dissenting opinions in *Weaverville v. Hobbs, Comr.,* 212 N. C., 684, 194 S. E., 860 (1938), may now be interpreted impersonally and objectively as they appear on the printed page.

> "The Moving Finger writes, and having writ,
> Moves on; nor all your piety nor wit
> Shall lure it back to cancel half a line,
> Nor all your tears wash out a word of it."

I am sure that those affected by that decision, and the profession generally, accepted it as overruling *Benson v. Johnston County, supra,* and were justified in that view. The main opinion, written by *Justice Devin,* and the concurring opinion of *Justice Connor,* can have no other interpretation. The main opinion adopts, with approval, the language of *Connor, J.,* in *Andrews v. Clay County,* 200 N. C., 280, 156 S. E., 855 (1931), as follows: "The provision in the first clause of section 5 of Article V of the Constitution of North Carolina, by which property belonging to or owned by a municipal corporation, is exempt from taxation, is self-executing, and by its own force, without the aid of legislation, exempts such property from taxation by the State or by the political subdivision of the State in which it is located, *because of its ownership, and without regard to the purpose for which such property was acquired and held by the corporation.* With respect to such property,

when lawfully acquired and held by statutory authority, new or additional conditions cannot be imposed by the General Assembly as prerequisites for its exemption from taxation. 37 Cyc., p. 886. The language of the constitutional provision is so clear and unambiguous that there is no room for judicial construction. The fact that social, economic, and political conditions in this State have undergone great changes since the adoption of our present Constitution, resulting in an enlargement of the functions of municipal corporations to meet the requirements of changed conditions, would not justify a construction of this provision *which would in effect result in its amendment by the courts and not by the people.*

"If required to adopt the construction of the sections of the machinery acts relied on by the defendants in the instant case, in support of their contention that by virtue of said sections property belonging to or owned by a municipal corporation is not exempt from taxation by the State or by the political subdivision of the State in which such property is located, unless such property is held wholly and exclusively for a public purpose, we should hold that said sections of the machinery acts, in so far as they have that effect, are unconstitutional and void."

In *Andrews v. Clay County, supra,* from which this extract is taken, the Court passed upon a contention of the defendant, Clay County, that because of the requirements of Article V, section 3, of the Constitution, providing that property be taxed by uniform rule, certain property of the municipality of Andrews must be taxed upon the theory now advanced by Warren County in the present case—that Article V, section 5, of the Constitution, does not exempt the property of a municipality except when held for a governmental or public purpose—and the unanimous opinion of the Court was against that interpretation, just as fifty years before its rendition the Court, in *R. R. v. Comrs.,* 84 N. C., 504, 512 (1881), considering the same sections of the Constitution together, also decided against that contention.

The concurring opinion of *Justice Connor* places the decision squarely on the unambiguous terms of the Constitution: "Property belonging to the State or to municipal corporations shall be exempt from taxation:" "There is no ambiguity in this language. Its meaning is plain. The language is clear and is not subject to judicial construction in order that a policy with respect to taxation in conflict with its provisions may be sustained. *Property belonging to the State is exempt from taxation, because of its ownership, without regard to the purpose for which it was acquired or for which it is owned by the State.*" The dissenting opinion of *Justice Clarkson* is principally addressed to that feature of the main opinion.

The Court cannot select and paramount the least of the considerations entering into the decision of any case in order to distinguish the opinion and eliminate it as authority without creating confusion and instigating popular distrust in the frankness and dependability of judicial opinion. All this, however, leads to fruitless discussion, since the majority of the Court has the same power to overrule *Weaverville v. Hobbs, Comr., supra,* as they have to distinguish it from the case at bar and reinstate the *dictum* of a twice overruled case, and the net result is the same. In either event, this series of cases will probably, in a minor way, go down in legal history classed with those differences within the Court where opposing forces have surged from this side to that of the juridical battlefield, with varying success, to impermanent victory.

If the main opinion applied only to the facts of this case—a hotel owned by the town of Warrenton—and to the circumstances under which this property seems to have been acquired, there might be a strong sense of impropriety in exempting property of that kind from taxation, and the capacity of the town to take and hold title to such property might even be challenged. But none of these questions are raised here, and the effect of the present decision is more sweeping: It harks back to *Benson v. Johnston County, supra,* which holds that when a town acquires property by foreclosure in an attempt to protect and collect its taxes for governmental purposes, it has, by this process, "stepped down from its sovereignty" and engaged in a private enterprise, and its property is accordingly the subject of taxation.

I beg to differ with the majority opinion in its observation that the clause of the Constitution declaring "property belonging to the State or to municipal corporations shall be exempt from taxation" has been accepted in this jurisdiction since 1876 as meaning property used for governmental or public purposes, and not otherwise. It is true that the first case of *R. R. v. Comrs.,* 75 N. C., 474, which is used as the headspring of authority in the case at bar and other cases above cited, was handed down in 1876. It was followed in less than six years by *R. R. v. Comrs.,* 84 N. C., 504 (1881), the effect of which was to overrule the former case. For a period of over fifty years, down to *Board of Financial Control v. Henderson County, supra* (1935), the proposition has had no judicial backing or standing, and it has never had any following in administrative practice at any time prior to the case last cited.

The Atlantic and North Carolina Railroad and the North Carolina Railroad were chartered in 1852, in the same act of Assembly and with identical provisions. When the question of taxing the property of the North Carolina Railroad came up for consideration in *R. R. v. Comrs.,* 84 N. C., 504 (1881), at a time when the Constitution of 1868, as amended in 1875, had the advantage of perspective, the same Court

(page 512), said: "It is suggested in the argument for the defendants that the exemption of three-fourths of the taxable property is within the inhibition of the Constitution (Article V, section 3), which prescribes a uniform rule of taxation upon 'all real and personal property according to its true value in money.' We do not concur in this view, nor is the point presented in the exceptions in this record. *This is but a mode of giving effect to section 5, which exempts from taxation 'property belonging to the State.'*" This is the opinion of the Court upon the Revenue Acts of 1869 to 1874, which contain the provision: "In valuing the property of railroads and other corporations in which the State is a stockholder, the whole property shall be valued, but a part of the valuation shall be deducted proportionate to the interest of the State, and the tax levied on the residue only."

I turn now to *R. R. v. Comrs.*, 75 N. C., 474, upon which *Benson v. Johnston County, supra,* and the case at bar, are made to depend. If the construction put on that case by the Court be conceded, it might find in it support both for the case at bar and the *Benson case, supra,* if, further, it is content to rest its decision on a mere *obiter dictum,* predicated on a principle which had no application whatever to the subject with which the Court was dealing then, or is dealing now, which subject, as I understand it to be, is the *constitutional* exemption of municipally owned property—a thing quite distinct from the plea of sovereign immunity. The State did not own one foot of the land nor one dollar's worth of the property sought to be taxed in that case, and a simple recognition of that fact would have disposed of the whole case. The writer of the opinion seemed to confuse the ownership of 51% of the stock with the actual ownership of that percentage of the property of the corporation. Any statement of the Court as to what the Constitution meant in exempting State or municipally owned property from taxation made under such circumstances was pure *dictum.*

There is still less applicability in the supposed supporting principle—that is, the doctrine that the sovereign loses its immunity when it steps down from the throne to engage in private enterprises. The exemption upon which the municipality relies rests in the provisions of the Constitution and has nothing to do with sovereignty. It concerns only the language used in that document which applies equally to both the sovereign and the subject. Had the Constitution been silent, and had the claim of exemption been based on the defense of sovereignty granted by the State to the municipality for its government, the argument might have had some point; but the constant repetition of this somewhat stilted gesture to democracy does no more than distract attention from the issue. Whether such a thing as "sovereignty" was in the minds of the framers of the Constitution is another question. If it had been, they no doubt

had the intelligence to relieve this Court of its present controversial embarrassment by saying so. I think their considerations were more practical and are fully expressed in the "black and white" of the Convention Journal. The illustration has had some application where the defense of sovereignty has been suggested to defeat some liability or obligation of the sovereign—generally with regard to contracts. In other instances also, where the sovereign has associated itself with others in a private enterprise and seeks because of such sovereignty a superior and inequitable advantage. *Southern Railway Co. v. North Carolina Railway Co.*, 81 Fed., 595. In the latter case there was an attempt to destroy the contractual charter relation established between the State of North Carolina and the private stockholders of the North Carolina Railroad by legislative repeal of the lease to the Southern Railroad. There, *Judge Simonton*, rendering the opinion of the Court, appropriately said: "The State of North Carolina, having thus laid down her sovereignty when she entered into this enterprise with the private stockholders, so far as respects the transactions of the corporation, exercises no power and enjoys no privilege in respect to these transactions not derived from the charter. Her interest, therefore, in this contract which has been assaulted is not a sovereign interest, nor are her functions with regard to them functions of sovereignty." I quote this in full because it was no doubt the principle at which the Court was aiming in *R. R. v. Comrs., supra* (the Carteret County case).

Members of the Court who are so anxious to distinguish cases according to the factual situation when such a view supports their argument ought, I think, to give *Justice Reade* credit for speaking to the facts of the case before him rather than tear his illustration away from its environment and send it forth upon the way "like a courier without baggage." Does our reminder that "language is but a vehicle of thought and it may vary in color and content according to the circumstances of its use" have application only to the Constitution? *Judge Reade* referred to the supposed partnership which the State had with private stockholders in the joint ownership and operation of the Atlantic and North Carolina Railroad for the benefit of the company and the communities through which the road passed, many of which were also stockholders—a fact situation entirely different from any of those to which the borrowed principle is here applied—(to my mind, in violation of its implications and with no little injustice to the Court which rendered it), and stated that where the State "embarks *with individuals* in business enterprises," the *interest* of the State in such business enterprises is taxable. Without giving the reasons why property owned exclusively and directly by the State is not taxed, and having used the Capitol building as an illustration, the opinion says: *"And so with other State property."*

There is not a sentence in the whole opinion which, fairly construed, serves as a basis for the main opinion. The opinions in this case substitute for the language quoted that property *exclusively* owned by the State and used in any way in *"competition"* with private ownership is subject to tax. *Justice Devin,* in the opinion of the Court in *Weaverville v. Hobbs, Comr., supra,* thoroughly understood and sufficiently expressed the extent to which the Court intended to go in that case: "In *R. R. v. Comrs. of Carteret,* 75 N. C., 474, cited by plaintiff, it was held that Art. V, sec. 5, of the Constitution did not exempt the physical property of the Atlantic and North Carolina Railroad Company from taxation, although the State of North Carolina owned a majority of the capital stock of the corporation. The decision in that case was addressed to a question materially different from the one presented here." The superstructure, built upon the narrow foundation of *R. R. v. Comrs., supra* (1876), so overhangs its support and the factual situation involved is so different from that in the case at bar as to suggest that the reliance upon this authority is pretextual rather than real.

It is contended that a literal interpretation of the exemption clause of the Constitution would enhance the danger of the acquisition by municipalities of large values of tax-exempt property; in other words, that it would be an undesirable State policy. While, in interpreting statutes, it is sometimes permissible to look at the consequences of the interpretation, that is only when the terms of the statute are equivocal. It has no application where the statute is unambiguous. But if such a rule of interpretation may be applied to the Constitution at all, the apprehension is not justified.

The acquisition of foreclosed property by municipalities is a matter of compulsion rather than of choice. They do not make the laws. The State has laid down for them a means of protecting their revenues—of collecting the taxes essential to local government. The State cannot label the execution of its laws as an evil. The renting of such property, pending the opportunity to sell it, duplicates the practice of the Veterans' Loan Bureau with its property acquired by foreclosure. If we are not set on placing the worst possible construction on that act and its significance, the better opinion is that such an economy is merely incidental to the main purpose for which the property is held and does not characterize it as a nongovernmental enterprise. *Ashwander v. Tennessee Valley Authority,* 297 U. S., 288, 334-337, 80 L. Ed., 688, 703-704; *United States v. Chandler-Dunbar Water Co.,* 229 U. S., 53, 57 L. Ed., 1063.

The present policy of the State toward its municipalities does not justify the fear that they will grow rich through the ownership of tax-exempt property, or that to leave the constitutional exemption unmo-

lested will in any way disturb the equitable balance of taxation. In 1920, the State elected to segregate its sources of revenue, relying upon income taxes, inheritance taxes, privilege taxes, and like taxes for the support of State Government and maintenance of its institutions, leaving the property tax exclusively as a source of revenue to local governments. In 1937, the State took over for its own exclusive taxation all intangibles, returning no part of the proceeds of such tax to any municipality except to discharge educational liabilities, when in fact few, if any, of the municipalities had obligations of that sort. *Board of Education v. Wilson County, ante,* 216; Revenue Act of 1937, sections 700, *et seq.* It is estimated that the State thus took away from the sources of revenue remaining to the municipalities many million dollars of taxable values. If the State should be so unfortunate as to be compelled further to resort to property taxation to raise its ordinary revenues, to support its government, maintain its institutions, and finance the vast enterprises which, under modern conception of the social obligations of government, it has undertaken, and in support of which property to which local government must resort for its support has been already taxed (Social Security Act of 1937), this will still further exhaust available resources which the policy of the State had left to the municipalities, and sharply reduce their tax income. Thus, municipal government, which our Constitution and laws recognize as organized to bring government close to the people in popular and congested territory, and which consequently must be more refined and implemented and, therefore, more expensive as it is more complicated and detailed, promises to be embarrassed by an additional burden of taxation put upon its instrumentalities on the theory that they are proprietary rather than governmental, private rather than public. If we were at liberty to interpret the Constitution by any such standards of policy, I think this should be a sufficient answer.

Another suggestion is that the general tenor of the Constitution, taken contextually, is directed toward the governmental aspects of municipalities and would, therefore, warrant the inference that this alone was considered in the clause under consideration and, therefore, proprietary or nongovernmental property of municipal corporations was not within the legislative mind. It is hard to formulate this contention, since there is no clause of the Constitution which may be pointed out as having a tendency to modify Article V, section 5, and an examination of the whole instrument discloses that the evidence is directly contrary to the contention asserted.

There is no clause of the Constitution of general effect applicable to either public or private property which has not been called on for the protection of municipal property of whatever kind or character. It

cannot be taken without compensation, nor without due process of law, nor without trial by jury; and the statute laws which have been enacted to implement the Constitution by more detailed application apply equally to the property of municipal corporations such as we are considering as they do to any other kind of property.

Article VII, section 7, of the Constitution clearly recognizes that municipalities may carry on activities unessential to government and that proprietary ownership of facilities for that purpose may legitimately take place. *Walker v. Faison,* 202 N. C., 694, 163 S. E., 875. Under the provisions of the Constitution, as a consequence easily foreseen at the time of its adoption, municipalities have been permitted, under appropriate legislative authority, to acquire, hold, and use property, which this Court now declares not to be within contemplation of a coördinate clause of the same document which exempts, upon its face, all property of municipalities, comprehensively and without distinction. *Holmes v. Fayetteville,* 197 N. C., 740, 741, 150 S. E., 624. That property of this sort might be acquired and held and might come within the protective provisions of this clause, as well as other clauses of the Constitution likewise general in their nature, was as well known, both presumptively and actually, to those who phrased the Constitution and those who adopted it as it is to us. Speaking of this method of construing the Constitution, it is appropriately observed in 12 C. J., p. 702: "Nor can construction read into the provisions of a constitution some unexpressed general policy or spirit, supposed to underlie and pervade the instrument and to render it consonant to the genius of the institutions of the State."

At the time of the adoption of the Constitution of 1868 and its reconsideration in 1875, proprietary ownership of property by towns and cities had been common in North Carolina for at least one hundred years, during which time, as far as I am able to discover, no tax had been levied on it by the State or any other agencies. The constitutional provision was but the reiteration of a State policy that had been in force since colonial days.

The Constitution must be interpreted in the light of this history. "Every Constitution has a history of its own which is likely to be more or less peculiar; and unless it is interpreted in the light of this history, is liable to be made to express purposes which were never within the minds of the people agreeing to it." *Per Cooley, C. J.,* in *People v. Harding,* 53 Mich., 48, 18 N. W., 555. The Court has gone so far as to say that "established usage may be a part of the State Constitution." *Calder v. Bull,* 3 Dall. (U. S.), 386, 1 L. Ed., 648. See *Edwards v. Cuba R. Co.,* 268 U. S., 628, 69 L. Ed., 1124; 11 Am. Jur., p. 676, sec. 63, Note 17; *Brushaber v. Union P. R. Co.,* 240 U. S., 1, 60 L. Ed.,

493; *Codd v. McGoldrick Lumber Co.,* 48 Idaho, 1, 279 P., 298, 67 A. L. R., 580; *Kendall v. United States,* 12 Pet. (U. S.), 524, 9 L. Ed., 1181; *Barry v. Truax,* 13 N. D., 131, 99 N. W., 769.

The Convention of 1868 rejected a minority report that would have taxed municipal property and adopted a majority report which exempted it. Journal of Convention of 1868, pp. 304, 305. The Convention of 1875 discussed this clause and declined to amend it. Journal of Convention of 1875, pp. 104, 111. With this knowledge that proprietary ownership of property was well nigh universal in all the cities of the states of any importance, this provision was adopted by one Convention and considered and left intact by another without qualification or clarification. We are not at liberty to discount the intelligence of the Convention by concluding that they were inadvertent to existing facts of history or unable to express such a reservation in appropriate language if they had intended it.

This Court, in common with other courts, has held that there is no room for construction where the terms of the document are unambiguous; *Jacksonville v. Bryan,* 196 N. C., 721, 147 S. E., 12; *McCain v. Insurance Co.,* 190 N. C., 549, 551, 130 S. E., 186; but if the Court is called upon in this instance to apply rules of construction, the Constitution, of all documents, has been considered, for best of reasons, to demand that construction which is plain and obvious upon its face, according to the natural signification of the words used.

"A written Constitution, framed by men chosen for the work by reason of their peculiar fitness, and adopted by the people upon mature deliberation, implies a degree of deliberation and a carefulness of expression proportioned to the importance of the transaction, and the words are presumed to have been used with the greatest possible discrimination." *People v. New York Cent. R. Co.,* 24 N. Y., 485, 487.

"We are not at liberty to presume that the framers of the Constitution, or the people who adopted it, did not understand the force of language." *People v. Purdy,* 2 Hill (N. Y.), 31.

"This is true of every instrument, but when we are speaking of the most solemn and deliberate of all human writings, those which ordain the fundamental law of states, the rule rises to a very high degree of significance." *Newell v. People,* 7 N. Y., 9, 97.

If we consider the question of intent and understanding with reference to the people who adopted the Constitution—as we should properly do under the approved rules of construction—and realize that they were not learned jurists, accustomed to probe the remote corners of such a document for hidden and technical meanings, but were accustomed to accept words in their ordinary meaning, our obligation to a common sense interpretation of this section seems to me imperative. *Manly v.*

State, 7 Md., 135, 147; *Miller v. Dean,* 72 Cal., 462, 14 P., 27. "Words or terms used in a Constitution, being dependent on ratification by the people voting upon it, must be understood in the sense most obvious to the common understanding at the time of its adoption, although a different rule might be applied in interpreting statutes and acts of the Legislature. This gives rise to the universally recognized and incontrovertibly established rule of construction that it is presumed that words appearing in a Constitution have been used according to their plain, natural, and usual signification and import." 11 Am. Jur., sec. 65, p. 680; *United States v. Sprague,* 282 U. S., 716, 76 L. Ed., 640, 71 A. L. R., 1381. "The interpretation that should be given the Constitution is that which reasonable minds, the great mass of the people themselves, would give it." *Veto Case,* 69 Mont., 325, 222 P., 428, 35 A. L. R., 592; *Pocket Veto Cases,* 279 U. S., 655, 73 L. Ed., 894. "Nor should the judiciary indulge in or follow any ingenious refinements or subtlety of reasoning as to the meaning of its provisions." And in this regard courts frequently allude to the fact that the meaning in question could have easily been plainly expressed if it had been intended. 11 Am. Jur., p. 682, Note 11. *People ex rel. Watseka T. & T. Co. v. Emmerson,* 302 Ill., 300, 134 N. E., 707, 21 A. L. R., 636.

I have carefully searched for any authority sustaining the construction which the majority have given this clause of the Constitution, and I have found none except the doubtful authority of *R. R. v. Comrs., supra* (the Carteret County case), and the recent cases which I am now challenging, based entirely upon what was said there. No other authority is cited by the majority. All other courts, without exception, as far as I am able to find, which have dealt with phraseology, either in the Constitution or the statute law, like that with which we are dealing (and many of them are identical), have decided the question contrary to that taken by this Court.

The rule is clearly stated in Cooley on Taxation, 4th Ed., sec. 622: "Constitutional or statutory provisions often expressly exempt the property of the State or some or all of the local subdivisions of the State, or both. Such provisions generally merely reiterate the prevailing law, but sometimes they are so general as to broaden the exemption so as to be construed as covering public property, regardless of its use." In section 623: "If such property is expressly exempted by the Constitution or a statute and there are no qualifying words used, the property is exempt regardless of its use." See, also, section 638.

In *Springfield v. Johnson,* 10 Utah, 351, 37 P., 577, where the property consisted of about 900 acres of land which was rented by the city for pasturage, and under a statute exempting property belonging to a municipality from taxation, and where the plea was made that the use

was not a public one, the Court said: "The exemption is absolute and depends upon no condition but ownership by the city." In *Newark v. Belleville,* 61 N. J. L., 455, 39 Atl., 658, speaking of a statute worded like the clause we are considering, and to a plea that the property was taxable since it was not devoted to a public purpose, the Court said: "In the statute we must now interpret it has been enacted that the property of cities—all of it, not a part only—shall be exempt from taxation. We have no right to interpolate a limitation. There is no ambiguity in the language of the statute. To construe it so as to accord with what the Court might think ought to have been enacted had attention been directed to this phase of the subject would be, not to exercise our power to declare, but to usurp power to make the law." To the same effect are: *City of Omaha v. Douglas County,* 96 Neb., 865, 148 N. W., 938; *San Francisco v. McGovern,* 28 Cal. Ap., 491, 152 P., 980; *Stewart v. City and County of Denver,* 70 Colo., 514, 202 P., 1085; *Colorado Springs v. Board of Commissioners of Fremont County,* 36 Colo., 231, 94 P., 1113; *Trustees of Academy of Richmond County v. City Council of Augusta,* 90 Ga., 634, 647, 17 S. E., 61; *Camden County v. Washington Township,* 60 N. J. L., 367; *Hackettsville v. Mt. Olive,* 63 N. J. L., 191, 42 Atl., 838; *Nashville v. Bank of Tenn.,* 1 Swan (Tenn.), 269. There is no use in extending the list. My purpose is not to proselyte the Court, but to show how thoroughly unique and groundless is the decision. Of course, where the Constitution expressly exempts the property of the State and municipalities *when used for a public purpose,* there could be no question as to the construction. I only say that what some states have thought it best to do by amendments to their constitutions, this Court should not attempt to do by a construction which, upon the face of it, is unreasonable and capricious.

In support of the main opinion, it is said: "Taxation is the rule; exemption the exception, with strict construction applicable to the latter." I would not refer to this except for the singular fact that it constitutes the sole approach to the interpretation of this clause of the Consitution by any known rule of construction. It is a rule of construction applied to statutes where taxes have been imposed and exceptions made. But here no note is taken of the fact that the 1936 amendment to the Constitution swept out of that document any requirement that property be taxed at all, by removing that feature from Article V and repealing Article VII, section 9, altogether. There is, therefore, no "general rule" or law left remaining in the Constitution to which the inhibition of Article V, section 5, cl. 1, against taxing the property of municipalities could form an exception. The rule of construction, and the cited authority, cannot be applied to the mere inevi-

tability of taxes implied in the popular expression "nobody can escape death and taxes." The Court has enough to do to construe the law without applying its technical rules to the philosophy of the day.

There has been a further change in the Constitution which makes the position of the majority less tenable. The general uniformity clause was stricken out of Article V and uniformity within the class substituted for it. There is now, therefore, less force in the argument that the exemption clause is laid upon a background of uniform and compulsory taxation than there was when that contention was presented in *Andrews v. Clay County, supra,* and rejected by the Court, without dissent by the justices now presenting the argument.

The changes in the Constitution were intended to give the Legislature a free hand in classification. No jurist, I think, would risk his reputation by claiming that the difference between public ownership and private ownership is not sufficient to sustain a classification, if intended, or deny that the wisdom of making it is a matter for the lawmakers. *Atlantic Coast Line Railway Co. v. Doughton,* 262 U. S., 413. There is, therefore, nothing inherently objectionable to the law in the classification, and for its adoption into the Constitution the people are not compelled to assign any reason but the exercise of their sovereign will. *Twining v. Wilmington,* 214 N. C., 655.

But the rule has never been accepted law as applied to taxation of the State and municipalities; nor is it supported by the decisions of this State. The rule is directly to the contrary. "If the government is not expressly referred to in a given statute, it is presumed that it was not intended to be affected thereby, and this presumption, in any case where the rights or interests of the State would be involved, can be overcome only by clear and irresistible implications from the statute itself . . . Statutes imposing taxation in general terms are not understood as authorizing the assessment of taxes upon the property of the State, real or personal, or of its municipal subdivisions." Black on Interpretation of Laws, 2nd Edition, pp. 94-96. See *Trustees v. Trenton, supra.* This has been the law since ancient times. It was the law when the Constitution was adopted; it is the law now. "General statutes do not bind the sovereign unless specially mentioned in them. . . . The county is a part of the delegated authority of the State, and is *pro hac vice* the State." *Guilford v. Georgia Company,* 112 N. C., 34, 17 S. E., 10. "It is a known and firmly established maxim that general statutes do not bind the sovereign unless expressly mentioned in them. Laws are made *prima facie* for the government of the citizens and not the State itself." *O'Berry v. Mecklenburg County,* 198 N. C., 357, 151 S. E., 880.

These are tax cases. How little application the rule suggested may have as applying to an independent mandate of the Constitution reliev-

ing property of the State and municipalities from taxation, I leave the reader to judge.

The first sentence of Article V, sec. 5, exempts property by reason of its public ownership, without reference to its use. The second sentence puts it within the power of the Legislature to exempt certain property of private citizens and corporations according to its use. Decisions of this Court relating to the taxation of private property, where the taxability depends upon its charitable or educational use, according to the test applied in the Constitution itself, obviously have no bearing upon the subject at issue here. Of such a character are the decisions brought to our attention in concurring opinions. In *United Brethren v. Commissioners,* 115 N. C., 489, 20 S. E., 626; *Trustees v. Avery County,* 184 N. C., 469, 114 S. E., 696, the decisions turned upon the constitutional test applied to private property, as to whether the use was charitable or otherwise. *Southern Assembly v. Palmer,* 166 N. C., 75, 82 S. E., 18, involved the question whether the plaintiff was a municipal corporation. *Davis v. Salisbury,* 161 N. C., 56, 76 S. E., 689, involved the taxation of property willed by Maxwell Chambers to the First Presbyterian Church of Salisbury. The question in all of them was whether they met the test of use applied in the Constitution to property belonging to a private corporation or person, and apply only to such an issue.

If the gratuitous expression of public policy embodied in the opinion of the Court were submitted to the people for adoption, the reaction might be surprising. It is certain that the policy presented is contrary to the practice from the foundation of this government down to 1935, (*Board of Financial Control v. Henderson County,* 208 N. C., 569), during all of which time not a single instance of levy upon property directly owned by the State or any municipality has been pointed out. I think it probable that in this State, with an urban population of more than a million people and approximately three and one-half millions living in counties, they might reject the theory and deal with the proposition in the light of accountancy. They will probably see that if the State taxes its own property, it merely takes money out of one pocket and puts it in another, and the public, "at long last," must feed both pockets. The same is true of a municipality. And if the tax is paid to another unit of government, the treasury must be replenished to that extent by a tax on the property of the citizens. The municipality is but the people of whom it is composed and they know that the tax must be paid by the people who are responsible for the debts of the town and not by the town pump.

"But inasmuch as taxation of public property would necessarily involve other taxation, for the payment of the taxes so laid, and thus the

public would be taxing itself in order to raise money to pay over to itself, the inference of law is that the general language of statutes prescribing the property which shall be taxable is not applicable to the property of the state or its municipalities. Such property is therefore, by implication, excluded from the operation of laws imposing taxation, unless there is a clear expression of intent to include it." *Trustees for Support of Public Schools v. Inhabitants of City of Trenton,* 30 N. J. Eq., 667.

There is a danger not entirely speculative that the principle laid down in this decision may react against progress, and the implication in the concurring opinions that municipal ownership of property should be cut back to a strictly governmental purpose is discouraging to those who wish to see more put into government than the dry cogs of its necessary operative machinery. Once constitutional standards of taxation have been discarded, there is a wide field for judicial definition and legislative action. If the Court has the power to annul any part of the clause we are considering, it might, with equal authority, extend the taxing power to include state and municipal property held for a public but non-governmental purpose, and the trend to that objective cannot escape the attention of critical students.

It has been suggested that those who do not agree with the majority verdict on the Constitution are looking too closely at the tree to see the forest. Hoffenstein puts it the other way:

> "The forest takes from every tree
> Its individuality."

Impressionism belongs to pictorial art, not to legal analysis and criticism. A camera could do all that is required in the illustration and think nothing of it.

But, looking at the Constitution as directed, I find certain things which ought to be self-evident. The Constitution is a declaration of principles of government accepted and established by the people as supreme authority. It was called into being by the necessity that these principles should be made clear, indisputable and permanent. It is so jealous of their permanency that it provides an exclusive method of amendment by the people who made it, or by their representatives to whom such power had been delegated. Article XIII. *Moose v. Commissioners,* 172 N. C., 419, 461, 90 S. E., 434. Its purposes are declared sometimes in general terms but the manner and means by which those purposes must be carried out are stated with science and precision where occasion demands it, and no resort may be had to its general

terms to set aside these specific provisions and substitute others, on the improvident assumption that the substituted method is better suited to the purpose. I find the Constitution to be harmonious and without repugnance or conflict in its parts when interpreted according to the ordinary and obvious meaning of the language employed. It was adopted by the plain citizenry and was not intended as a playground for lawyers. It is so jealous of the power of the courts that it specifically denies to them the legislative function. Article I, sec. 8; *Person v. Watts,* 184 N. C., 499, 502. Neither in letter nor in spirit does it expect amendment at the hands of the Court under a supposed power of construction wrongfully assumed and dangerously exercised. This is what I find by looking at the Constitution "steadily and as a whole." So looking, I do not read into the charter that the people have given this Court the power to take into our hands the frame of things and wreck it, and out of the fragments build again according to our desire.

When this Court in *Bayard v. Singleton,* 1 N. C., 5, and later the United States Supreme Court in *Marbury v. Madison,* U. S., announced the doctrine that the Courts might nullify an act of the legislature because it was in contravention of the Constitution, it was thought that the Courts had gone to the extreme limit of their power. But even so, they will not declare a statute void for unconstitutionality when there is any doubt. The Constitution deserves the same conservative treatment that is accorded a mere statute. There is no ceiling above this Court, such as it has declared the Constitution to be over the power of the lawmakers, save and except that sense of responsibility which should come with power. Fully according to my brethren that sincerity of purpose which I know characterizes all their acts, collectively and individually, and not assuming to possess a wisdom greater than theirs, I cannot but regard the attempt to change the unambiguous terms of the Constitution, by reading into it implications which express an intention contrary to the ordinary meaning of the language employed, as having the effect of amendment. As such, it is an amazing assumption of power which ought to be left with the people, whose prerogative it is to make and unmake Constitutions.

The judgment of the court below should be reversed.

J. T. LEDWELL v. SHENANDOAH MILLING COMPANY, INC., AND A. A. ROUNDEBUSCH AND T. COLEMAN ANDREWS, AND GEORGE PILCHER, RECEIVERS OF SHENANDOAH MILLING COMPANY, INC., DEFENDANTS—AND SOUTHERN BANK OF NORFOLK, INTERPLEADER.

(Filed 29 March, 1939.)

1. Appeal and Error § 6e—Testimony of witness having no personal knowledge of facts will be considered when no objection is made giving opportunity to prove transaction by competent witness.

Where an agent of a bank testifies as to the circumstances under which the draft in question was deposited in the bank, but later admits, on cross-examination, that he had no recollection of the particular transaction in suit, *held*, his testimony must be considered on appeal in so far as it is pertinent to the issue in the absence of a motion by the adverse party to strike out, since if the motion to strike had been made and allowed the bank might have proved the transaction by its agent who handled it.

2. Courts § 11: Bills and Notes § 10c—

Held: Even conceding appellant's contention that the laws of the State of Virginia govern the legal effect of a deposit of a draft in a bank in that State, drawn on a resident of this State, appellant's contention that under the laws of Virginia such deposit vested title to the draft in the bank as a matter of law is untenable.

3. Bills and Notes § 10c—Whether deposit of draft in bank constitutes the bank a purchaser or agent for collection depends upon the facts.

Where a check or draft is deposited in a bank as cash and credited to the account of a depositor with the right to check against the deposit in the usual course of business without restrictions or contemporaneous agreement with respect thereto, the bank becomes the owner of the check or draft; but when a check or draft is deposited as such, the bank holds same for collection even though the amount is credited to the depositor with the privilege of drawing against it, especially when there is an express agreement giving the bank the right to cancel the credit if the paper is not paid.

4. Same—

Where a bank allows a depositor to draw against uncollected items deposited for collection, the bank is entitled to hold the paper so deposited or the proceeds thereof at least as collateral security, since its act in permitting withdrawal by the depositor constitutes a waiver of the original agreement of deposit for collection only.

5. Same—

In the absence of any specific agreement, the intention of the parties determines whether a bank is the owner or an agent for collection of items deposited in it.

6. Same: Bills and Notes § 27—Evidence held for jury on question of waiver of original agreement that bank should act as agent for collection.

The draft in question was deposited in the intervener bank under a written agreement on the deposit slip that the bank should act as agent for collection. Plaintiff attached the proceeds of the draft to satisfy a debt owed plaintiff by the depositor. The bank claimed the funds and introduced evidence that it had credited the account of the depositor with the amount of the draft at the time of deposit and that it had permitted the depositor to draw against the credit so made. *Held:* The evidence should have been submitted to the jury on the question of whether the bank's permitting the depositor to draw against the credit constituted a waiver of the original agreement that the bank should act as agent for collection, entitling the bank to the proceeds of the draft as against a creditor of the depositor, and an instruction that the jury should answer the issue against the intervening bank if it should find the facts to be as all the evidence tended to show, is error.

APPEAL by intervener from *Williams, J.*, at October-November Term, 1938, of LEE. New trial.

Civil action to subject proceeds of draft with bill of lading attached, drawn by defendant through the Southern Bank of Norfolk on Howard-Bobbitt Company, of Sanford, N. C., to satisfy a debt the plaintiff alleges is due and owing him by the defendants, which proceeds were seized under writ of attachment.

On 10 May, 1938, the receivers of Shenandoah Milling Company shipped a carload of flour from Norfolk, Va., to Howard-Bobbitt Company, Sanford, N. C. At the same time the receivers drew a sight draft on Howard-Bobbitt Company, payable to the Southern Bank of Norfolk, for the purchase price of the flour in the sum of $913.03. Bill of lading was attached to the draft. The Norfolk Bank credited the amount of the draft to the account of the receivers and forwarded the draft for collection. Upon presentation of the draft to the drawee through the National Bank of Sanford it was paid 12 May, 1937. The plaintiff instituted this action 11 May, 1938, and procured the issuance of a warrant of attachment, which was served upon the National Bank of Sanford, attaching the proceeds of said draft. The plaintiff seeks to have said sum condemned and applied to the satisfaction of a debt for services rendered he alleges is due him by the Shenandoah Milling Company.

After the service of the attachment the Southern Bank of Norfolk filed an interplea and bond in accord with the statute and the sum in the hands of the National Bank of Sanford was paid to it.

The cause came on to be heard in the court below on the issue of title to said fund raised by the interplea. Under the instruction of the court

that: "The court, therefore, holds as a matter of law, and instructs you, that if you find the facts to be as all the evidence tends to show, as a matter of law, that as to the first issue, 'Did the intervener, Southern Bank of Norfolk, take the draft as a purchaser or for collection?' I instruct you that you will answer that issue, 'For collection.'" The jury answered the first issue, "For collection," and found under a like instruction in answer to the second issue that the intervener is not the owner of the proceeds of said draft. Thereupon, the court signed judgment against the intervener and the intervener appealed.

Gavin & Jackson for plaintiff, appellee.
Langston, Allen & Taylor for intervener, appellant.

BARNHILL, J. The draft, the proceeds of which are here involved, was made payable to the Southern Bank of Norfolk and was not endorsed by the intervener. On the deposit slip issued to the depositor of the draft at the time there was printed: "In receiving items for deposit or collection, this bank acts only as depositor's collecting agent and assumes no responsibility beyond the exercise of due care. All items are credited subject to final payment in cash or solvent credits. This bank will not be liable for default or negligence of its duly selected correspondents nor for losses in transit, and each correspondent so selected shall not be liable except for its own negligence. This bank or its correspondents may send items, directly or indirectly, to any bank, including the payor, and accept its draft or credit as conditional payment in lieu of cash; it may charge back any item at any time before final payment, whether returned or not, also any item drawn on this bank not good at close of business on day deposited." There was entered thereunder the following: "B.L.S.D., Howard-Bobbitt Company, $913.03."

The vice president of the intervener, as a witness for intervener, testified that the draft was brought to his bank 10 May and accepted as a deposit and the proceeds thereof credited to the account of defendants in their regular checking account; that the bank took the draft for value and that it has never been charged back and the bank has not been refunded by the Shenandoah Milling Company. The intervener offered further evidence tending to show that, while the defendants at all times had on deposit in the intervener bank a sum more than sufficient to permit the intervener to charge the item back to the account of the receivers without creating an overdraft, the defendants in fact withdrew from the account the proceeds of the draft and that the balance was created by other deposits.

In forwarding the draft for collection the intervener, on the letter or remittance sheet, designated the Shenandoah Milling Company as the owner of the draft enclosed for collection.

The questions presented by the appeal are: (1) Is the intervener the holder of said draft in due course for value as a matter of law, and (2) If not, is there conflicting evidence, requiring the submission of the cause to a jury under appropriate instructions?

The intervener's witness, on cross-examination, testified that if he handled the transaction at the time the draft was deposited he had no recollection thereof. If it be conceded that this rendered incompetent his former testimony, there was no motion to strike. Had a motion to strike been made and allowed the intervener would have been at liberty to offer its agent who actually handled the transaction. Under these circumstances we are required to consider the question involved as if this testimony, in so far as it is pertinent, was competent, giving due consideration thereto, together with the other evidence offered, to determine the questions presented. *Morgan v. Benefit Society,* 167 N. C., 262, 83 S. E., 479.

The appellant earnestly contends that the contract under which the Southern Bank of Norfolk received the draft from the defendants was made in Virginia and that the Virginia law is controlling. As to this, we do not take issue. It further contends, however, that under the Virginia law the passing of the draft to the appellant vested title thereto in the bank as a matter of law. In support of this position, appellant offered in evidence and relies upon *McAuley v. Morris Plan Bank of Virginia,* 156 S. E., 418, and *Fourth National Bank of Montgomery v. Bragg,* 11 A. L. R., 1034. After an examination of these and other Virginia cases we are of the opinion that appellant's position in this respect is not sustained.

In *Fine v. Receiver of Dickenson County Bank,* 175 S. E., 863, the Virginia Court declares the legal effect of a deposit made under a deposit slip in language identical with the one involved in the instant case. The plaintiff was a regular customer of the bank. The check was deposited and credited to the depositor's account prior to insolvency of the bank and paid after appointment of receivers. It is said by the Court: "The deposit slip delivered to and accepted by Fine constituted an express agreement that the bank should act as the agent of Fine to collect this check and then deposit its proceeds to Fine's credit. Though it speaks of the check being credited to Fine, it is plain that, if it is credited to him, it is to be done merely for bookkeeping convenience, and that Fine shall acquire no rights by virtue of its being so credited unless and until the check is paid. The bank selected and used this form of deposit slip for its protection. But, when it did so, it assumed the

burdens thereof no less than it became entitled to its benefits. This case is controlled by *Miller's Trustees v. Smith,* 114 Va., 619, 77 S. E., 462. The facts of this case are materially different from those in *Fourth National Bank v. Bragg,* 127 Va., 47, 102 S. E., 649, 11 A. L. R., 1034; and *McAuley v. Morris Plan Bank,* 155 Va., 777, 156 S. E., 418.

"The cashier of the bank testifies that the bank would have permitted Fine to check against this 'deposit,' but there is nothing to show that this was communicated to Fine. Nor do we find anything in the evidence which we think constituted a waiver either by the bank or by Fine of the contract made between them by the delivery to him and the acceptance by him of this deposit slip." Thus we find that the Supreme Court of Virginia has held that the cases relied upon by the appellant are not here in point.

Where a check or draft is deposited in bank as cash and credited to the account of the depositor with the right to check against the proceeds thus credited in the usual course of business with no restricting contemporaneous agreement with respect thereto, the relationship of creditor and debtor is created and the bank becomes the owner of the check or draft. The act of crediting when nothing else appears is equivalent to a payment in money. *Miller v. Norton & Smith,* 77 S. E., 452; *Fayette National Bank v. Summers,* 105 Va., 689; *Greensburg Nat. Bank v. Syer,* 113 Va., 53; *Woodward v. Trust Co.,* 178 N. C., 184. According to the majority of cases, where there is no definite understanding between the depositor and bank as to the ownership of paper, but the paper is endorsed by an unrestricted endorsement and deposited in the usual course of business with the bank, which gives credit to the depositor for the amount thereof, with the right to draw thereon, title passes to the bank. *Fourth Nat. Bank v. Bragg, supra.* Other authorities are cited in the notations. 11 A. L. R., 1060.

When a check or draft is deposited as such the bank holds the same for collection even though the amount of the check or draft was credited to the depositor with the privilege of drawing against it. This is particularly true when the deposit is accompanied by an express agreement, such as that used in the instant case. If the check or draft was in fact delivered to the bank for collection or for collection and credit a credit to the customer before collection is deemed merely provisional, which the bank may cancel if the paper is not paid. If such paper is delivered to the bank for collection and credit the credit of the amount to the customer before and in anticipation of collection is merely provisional and the privilege of drawing against it merely gratuitous, especially when the bank reserves the right to cancel the credit or charge back the paper to the customer's account at any time. *Greensburg Nat. Bank v.*

Syer, supra; Fine v. Receiver of Dickenson County Bank, supra; Re State Bank, 56 Minn., 119, 45 A. S. R., 454; *Miller v. Norton & Smith, supra.*

Where the paper is deposited as such and credited to the account of the customer and the customer thereafter draws checks against such proceeds which are honored by the bank and the proceeds are thus withdrawn this constitutes a waiver of the original agreement and the bank becomes the holder of the instrument, at least as collateral. *Standard Trust Co. v. Commercial National Bank,* 166 N. C., 112, 81 S. E., 1074; *Elk Valley Bank v. State Road Commission,* 156 S. E., 889; *Miller v. Norton & Smith, supra; Fourth Nat. Bank v. Bragg, supra,* in which the Court quotes with approval the general rule as stated in 6 A. L. R., 259, as follows: "A bank that gets possession of a negotiable instrument by giving the one who presents it credit for the full amount of the proceeds, and honors his checks or drafts to the same amount, or parts with some security, or in some other way makes himself liable for the amount of the deposit outside of the obligation created by the mere deposit, on the faith of the instrument, is the holder of the instrument for value."

Where a deposit is made without any specific agreement the intention of the parties at the time is controlling. *Miller v. Norton & Smith, supra; Fayette Nat. Bank v. Summers, supra; Greensburg Nat. Bank v. Syer, supra; Fourth Nat. Bank of Montgomery v. Bragg, supra,* in which it is said: "The result of the decision of this Court in *Fayette Nat. Bank v. Summers* (105 Va., 689), and of the Alabama case of *National Commercial Bank v. Miller* (77 Ala., 173, 54 Am. Rep., 50), undoubtedly is that the question is one of intention of the parties, and both of these cases, as well as the other cases in Virginia and Alabama, to which our attention has been directed, show a strong tendency to leave the question to the jury wherever there is any evidence to rebut the *prima facie* presumption that a cash deposit is intended to vest in the bank the title to the instrument pursuant to which the cash deposit is made." The same rule applies when there is evidence tending to show a waiver of the original agreement that the bank should act as collector.

Under the evidence in this cause it clearly appears that the draft in question was originally deposited with the appellant under a written agreement that the bank was to act as collector. This agreement being in writing, it is not subject to contradiction by proof that another and a different agreement was in fact at the time made. There is, however, evidence offered by the appellant from which a jury might permissibly draw the conclusion that after the proceeds of this draft were deposited in the appellant bank they were drawn against by the depositor and the checks were honored by the bank, and that in fact, the proceeds of the

draft were actually paid to the depositor. If this be the fact, then under the law the appellant bank has an interest in the paper superior to that of any creditor of the drawer who might attempt to attach the proceeds thereof.

Upon a consideration of the authorities on the subject, we are of the opinion that the appellant has offered sufficient evidence to require the submission of this cause to a jury on the question as to whether the original agreement that the bank should act as collector only was thereafter waived.

New trial.

D. C. NIXON, GUY SIFFORD AND BERNADETT WILLIAMS, ADMINISTRATORS OF R. J. NIXON, DECEASED, v. D. C. NIXON, S. J. NIXON, ROSA NIXON, EVA NIXON, BERNADETT WILLIAMS, JOSEY NIXON, AGNES NIXON, WILLIE S. DUCKWORTH, GUY SIFFORD, MRS. ZETTIE ROGERS, BANNER SIFFORD, MADGE SIFFORD, NEAL SIFFORD, RENA KILLIAN, HALL SIFFORD, MAEBELLE ARMSTRONG, RAY C. SIFFORD AND MRS. DELLA WILLIAMSON.

(Filed 29 March, 1939.)

1. Deeds § 1b—

A limitation over of the remainder in personal property after a reservation of a life estate therein is void, and the language of the deed in this case *is held* to reserve the "complete use and control" of the personalty in the grantor, which constitutes a reservation of a life estate therein.

2. Executors and Administrators § 21—

Where a person executes a deed attempting to convey a remainder in personalty after a reservation of a life estate therein, and subsequntly dies intestate, the limitation over is void, and he dies owning the personalty, which must be distributed to his heirs at law according to the statutes of distribution.

3. Descent and Distribution § 3—

Where intestate dies owning personalty and leaving as his sole heirs at law children of two deceased brothers and one deceased sister, the personalty must be equally divided among all his nephews and nieces *per capita* and not *per stirpes*, since each of the heirs at law are of equal degree of kinship. C. S., 137 (5).

APPEAL by plaintiffs and the children of J. A. and Sidney Nixon, defendants, from *Ervin, Jr., Special Judge,* at January Term, 1939, of LINCOLN.

Civil action brought by the administrators of the estate of R. J. Nixon, deceased, for the construction of deed executed by R. J. Nixon,

and for order as to proper distribution of personal assets of the estate in hands of plaintiffs, as administrators of R. J. Nixon, deceased.

The parties having waived jury trial, the court finds the facts substantially as follows:

1. R. J. Nixon, late of the county of Lincoln, North Carolina, died intestate on 23 April, 1938, leaving as his only next of kin eighteen nieces and nephews, namely: (1) D. C. Nixon, S. J. Nixon, Rosa Nixon and Eva Nixon, children of a predeceased brother, J. A. Nixon; (2) Mrs. Bernadett Williams, Josey Nixon and Agnes Nixon, children of another predeceased brother, Sidney J. Nixon; and (3) Mrs. Willie Duckworth, Guy Sifford, Mrs. Zettie Rogers, Banner Sifford, Madge Sifford, Neal Sifford, Rena Killian, Hall Sifford, Maebelle Armstrong, Ray C. Sifford and Mrs. Della Williamson, children of a predeceased sister, Mrs. Sallie Sifford, all of whom were in being on 22 March, 1935. The plaintiffs are the duly appointed and qualified administrators of said R. J. Nixon, deceased.

2. On 22 March, 1935, R. J. Nixon signed, sealed and acknowledged, and had probated and registered a typewritten paper writing, without witnesses, in the form of a deed, "to the children of my deceased brothers, Sidney Nixon and J. A. Nixon, and my deceased sister, Mrs. Sallie Sifford," containing these pertinent provisions:

"said R. J. Nixon, party of the first part, has bargained and sold, and by these presents does bargain, sell, give, grant, and convey to the children of my deceased brother Sidney Nixon as a class, the children of my deceased brother J. A. Nixon as a class, and the children of my deceased sister Mrs. Sallie Sifford as a class, the remainder, after the expiration of my life estate, which I hereby reserve, in and to all of the land or real estate which I now own or which I may, during my natural life acquire, wheresoever situate, . . . also all of my personal property, money, accounts, choses in action of every description not expended, used, or disposed of by me during my natural life.

"To Have and To Hold said lands and premises, and possess said personal property, money, choses in action, etc., after the expiration of my natural life, except such of the personal property, money, choses in action, etc., as may be used, expended or disposed of by me during my natural life, to them, as three separate classes, such class receiving and representing one-third interest therein to them, and their heirs and assigns, to their only use and behoof forever, in remainder, after the expiration of my life estate.

"Party of the first part expressly reserves unto himself a life estate in said lands and premises, and right to manage and possess, and receive the rents and return therefrom during his natural life, and the right to the use and enjoyment of such of the personal property, money, choses

in action, etc., as he may need with full right to expend, use and dispose of such as he may need during his natural life."

4. The plaintiffs as administrators of R. J. Nixon have in their hands personal property, consisting of chattels and approximately $20,000 in money, which belonged to and was left by said Nixon, and after the payment of debts, taxes and expenses, there will be a substantial surplus for distribution to the persons entitled thereto.

Upon such findings the court concluded, in substance, that:

(1) The paper writing executed by R. J. Nixon on 22 March, 1935, is a deed of conveyance and not a testamentary disposition of his property.

(2) ". . . The paper writing in controversy attempts to reserve to the said R. J. Nixon a life estate in his personalty while attempting to convey to his eighteen nephews and nieces a remainder in said personalty. . . . Under the law of North Carolina a reservation of a life estate in personalty in a deed attempting to convey such personalty in remainder reserves the whole estate and the limitation over is void, and, hence, the paper writing executed by R. J. Nixon was and is wholly ineffectual to vest title to the personalty of said R. J. Nixon in the grantees named in said paper writing, and, hence, the said R. J. Nixon was the absolute owner of said personalty at the time of his death, and said personalty is to be distributed among his nephews and nieces as his next of kin in accordance with the statutes of distribution, and said nephews and nieces are entitled to share equally in the surplus of his personal estate, that is, each nephew or niece is entitled to one-eighteenth (1/18) of the surplus of said personalty."

Thereupon the court entered judgment in accordance with such conclusions.

The plaintiffs, and the children of Sidney Nixon and J. A. Nixon, deceased, appeal therefrom to the Supreme Court, and assign error.

A. L. Quickel for plaintiffs, appellants.
Sheldon M. Roper for defendants, appellees.

WINBORNE, J. While the deed in question purports to convey both real and personal property, counsel for appellants in brief filed states that the conveyance of the real property is not in question on this appeal.

The ruling of the court below with respect to the provisions of the deed relating to personal property is made expressly upon authority of these decisions: *Graham v. Graham,* 9 N. C., 322; *Morrow v. Williams,* 14 N. C., 263; *Dail v. Jones,* 85 N. C., 221; *Outlaw v. Taylor,* 168 N. C., 511, 84 S. E., 811; *Speight v. Speight,* 208 N. C., 132, 179 S. E., 461. We think this case comes within the principle there enunciated.

In *Speight v. Speight, supra,* the Court said: "It has been the consistent holding in this jurisdiction following the decision in *Graham v. Graham, supra* (1822), that a reservation of life estate in personal chattels, in a deed attempting to convey them in remainder, reserves the whole estate, and the limitation over is void," and, continuing, "A reservation for life of 'the complete use and control' of personal chattels is a reservation for life of said chattels. 25 C. J., 1039; 17 R. C. L., 617; 11 R. C. L., 473."

In the present case these clauses "all of my personal property . . . not expended, used or disposed of by me during my natural life"; "to have . . . and possess said personal property . . . after the expiration of my natural life, except such of the personal property . . . as may be used, expended or disposed of by me during my natural life, to them, . . . in remainder, after the expiration of my life estate"; and "party of the first part expressly reserves unto himself . . . the right to the use and enjoyment of such of the personal property . . . as he may need with full right to expend, use and dispose of such as he may need during his life time," clearly reserved to R. J. Nixon the right to "the complete use and control" of all the personal property during his life time, with remainder over at his death.

The language used is ineffectual to vest title to the personal property in the nieces and nephews. Hence, they, as the only next of kin of the intestate, all in equal degree, take per capita under the statutes of distribution. C. S., 137, clause 5; *Ellis v. Harrison,* 140 N. C., 444; 53 S. E., 299; *In re Estate of Mizzelle,* 213 N. C., 367, 196 S. E., 364.

We have carefully considered the able argument and brief of counsel for appellants and the authorities cited. However, we are not persuaded to depart from the applicable rule which "may be said to rest upon common law authority with statutory support and judicial approval in this State." *Stacy, C. J.,* in *Speight v. Speight, supra.*

Let the judgment below be

Affirmed.

MARY CONNALLY COXE ET AL. V. CHARLES STORES COMPANY.

(Filed 29 March, 1939.)

1. Guardian and Ward § 17b—

The provisions of C. S., 2172, constitute limitations upon the discretionary power of guardians in leasing their wards' real estate, and the statute does not preclude guardians from leasing realty belonging to the wards for a period extending beyond the minority of the wards with the approval and under the orders of a court of general equity jurisdiction.

2. Same—Superior Courts in their equity jurisdiction have plenary power to order lease of wards' estates beyond period of their minority.

Since the Superior Courts in proper instances have authority to order a sale of infants' real estate and to order and approve execution of a mortgage on same by the guardian for a period exceeding the minority of the wards, C. S., 2180, such statutory power, together with the inherent jurisdiction of courts of equity over the estates of infants give courts of equity plenary jurisdiction to order and empower a guardian to execute a lease on the real estate belonging to his wards for a period exceeding the guardianship or the minority of the wards, upon its finding that such would be to the best interest of the infant wards.

3. Infants § 1—

The Superior Courts of the State in their equity jurisdiction have inherent authority over the property of infants, since they stand *in loco parentis* and have the same jurisdiction in this respect as that of the English High Courts of Chancery.

APPEAL by defendant from *Pless, J.*, at Chambers, 6 March, 1939, of BUNCOMBE.

Controversy without action submitted on agreed statement of facts, an abridgment of which follows:

1. The plaintiffs who are twin sisters, eighteen years of age, and represented herein by their duly appointed guardians, are the owners of a lot and large store building in the city of Asheville, situate at No. 11 Patton Avenue.

2. The premises are now and have been since 1 November, 1926, under lease to the defendant, which lease will expire 31 October, 1941.

3. The parties desire to make extensive improvements and repairs to the property and to substitute a new rental contract for the present one, the new lease to run for a period of ten years from 1 January, 1939. That such a lease is customary, and the manner of renting essential, due to the size and location of the property and the attendant circumstances.

4. It is found as a fact that the new lease "is just, fair and reasonable, and as advantageous to the said petitioners, Mary Connally and Francis Rebecca Coxe, and to each of them, as could be obtained for said land and building." And further, "it will materially promote the best interests of the infant petitioners" if their guardians are permitted to make the repairs agreed upon and to execute the new lease on behalf of their wards, and to cancel the present lease upon the premises.

5. The character of the property is such that a failure in the present negotiations may reasonably be expected to result in irreparable injury to the petitioners.

6. The infant petitioners are familiar with the terms of the proposed lease and have filed affidavits approving it and requesting the court to grant the relief asked for in the petition.

The court being of opinion that C. S., 2172, was intended as a restriction upon the power of guardians and not as a limitation upon the power of the court, granted the prayer of the petition and approved the lease after finding that it was clearly to the best interests of the infant petitioners.

The defendant appeals, questioning the authority of the court to approve the lease for a longer period than the current year in which the infant petitioners shall become of age.

Harkins, Van Winkle & Walton for plaintiffs, appellees.
Henderson & Henderson for defendant, appellant.

STACY, C. J. The question for decision is whether guardians may lease the real property of their infant wards for a period extending beyond the guardianship or the minority of the wards with the approval of a court of general equity jurisdiction. While the question appears to be one of first impression in this jurisdiction, from all the reasoning in our decisions on the subject, its proper solution would seem to be involved in no serious doubt.

It is conceded that under C. S., 2172, the guardians, without the court's approval, would have no authority to lease the premises for a term in excess of the current year in which the infant wards shall become of age. In the absence of statutory authority, a guardian cannot overreach his time so as to bind the ward. *Melton v. McKesson,* 35 N. C., 475; *Van Doren,* 5 N. J. L., 460, 8 Am. Dec., 615; 12 R. C. L., 1126.

By the express terms of the statute, guardians are permitted to lease the lands of their infant wards "for a term not exceeding the end of the current year in which the infant shall become of age, or die in nonage. But no guardian, without leave of the clerk of the Superior Court, shall lease any land of his ward without impeachment of waste, or for a term of more than three years, unless at a rent not less than three per centum on the assessed taxable value of the land."

The enactment would seem to be a limitation upon the discretionary powers of guardians, and not upon the authority of a court of chancery having supervision and oversight over their conduct. The matter intended to be regulated was not the abuse of power by the court, but by guardians when not acting under the restraint of its orders. *Barcello v. Hapgood,* 118 N. C., 712, 24 S. E., 124.

The Superior Courts of this State, by statute, C. S., 2180, and in the exercise of their chancery jurisdiction, have ample authority to order the sale or mortgage of the real estate of infants, upon application of

their guardians showing that the interests of the wards would be materially promoted thereby, *Watson v. Watson,* 56 N. C., 400; *Ex parte Dodd,* 62 N. C., 97; *Rowland v. Thompson,* 73 N. C., 504, and we think it must be held upon authority, as well as upon reason, that the power to order sales and mortgages includes the lesser power to approve leases where it clearly appears that such would be to the best interests of the infant wards. Annotation 1916F L. R. A., 499. It is observed that while formerly a guardian was not permitted to mortgage his ward's property for a term of years "exceeding the minority of the ward," this limitation was stricken out by ch. 67, Public Laws 1923, and the term was made dependent upon the decree of the court. C. S., 2180.

Granting the power of a court of equity to dispose of the fee in a minor's real estate when it appears that such is manifestly to his interest, it would seem to follow as a necessary corollary that the disposition of a lesser estate upon the same ground might equally be sanctioned by the court. *Ricardi v. Gaboury,* 115 Tenn., 484, 89 S. W., 98. The general jurisdiction of the court over the property of infants, aided by the statutes on the subject, would appear to be sufficient to confer the authority. *Springs v. Scott,* 132 N. C., 548, 44 S. E., 116. Indeed, the court stands *in loco parentis* to infants and it may change their estates from realty into personalty, and from personalty into realty, whenever it deems such a proceeding most beneficial to the infant. C. S., 2181; *Latta v. Trustees,* 213 N. C., 462, 196 S. E., 862; *Reynolds v. Reynolds,* 208 N. C., 578, 182 S. E., 341.

Speaking generally to the subject in *Bank v. Alexander,* 188 N. C., 667, 125 S. E., 385, *Adams, J.,* delivering the opinion of the Court, said: "It is unquestionable that courts of equity have general jurisdiction over the property of infants and that infancy alone is sufficient to sustain the right of supervision. The jurisdiction in all cases is complete and may be exercised in order to afford relief wherever it may be necessary to preserve and protect the estates and interests of those who are under age. The petition states facts and circumstances which invoke the jurisdiction of a court of equity to preserve the corpus of the estate and in this way to work out what the decree adjudges to be the best interests of the infant defendants. 3 Story's Eq. Jurisprudence, 14 ed., sec. 1742 *et seq.;* 10 R. C. L., 340, sec. 89; 31 C. J., 1035, sec. 97; *Morris v. Gentry,* 89 N. C., 248; *Tate v. Mott,* 96 N. C., 19."

In the case of *Cecil v. Salisbury,* 2 Vern., 224, the English High Court of Chancery (1691) declared: "This court hath often decreed building leases for *sixty* years of infants' estates, where for their benefit." And this was said without reference to any enabling statute or act of Parliament. *Cabin Valley Mining Co. v. Hall,* 53 Okla., 760, 155 Pac., 570, L. R. A., 1916F, 493; *Ricardi v. Gaboury, supra. Cf.*

Beauchamp v. Bertig, 90 Ark., 351, 119 S. W., 75, 23 L. R. A. (N. S.), 659.

It has been held in a number of cases that our Superior Courts are endowed with authority equal to that of the English High Court of Chancery in dealing with the property of infants. *Williams v. Harrington,* 33 N. C., 616; *Sutton v. Schonwald,* 86 N. C., 198; *Morris v. Gentry,* 89 N. C., 252; *Tate v. Mott,* 96 N. C., 19, 2 S. E., 176; *Harriss v. Richardson,* 15 N. C., 279.

The judgment of the Superior Court will be upheld.

Affirmed.

I. A. LIPPARD v. DR. HARRY JOHNSON.

(Filed 29 March, 1939.)

1. Physicians and Surgeons § 15e—Evidence held insufficient to be submitted to jury in this action for malpractice.

Plaintiff's evidence tended to show that defendant surgeon in performing an operation used a local anesthetic, that immediately upon its injection there was a sensation of burning, that a blister formed which burst and was followed by decay of part of the tissue, that a hard, black tissue formed which could be removed only by treatment with vaseline and cutting away, and that thereafter plaintiff went to another specialist and that the place healed after several weeks of treatment. Plaintiff contended that defendant was negligent in using novocain containing foreign, caustic, and deleterious substances or that he used some liquid other than novocain which contained caustic and deleterious substances, and that defendant was negligent in failing to properly diagnose and treat plaintiff after infection set in. There was no expert testimony tending to establish that defendant used a caustic or deleterious substance. *Held:* Whether the injury resulted from the use of some caustic and deleterious substance or whether it resulted from some unusual or unexpected reaction of plaintiff's system to an anesthetic in common use, or whether it resulted from some infection, and whether defendant incorrectly diagnosed the condition and failed to apply the proper remedy, and, if so, whether this was due to an error of judgment or negligence, all rest in speculation and conjecture, and the evidence is insufficient to overrule defendant's motion to nonsuit.

2. Same—

Since, due to allergy and the varying conditions of human systems, the reaction of a particular person to a specific drug is, in a large measure, unpredictable, the doctrine of *res ipsa loquitur* does not apply to an unexpected, unanticipated, and unfavorable result of a treatment by a physician.

APPEAL by plaintiff from *Ervin, Jr., Special Judge,* at December Special Term, 1938, of CATAWBA. Affirmed.

LIPPARD *v.* JOHNSON.

Civil action to recover damages for personal injuries alleged to have been caused by the negligence of the defendant.

The plaintiff, on advice of his physician, procured the defendant, the chief surgeon in charge of the Hickory Memorial Hospital, to perform an operation of circumcision. In performing the operation the defendant used a local anesthetic which he told the plaintiff was novocain. There were a number of injections. At the point of the first injection a knot arose which developed into a blister. Thereafter the blister burst and a process of decay set in, eating out a portion of the tissue. The section covering the blister became black and hard and could not be removed without a treatment with vaseline and by cutting away. After the defendant had treated the plaintiff for some time he went to a specialist in Charlotte. After several weeks treatment by the specialist the place healed, but has left the plaintiff in such condition that he now at times suffers therefrom. During the treatment the defendant, upon being asked if he thought novocain would cause the condition, replied: "No, I don't think so."

At the conclusion of plaintiff's evidence the court, on motion of the defendant, entered judgment of nonsuit. Plaintiff excepted and appealed.

Theodore F. Cummings and W. A. Self for plaintiff, appellant.
Walter C. Feimster and Sapp & Sapp for defendant, appellee.

BARNHILL, J. A careful examination of the complaint discloses that the plaintiff makes only two allegations of negligence: (1) That the defendant, in undertaking to induce a condition of local anesthesia, used a quantity of liquid containing a high percentage of some caustic and deleterious chemical or chemicals; and (2) that the defendant failed to diagnose the condition of the plaintiff's trouble which developed after the performance of the surgery for which he had been employed, and to use proper remedies for its alleviation and ultimate cure. There is no allegation that the defendant does not possess the requisite degree of learning, skill and ability necessary to the practice of his profession as a physician and surgeon; or that he failed to exert his best judgment in the treatment and care of plaintiff's case. Plaintiff's cause of action is bottomed upon the theory that in using, or attempting to use, novocain as a local anesthetic the defendant either used novocain containing foreign caustic and deleterious chemicals, or that he used some liquid that was not novocain, but was caustic and deleterious, and upon the further theory that after the sore or infection set in the defendant failed to ascertain the cause of such condition and to use proper remedies for its alleviation and ultimate cure. Except as thus alleged, there is no

allegation that the defendant failed to exercise reasonable and ordinary care and diligence in the use of his skill and in the application of his knowledge to plaintiff's case.

The plaintiff relied on his testimony and the testimony of his wife. There was no expert testimony. It follows that of necessity the plaintiff relies upon the doctrine of *res ipsa loquitur* and contends that the burning and stinging sensation which was immediately attendant upon the first injection of the anesthetic and the development of the condition thereafter is sufficient evidence to be submitted to a jury as tending to show that the liquid injected contained some caustic chemical and produced the condition complained of, and that it further tends to show that the defendant failed to properly diagnose the trouble and use the proper remedies in the treatment thereof.

It has been said that there is no such doctrine; that it is a pious symbol long used by the priests of the law to exercise spirits; that it is some of that ancient and sacred nomenclature, which means nothing more than a statement that the "obvious is self-evident—the thing itself speaks." Whether this comment is justified or not this Court, in proper cases, applies what is commonly known and referred to as the doctrine of *res ipsa loquitur*. We are of the opinion, however, that it has no application here.

The plaintiff testified that the area to be operated upon became completely dead following the injections. This indicates that some type of anesthetic was used. Was the burning and stinging sensation which followed the first injection due to some caustic chemical in the liquid, or to some unusual and unexpected reaction of plaintiff's system to the medicine? Was the resulting blister and the condition that thereafter developed due to this caustic chemical or to some germ or foreign substance which was transported into the plaintiff's system by the needle? Was the condition that followed caused by an infection that set in after the blister burst? What was the defendant's diagnosis? What treatment should have been followed? Did the specialist make a different diagnosis and use a different treatment? If the defendant incorrectly diagnosed the cause of the sore and failed to apply the proper remedy, was this due to an error of judgment or to negligence? These and other speculative questions arise upon a consideration of the evidence. In undertaking to answer them, one guess is as good as another. And any conclusion, on this record, is based upon surmise and conjecture. The answer is not obvious. There is no evidence in the record which, when considered in the light most favorable to the plaintiff, makes one conclusion more probable than the other.

Practical application of the medical science is necessarily to a large degree experimental. Due to the varying conditions of human systems

the result of the use of any medicine cannot be predicted with certainty. What is beneficial to many sometimes proves to be highly injurious to others. A food or drink that one allergic person may use with impunity is highly injurious to another. The goldenrod is a thing of beauty to one asthmatic; to another it is a thing to be shunned. Even the expert cannot completely fathom or understand the reactions of the human system. Therefore, to say that an unexpected, unanticipated and unfavorable result of a treatment by a physician invokes the application of the doctrine of *res ipsa loquitur* would be to stretch that doctrine far beyond its real purpose and to destroy its recognized usefulness in proper cases.

The plaintiff relies on the decision in *Covington v. James*, 214 N. C., 71, 197 S. E., 701. While this doctrine was discussed in that opinion and the Court announced its unwillingness to decide that it is not a mode or method of proof in malpractice cases, except where foreign substances have been introduced into the body during an operation and left there, the Court expressly refrained from applying the doctrine to the facts in that case. That decision, when properly interpreted, can bring very little comfort to the plaintiff.

We concur in the opinion of the court below that the plaintiff has failed to offer any evidence tending to show that he has suffered any physical injury as a proximate result of any careless or negligent conduct of the defendant.

The judgment of nonsuit is

Affirmed.

STATE v. J. W. WATSON, SR.

(Filed 29 March, 1939.)

1. Criminal Law §§ 41h, 51—Solicitor may not comment upon the failure of defendant's wife to testify in his behalf.

The solicitor in his argument to the jury commented on the failure of the defendant to call his wife as a witness in his behalf. The defendant objected, and the court overruled the objection. *Held:* The comment of the solicitor violates C. S., 1802, and the failure of the court to correct the error renders it prejudicial.

2. Criminal Law § 81d—

Where a new trial is awarded on one assignment of error, other assignments relating to matters which may not recur on the subsequent hearing need not be considered.

STATE *v.* WATSON.

APPEAL by defendant from *Frizzelle, J.*, at October Term, 1938, of CARTERET.

Criminal action tried upon indictment charging the defendant with the murder in the first degree of one J. W. Watson, Jr.

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 for a verdict of murder in the second degree or manslaughter, as the evidence might justify. The defendant pleaded not guilty and relied upon plea of self-defense.

Verdict: Guilty of manslaughter with prayer for the mercy of the court.

Judgment: Confinement in State's Prison not less than 18 months and not more than 2 years.

Defendant appealed to the Supreme Court, and assigns error.

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

Ward & Ward for defendant, appellant.

WINBORNE, J. The record on this appeal shows that in the course of his argument to the jury the solicitor commented upon the failure of the defendant to call his wife as a witness in his behalf, to which the defendant objected. The court overruled the objection, and the defendant excepted. We are of opinion that this exception is well taken.

C. S., sec. 1802, provides that "The husband or wife of the defendant, in all criminal actions or proceedings, shall be a competent witness for the defendant, but the failure of such witness to be examined shall not be used to the prejudice of the defense . . ." The latter portion of the statute has been the subject of discussion by this Court in the cases of *S. v. Cox,* 150 N. C., 846, 64 S. E., 199; *S. v. Spivey,* 151 N. C., 676, 65 S. E., 995; and *S. v. Harris,* 181 N. C., 600, 107 S. E., 466.

In *S. v. Cox, supra,* the State called the wife of defendant, who was under subpœna, and tendered her to defendant for examination. The court ruled that she could only testify for defendant. Then the solicitor, in his argument to the jury, commented on the failure of the defendant to corroborate his own testimony by his wife. Defendant objected. Speaking to the question, the Court said: "The tender of the wife by the State and the remarks of the solicitor sharply called attention to the failure of the defense to examine the defendant's wife. Objection was made, but the court, instead of telling the jury that they should not let that fact prejudice the defendant, on both occasions rather accentuated the matter by telling the jury that the State could not use the wife of

the defendant as a witness, but that he could. The effect, though unintentional on the part of his Honor, was to throw the fault of the wife not being a witness upon the defendant, since he could have put her on and the State could not. There was no caution that such failure to use the wife as a witness should not be considered by the jury. Yet the tender, and the remarks of counsel being called to the judge's attention, called for such caution, and his failing to give it was prejudicial."

In *S. v. Spivey, supra,* the Court, after setting out in full the matters pertaining to the incident to which the exception related, said: "There was a similar incident in *S. v. Cox,* 150 N. C., 846, but his Honor, in the present case, observed the caution pointed out in that case, which the learned judge who tried Cox' case had unintentionally failed to observe. While it was improper for the solicitor to tender the prisoner's wife, with the remark made by him, yet his Honor corrected the error fully." The assignment of error was overruled.

In *S. v. Harris, supra,* upon objection to questions tending to show that the wife of defendant had been subpœnaed by defendant and discharged as his witness, the court below ruled out the question and read the statute to the jury. (C. S., sec. 1802, quoted above). On appeal, this Court held that the caution was sufficient to cure any prejudicial effect.

The argument of the solicitor in the present case runs counter to the prohibitory provisions of the statute, C. S., sec. 1802, as applied in *S. v. Cox, supra,* and is prejudicial error.

As other matters to which assignments relate may not recur on another trial, they are not here considered.

New trial.

JIMMIE SUTTON AND WIFE, TRILBY SUTTON, BESSIE WILLOUGHBY AND HUSBAND, J. E. WILLOUGHBY, CLARA TODD AND HUSBAND, D. E. TODD, CHARLES F. SUTTON AND WIFE, MRS. CHARLES F. SUTTON, AND J. W. SUTTON, JR., v. W. H. WOOLARD, TRUSTEE, AND GREENVILLE BANK & TRUST COMPANY (NOW GUARANTY BANK & TRUST COMPANY).

(Filed 12 April, 1939.)

1. Mortgages § 31a—

The power of sale under a deed of trust is not exhausted by a sale thereunder which is vacated and set aside by a judgment which also establishes the validity of the encumbrance and the amount due thereunder.

2. Estoppel § 3: Mortgages § 26—

The fact that the *cestui que trust* accepts a note and deed of trust executed by the purchaser at the foreclosure sale of the original deed of trust does not estop the *cestui* from claiming under the original deed of trust when the foreclosure thereunder is set aside and the subsequent encumbrances declared void, the validity of the original deed of trust not being attacked.

3. Same—Agreement based upon consent of parties that verdict be set aside is not binding when the setting aside of the verdict is held erroneous on appeal.

An agreement of the parties, set out in the judgment, that the *cestui que trust* would not claim under the instrument in consideration of the trustor's consent that the verdict establishing the invalidity of the foreclosure of the instrument should be set aside as to the *cestui*, does not estop the *cestui* from claiming under the original instrument when the setting aside of the verdict is held erroneous on appeal and a new trial on the merits is ordered.

4. Judgments § 32—

A judgment setting aside foreclosure under a deed of trust and reestablishing the lien and the amount secured thereby, the validity of the instrument not being attacked, constitutes *res judicata* as to the rights of the parties with respect to the subject matter involved, and a subsequent action to restrain foreclosure under the instrument is properly dismissed.

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

APPEAL by plaintiffs from *Frizzelle, J.*, at October Term, 1938, of PITT. Judgment affirmed.

Action to restrain foreclosure sale of land under deed of trust. From judgment dissolving the temporary restraining order, plaintiffs appealed.

J. H. Harrell and L. W. Gaylord for plaintiffs.
J. B. James for defendants.

DEVIN, J. The facts upon which this case is presented for review are substantially stated in the opinions of this Court in *Bundy v. Sutton*, 207 N. C., 422, 177 S. E., 420, and the same case reported in 209 N. C., 571, 183 S. E., 725, wherein litigation over the same subject matter and between the same parties was determined. J. W. Sutton, Sr., died since the judgment in the last named case and the plaintiffs herein are his heirs at law.

J. W. Sutton, the owner of the land involved in the litigation, was declared incompetent and thereafter L. W. Tucker, as receiver of the estate of J. W. Sutton, was empowered by order of court to execute a deed of trust on the land to W. H. Woolard, Trustee, to secure indebt-

edness due Greenville Banking & Trust Company for money borrowed. The debt not having been paid, Woolard, Trustee, advertised and sold the land under the deed of trust, and Joe and Guy Sutton became the purchasers. The purchasers then executed several deeds of trust on the land. Subsequently W. J. Bundy was appointed guardian of J. W. Sutton and he instituted action to set aside the foreclosure sale and deed, and also the deeds of trust thereafter executed by Joe and Guy Sutton, on the ground of suppression of bidding and fraudulent collusion on the part of the purchasers, the trustee, the bank, and certain of its officers. On the first trial of the action issues were answered in favor of the plaintiff and against all the defendants. The presiding judge attempted to reform the verdict in accordance with an agreement between the bank and the plaintiff that the bank, in consideration of plaintiffs' consent to set aside the issue as to the bank and its officers, would waive all claim against J. W. Sutton or his estate. Upon appeal, the action of the judge was held to be erroneous and the entire case ordered retried upon its merits. *Bundy v. Sutton, supra.*

On the second trial, substantially the same issues were submitted to the jury and again answered in favor of the plaintiff (J. W. Sutton now acting in his own behalf). Thereupon Judge Barnhill, the presiding judge at the second trial, entered judgment on the verdict vacating the attempted foreclosure sale and setting aside the trustee's deed to the purchasers, Joe and Guy Sutton, and the subsequent deeds of trust executed by them to various parties, and adjudicating conflicting claims as to rents and payments between the parties in accord with the verdict. The judgment upon the verdict further ascertained and declared the correct amount then due and owing on the deed of trust of Tucker, Receiver, to Woolard, Trustee, in the following words: "It is further ordered, adjudged and decreed that the amount now due and unpaid upon the note executed by L. W. Tucker, Receiver, to the Greenville Banking & Trust Company, endorsed by H. L. Hodges and secured by trust deed to W. H. Woolard, Trustee, recorded in Book ....., at page ....., Pitt County Registry, is $1114.77, with interest from March 24, 1935, after crediting the payment made to Joe Sutton and Guy Sutton and also crediting $311.53 received by said bank upon a fire insurance policy, said payments by Joe Sutton and Guy Sutton having been made by them upon their note substituted for the note of L. W. Tucker, Receiver, as above recited." Upon appeal the judgment of Judge Barnhill was affirmed. *Bundy v. Sutton,* 209 N. C., 571, 183 S. E., 725.

The defendants in this action pleaded the Barnhill judgment as *res judicata* and the court below held the plaintiffs estopped thereby, and thereupon dissolved the restraining order.

Plaintiffs challenge the correctness of this ruling on several grounds. It is urged that a sale having once been made by the trustee under the deed of trust, his power was exhausted. But by the judgment of the court the sale was vacated and set aside. Nor would the fact that the bank took notes from Joe and Guy Sutton, secured by deed of trust on the land purchased by them, estop it from claiming under the original deed of trust, since it was determined by the court that the attempted sale was of no effect, and the conveyance executed pursuant thereto void. The Tucker note and deed of trust were not surrendered, and the amount due and owing thereon was established by the judgment. While it was found by the jury that the bank and some of its officers were guilty of collusion with Joe and Guy Sutton to suppress bidding and the sale was for that reason set aside, there was no attack upon the validity of the Tucker deed of trust. There was neither allegation nor proof that it was not executed in good faith, and the judgment has fixed the amount now due thereon.

Plaintiffs further contend that defendants are estopped from claiming under the Tucker deed of trust by reason of the agreement entered into, as recited in the judgment in the first case, to the effect that the bank and its officers waived all claim against J. W. Sutton or his estate on account of the note and Tucker deed of trust. However, it appears that this was done in consideration of Sutton's consent that the verdict be set aside as to the bank and its officers, and that upon appeal the setting aside of the verdict was held erroneous, and a new trial on its merits awarded. So that any agreement predicated upon the disposition of the verdict in the first trial was eliminated from the case when that verdict and the judgment thereon were vacated and a new trial of the entire case subsequently held. In the second trial substantially the same verdict as in the first trial was returned, and judgment for the plaintiff in accord therewith duly entered.

We agree with the court below that the judgment of Judge Barnhill (affirmed on appeal) fully adjudicated the rights of the parties to the present action with respect to the subject matter involved in this action, and that the matters therein determined are *res judicata*. The restraining order was properly dissolved.

Judgment affirmed.

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

STATE v. PARROTT CADE, LACY CADE, LEON CODY, AND DUBELLE LANGSTON.

(Filed 12 April, 1939.)

1. **Homicide § 30: Criminal Law § 81c—**

The jury's verdict of guilty of murder in the second degree renders immaterial the action of the court in overruling defendant's motion for a directed verdict of "Not guilty" as to the charge of first degree murder.

2. **Same—**

The admission of incompetent opinion evidence relating to the *corpus delicti* cannot be held for reversible error when defendant elicits similar opinions in almost identical language upon cross-examination of the witness, especially when defendant's sole defense is an alibi and he does not challenge the existence of the *corpus delicti* except by his plea of not guilty.

3. **Homicide § 23: Criminal Law § 38—**

The admission of photographs of the body of deceased as it was lying at the spot where it was found, identified by the photographer as taken by him and as being a true picture of the body and the premises before the body was moved, will not be held for error, there being no request that their use be limited or restricted.

4. **Witnesses § 5—**

The competency of a witness of low mentality is for the determination of the court in its discretion, and the court's refusal to strike out such witness' testimony will not be held for error in the absence of abuse of discretion.

5. **Homicide § 25—**

The court's refusal of defendant's request for a directed verdict of "Not guilty" in this prosecution for homicide *is held* not error upon the evidence in the case.

6. **Homicide § 30: Criminal Law § 81c—Inadvertent error on subordinate feature held cured by subsequent correction in the charge.**

The court correctly instructed the jury that defendant's failure to testify in his own behalf should not be considered against him. Thereafter the court, in instructing the jury in the weight to be given the testimony of an interested witness, inadvertently referred to testimony given by defendant, but thereafter corrected this instruction and charged the jury that he meant to refer to testimony of defendant's wife. *Held:* The inadvertent error thus corrected was not prejudicial, nor was it necessary for the court to have repeated the rule governing the consideration of testimony of an interested witness.

APPEAL by defendant Parrott Cade from *Stevens, J.*, at January Term, 1939, of LENOIR.

STATE *v.* CADE.

Criminal indictment in which the defendants were charged with the capital felony of murder of one Noah Rouse.

The defendant, Dubelle Langston, tendered a plea of guilty as an accessory before the fact to first degree murder, which was accepted by the State. The defendant, Leon Cody, entered a plea of guilty of murder in the second degree. It is also stated in the brief of the defendant that the defendant, Lacy Cade, during the progress of the trial, likewise entered a plea of guilty of murder in the second degree. The cause was submitted to the jury only as to the appealing defendant.

The body of the deceased was found on Wednesday, 21 November, in the woods about 250 yards back of his shop. An examination disclosed that he had received a wound on the left side of the head that was of the depth of one finger and the width of two fingers. This wound was sufficient to have caused death. There was also a gunshot wound through his left kidney, penetrating his heart.

The evidence for the State tended to show that Langston and Lacy Cade stopped at the shop of the deceased for a drink of whiskey on Saturday, 19 November; that they purchased several drinks and were shooting dice for a nickel; that Parrott Cade and Leon Cody came into the room while the others were shooting dice; that Parrott Cade and the deceased got into an argument about a coat belonging to the deceased, which Parrott Cade had pawned and which he would not return to the deceased, and that Parrott Cade and the deceased became very angry. One of the dice rolled off the table and dropped on the floor. The deceased reached down to pick it up and as he raised up Lacy Cade struck him over the head with an axe. Parrott Cade then, at the point of a pistol, forced Langston to give Cody a gun sitting by the door. Langston testified that he then ran off. The defendants then took the body of the deceased and carried it into the woods where it was later found. There Parrott Cade, with a drawn pistol, forced Leon Cody to shoot the deceased with a shotgun. Cody testified that after they had carried the deceased to the woods he raised up and groaned and that was the time that he shot. After Cody shot the deceased Parrott Cade had Lacy Cade to search his pockets. They found something less than $300.00. This defendant tore up a check so his finger prints would not be found. There was evidence Parrott Cade and Cody were together when they went to the home of the deceased. On the way Cade insisted that Cody drink some liquor and stated to him: "You must, because we are going to kill or be killed." There was also evidence that this defendant had theretofore planned to rob the deceased.

There was a verdict of guilty of murder in the second degree. From judgment thereon defendant Parrott Cade appealed.

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

S. H. Newberry for defendant, appellant.

BARNHILL, J. While there was conflicting evidence and evidence tending to contradict the statements of some of the State's witnesses, when considered in the light most favorable to the State, it was sufficient to be submitted to the jury. In recognition of this fact counsel for the defendant made no motion to dismiss as of nonsuit when the State rested. Instead he made a motion for a directed verdict of "Not guilty" as to the charge of first degree murder. As the jury returned a verdict of guilty of murder in the second degree, exception to the action of the court in overruling this motion becomes immaterial.

The coroner who examined the body at the place where it was found was examined as a witness. There are exceptions to parts of his testimony. Some of the statements of this witness were clearly expressions of opinion which were not admissible as expert testimony, such as: "He was evidently carried up the road and probably put down where the keys and fountain pen were found." "He was shot after he was laid out to be sure he was dead." "I presume that he was knocked down and shot thereafter." "I think he was then carried up in the woods and shot." On cross-examination the defendant elicited from this witness similar opinions in almost identical language. The repetitions were not excepted to, but were made in response to questions by counsel for the defendant. Under these circumstances the admission of the statements of the witness which were the subject of objection and exception by the defendant cannot be held for error. In any event, the defendant's sole defense was based upon a plea of alibi, which he undertook to establish through the testimony of a number of witnesses. While the burden was on the State to establish the *corpus delicti* the defendant did not challenge the existence thereof except by his plea of not guilty. His contention was that he did not participate in said crime and he undertook to show the impossibility of his participation by evidence that he was elsewhere at the time. *S. v. Vick,* 213 N. C., 235, 195 S. E., 779; *S. v. Church,* 192 N. C., 658, 135 S. E., 769; *S. v. White,* 171 N. C., 785, 87 S. E., 984.

The defendant excepts to the admission of photographs of the body taken as he was found lying in the woods. This exception cannot be sustained. The photographer testified that he took the pictures of the deceased at the spot where deceased was found and that they correctly presented a true picture of the deceased and the premises where he was found before the body was moved. The evidence merely shows that the photographs were exhibited to the jury and there was no request that their use be limited or restricted.

There was evidence that the witness Leon Cody was a person of low mentality and had theretofore been confined in the insane asylum. There was further evidence that he knew right from wrong, and that he had the mentality of a child varying in age from 7½ years to 16 or 17 years. The defendant assigns as error the refusal of the court below to strike the testimony of this witness. The jury heard the testimony as to his mental condition and the court in its charge fully stated the defendant's contention that he was of such mentality that his testimony should not be given any weight or considered adversely to the defendant. Conceding that the witness was of low mentality, it was discretionary with the court as to whether it would permit him to testify. We can find nothing in the record that tends to show any abuse of this discretion.

At the conclusion of all the evidence the defendant requested a directed verdict of "Not guilty" as charged in the bill of indictment. The court properly declined to so instruct the jury.

There are likewise a number of exceptive assignments of error directed to portions of the charge. The court, in charging the jury as to how they should weigh and consider the testimony of an interested witness to determine what weight, if any, they would give such testimony, inadvertently referred to the defendant rather than to the defendant's wife. It had, therefore, called the attention of the jury to the fact that the defendant did not testify; that he was presumed to be innocent and had a constitutional right to rely upon what he conceived to be the weakness of the State's case; that his failure to testify was not a circumstance tending to show guilt and was not to be considered by the jury in any manner adversely to the defendant; and that the burden was on the State to satisfy the jury of his guilt beyond a reasonable doubt. It corrected the erroneous reference to the defendant and instructed the jury that it meant to refer to the defendant's wife, who had testified. It was not necessary for the court to repeat the rule governing the consideration of the testimony of interested witnesses. Men of average intelligence could understand what he had said and comprehend the correction he had made. We do not consider that the mere inadvertent reference to the defendant, thus corrected, could be held for reversible error.

We have examined the other exceptive assignments of error and find in them no sufficient merit to require a new trial.

No error.

B. A. HOFT v. N. E. MOHN AND FLORENCE L. MOHN, HIS WIFE; C. T. HELLINGER AND ROSALEE D. HELLINGER, HIS WIFE; C. L. ABERNETHY, JR., AND SARA ABERNETHY, HIS WIFE; W. H. LEE, TRUSTEE OF FEDERAL RESERVE BANK OF RICHMOND.

(Filed 12 April, 1939.)

1. **Judgments § 37b—Payment of judgment by judgment debtor who is jointly and severally liable does not entitle him to assignment of judgment.**

Where a person jointly and severally liable on a judgment pays same, he extinguishes the judgment and is not entitled to an assignment thereof against the other judgment debtors, since the judgment itself is not a proper instrument for the adjustment of the equities between them, the exclusive remedy for such adjustment being by transfer of the judgment to a trustee under the provision of C. S., 618, and a substantial compliance with the statute is necessary in order to invoke its protection.

2. **Same—Commissioner of Banks paying judgment against bank out of its assets held not entitled to assignment as against other judgment debtors.**

A bank holding a note hypothecated by the payee bank obtained judgment thereon against the payee bank and the makers. Thereafter the payee bank became insolvent and the Commissioner of Banks made a payment on the judgment out of the assets of the payee bank and obtained an assignment of the judgment, which it transferred to plaintiff, who brought suit thereon against the makers. *Held:* The Commissioner of Banks in the payment of the judgment and in taking the assignment represented the bank and such acts were taken in the same right and with the effect as though they had been taken by the bank, and therefore the Commissioner of Banks may not act as a trustee for the transfer of the judgment under C. S., 618, and the payment of the judgment by the Commissioner of Banks extinguished same.

3. **Banks and Banking § 13—Commissioner of Banks is statutory receiver.**

The Commissioner of Banks acts as a receiver under the inherent power of the court only in matters which are not provided for by statute, C. S., 218 (c), and his powers and duties in the collection and distribution of the assets of an insolvent bank are derived from the statute, C. S., 218 (c), (6), (7), (14), (17), and while in certain aspects he represents the creditors and depositors, in the assertion of a debt owed the bank and in the payment of a judgment against the bank out of its assets, he acts *pro hac vice* the bank.

APPEAL of plaintiff from *Frizzelle, J.*, at October Term, 1938, of CRAVEN. Affirmed.

W. B. R. Guion for plaintiff, appellant.

William Dunn and R. E. Whitehurst for defendants, appellees.

SEAWELL, J. The Wachovia Bank and Trust Company brought an action in the county court of Forsyth County and recovered judgment on a note which had been executed by N. E. Mohn, C. T. Hellinger and C. L. Abernethy and made payable to the Eastern Bank and Trust Company, and by it hypothecated to the Wachovia Bank and Trust Company. The Eastern Bank and Trust Company became insolvent and was taken over by Gurney P. Hood, Commissioner of Banks, under the State Banking Laws. Thereafter, out of the funds of the bank in his hands, Hood, as Commissioner, paid over to the Wachovia Bank and Trust Company a part of the amount represented by the judgment, leaving a balance of $1,328.96, and took an assignment reading as follows: "This judgment, principal, interest and costs is hereby transferred, set over and assigned to Gurney P. Hood, Commissioner of Banks, *ex rel.* Eastern Bank and Trust Co., New Bern, North Carolina. (R., p. 8.) This 11th day of December, 1934. (Signed) WACHOVIA BANK & TRUST COMPANY, Plaintiff, By RATCLIFF, HUDSON & FERRELL, Attorneys." Thereafter, Hood, Commissioner, attempted to transfer the judgment to this plaintiff by assignment reading as follows: "For value received without recourse and by court order this judgment with unpaid balance of $1,328.96 is hereby assigned to B. A. Hoft, Trustee. . . . (R., p. 9.) Gurney P. Hood, Commissioner, etc."

Since remote days of the common law, it has been held that payment by one or more of those jointly and severally liable on a judgment is an extinguishment of the judgment (*Fowle v. McLean,* 168 N. C., 537, 541, 84 S. E., 852; *Bank v. Sprinkle,* 180 N. C., 580, 104 S. E., 477), and that an assignment of the judgment to such person or persons will not serve to keep it alive against the others; *Sherwood v. Collier,* 14 N. C., 380. The soundness of this rule is attacked by the plaintiff, and the dissenting opinion of *Justice Walker* in *Liverman v. Cahoon,* 156 N. C., 187, 72 S. E., 327, is quoted, in which the rule is referred to as "one of the fossilized doctrines of the common law, which is not suited to this age and our present enlightened ideas." But the rule has behind it considerable logic, whatever reason may be assigned for its origin; and at any rate it has been so long in force and is so fully recognized that we are not at liberty to alter it or overrule the cases adhering to the principle. See *Tripp v. Harris,* 154 N. C., 296, 70 S. E., 470; *Jones v. Rhea,* 198 N. C., 190, 151 S. E., 255.

If we are permitted to theorize, we might find sound reasons in support of the rule. Whatever rights might be supposed to exist between the judgment debtors because of the payment made by one or more of them upon a judgment (and the common law recognized no such right where they were jointly and severally liable), any right so arising is so entirely different in nature from that created by the judgment as to

repel an application of any principle of subrogation. In its controlling aspect the judgment is faced toward the enforcement of the creditor's right. This right, which has become merged in the judgment, is to have his debt paid by any or all of those jointly and severally liable, without regard to the equities between them. Such right, ready to hand in the form of an enforceable remedy, ought not in equity to be acquired by any one or more of the judgment debtors for enforcement against the others, and the extinguishment of such a judgment by payment of any one of them is logical and fair.

It may readily be seen that the judgment itself is not a suitable instrument for the adjustment of equities between the judgment debtors. The statute—C. S., 618—provides a method by which the judgment may be kept alive, and at the same time protects the equities between the judgment debtors against the injustice that might result from a simple subrogation. It creates a new right, provides an exclusive remedy, and substantial compliance with its terms is necessary to make it available.

The assignment of the judgment to Gurney P. Hood, Commissioner of Banks, "*ex rel.* Eastern Bank and Trust Company," does not purport to be, and in fact is not, a compliance with this statute. It is an absolute transfer to him of the judgment in his capacity as Commissioner of Banks and by reason of his relationship to the Eastern Bank and Trust Company, judgment debtor, without reference to any trust relationship contemplated by the statute.

That an assignment of the judgment to the Commissioner of Banks is in effect an assignment to the judgment debtor follows, we think, from the relation of the Commissioner to the bank in his hands for liquidation. The Commissioner takes custody of the assets of the bank by force and virtue of the statute itself—C. S., 218 (c) (7). He may sue and be sued, without permission of the court, and his power and duty to collect and distribute the assets of an insolvent bank are derived from the statute and not from the order of the court. C. S., 218 (c), (6), (7), (14), (17). "Upon taking possession of any bank . . . all the property, assets, choses in actions, rights and privileges of the said bank . . . shall vest in the said Commissioner and/or duly appointed liquidating agent absolutely, for the purpose of liquidating." C. S., 218 (c), (7).

While in many respects his powers and duties are the same as those exercised by a receiver appointed by the court, and while in some instances his acts, like those of a receiver, are authorized, supervised, and regulated by the court, the analogy is not complete. The statutory powers and functions of the Commissioner are controlling, and he exercises the functions of a chancery receiver under the inherent power of the court only in matters which are not inconsistent with his statutory

duties, and the authority of the court may not be substituted for that of the statute. *Blades v. Hood, Comr.*, 203 N. C., 56, 164 S. E., 828. In such case the Banking Act itself makes laws relating to receivers applicable to him when not inconsistent with his statutory powers and duties. C. S., 218 (e). General statements as to the agency or representation of the Commissioner of Banks or the capacity in which he acts must be taken in connection with the problem then under consideration, and may not be applied as controlling to particular transactions where the implications are different. Although the ultimate purpose of the collection of assets is for the benefit of the creditors and others entitled to final distribution, and in this sense the Commissioner undoubtedly represents them, yet, in the collection of specific items of debt, in a more technical sense he must be held to represent the bank to whose rights and privileges he has succeeded and which he exercises. He can assert no greater right than that of the bank against any debtor, nor can he avoid any defense which might not be made against the bank. In this respect, he is *pro hac vice* the bank. The payment by him of a judgment against the bank, out of its funds, has the same effect as it would have had if paid by the bank, and an assignment to him has the force and effect of an assignment to the bank. He is not a proper trustee under C. S., 618, even if it had been so intended.

We do not consider the assignment sufficient at law to keep the judgment alive, and the judgment of the court below is

Affirmed.

SHELBY BUILDING & LOAN ASSOCIATION v. J. M. BLACK.

(Filed 12 April, 1939.)

1. Mortgages § 34b—

A last and highest bidder at a foreclosure sale is but a proposed purchaser or preferred bidder during the ten days allowed by statute for an increase in the bid, and the sale cannot be consummated until after the expiration of ten days after the public auction, C. S., 2591.

2. Mortgages § 36: Limitation of Actions § 3—

An action for a deficiency judgment after foreclosure is not barred by chapter 529, section 1, Public Laws 1933, Michie's N. C. Code, 437 (a), when it is instituted less than one year after the expiration of the ten-day period for an increase in bid, even though it is instituted more than one year after the date the property is exposed for sale.

APPEAL by defendant from *Rousseau, J.*, at March Term, 1938, of CLEVELAND. Affirmed.

This is an action on a promissory note secured by deed of trust on real estate instituted after the foreclosure of the deed of trust securing said note.

The action was commenced by the issuance of a summons on 28 August, 1937. The deed of trust was foreclosed by exposing the land for sale at public auction at the courthouse door, after due advertisement, on 22 August, 1936, on which date the plaintiff became the last and highest bidder, which sale was confirmed by the clerk of the Superior Court on 7 September, 1936, and deed from Clyde R. Hoey, the trustee in the deed of trust, to Shelby Building & Loan Association, dated 5 September, 1936, was delivered to said association.

The defendant pleaded in bar of plaintiff's right to maintain its action section 1, chapter 529, Public Laws 1933 (N. C. Code of 1935 [Michie], 437 [a]), the portion of which germane to this action reads: "No action shall be maintained on any promissory note, . . . secured by a . . . deed of trust on real estate after the foreclosure of the . . . deed of trust securing same, except within one year from the date of sale under such foreclosure, . . ."

The judge of the Superior Court held that the action was not barred by the statute and instructed the jury peremptorily so to answer the issue relative thereto. From judgment in favor of the plaintiff the defendant appealed, assigning errors.

Joseph C. Whisnant for plaintiff, appellee.
Peyton McSwain for defendant, appellant.

SCHENCK, J. In the record it is stipulated that the only question involved on this appeal is whether the action is barred by the statute of limitation pleaded, chapter 529, Public Laws 1933; and the answer to the question is dependent upon what is meant by the words "within one year from the date of sale under such foreclosure."

It is the contention of the defendant that the aforesaid words mean within one year from the date the property was exposed for sale at public auction, and that since this exposure was made on 22 August, 1936, and this action was commenced on 28 August, 1937, six days more than one year from the first date, the action is barred by the statute pleaded. It is the contention of the plaintiff that the words mean within one year from the consummation of the foreclosure sale, and that such consummation could not take place until at least ten days after the exposure for sale at public auction. We concur with the contention of the plaintiff.

By becoming the last and highest bidder at the foreclosure sale on 22 August, 1936, the plaintiff became but a proposed purchaser or pre-

ferred bidder during the ten days allowed by statute for an increase in the bid. *Davis v. Insurance Co.*, 197 N. C., 617; *Alexander v. Boyd*, 204 N. C., 103; *Creech v. Wilder*, 212 N. C., 162. During this ten days there was an offer of purchase by the last and highest bidder, but no acceptance thereof by the trustee, which was necessary for a consummation of the sale. C. S., 2591, provides that "in the foreclosure of . . . deeds of trust on real estate . . . the sale shall not be deemed to be closed under ten days. If in ten days from the date of the sale, the sale price is increased . . . and the same is paid to the clerk of the Superior Court, the . . . trustee . . . shall reopen the sale of said property and advertise the same in the same manner as in the first instance." The provision that the foreclosure sale "shall not be deemed to be closed under ten days" from the date the property was exposed to sale at public auction clearly means that such foreclosure sale cannot be consummated within ten days from such exposure. The tenth day after 22 August, 1936, the date the property was exposed for sale at public auction, was 1 September, 1936, which was the earliest possible date that the foreclosure sale could have been deemed closed, or consummated, and 28 August, 1937, the date this action was commenced, was four days less than one year therefrom.

We are of the opinion, and so hold, that the ruling of the Superior Court was correct and the judgment thereof is

Affirmed.

RENA WARREN v. PILOT LIFE INSURANCE COMPANY.

(Filed 12 April, 1939.)

1. Insurance § 41—Burden of proof in actions on double indemnity clauses.

Where, in an action to recover double indemnity under the terms of a policy of life insurance, plaintiff shows the unexplained death of insured by violence, insurer seeking to avoid liability on the ground that death resulted from bodily injuries intentionally inflicted by another, has the burden of going forward with the evidence, but the burden of the issue of death by accidental means remains upon plaintiff.

2. Same—

The instruction of the court on the question of the burden of proof in this action to recover double indemnity under the terms of a life insurance policy *is held* not error in view of the pleadings.

3. Appeal and Error § 49a—

The decision of the court upon a former appeal becomes the law of the case and is controlling upon the subsequent hearing and upon subsequent appeal.

4. Insurance § 41: Evidence § 29—

In an action to recover double indemnity under the terms of a life insurance policy the record and judgment in a criminal prosecution of another for murder of deceased insured is incompetent, plaintiff beneficiary not being bound by the verdict and judgment therein or estopped thereby to show that in fact the death of insured was caused by accidental means.

5. Insurance § 41: Evidence § 45—Admission of testimony by witness as to fact beyond her personal knowledge held prejudicial error.

In an action to recover double indemnity under the terms of a life insurance policy, testimony of a witness that the person inflicting the fatal injury was a stranger to deceased insured *is held* incompetent as being of a fact beyond the personal knowledge of the witness, and prejudicial to the insurer as tending to support plaintiff beneficiary's contention that the shooting of the insured was accidental rather than intentional.

6. Same—

In an action to recover double indemnity under the terms of a policy of life insurance, testimony of a witness that the assailant who fatally shot deceased insured first pointed the gun in her face and that if she had not struck up her arm the bullet would have struck her, *is held* incompetent, since she could not testify to her own knowledge that the assailant would have shot her or that he intended to do so.

7. Insurance § 41—

In an action to recover double indemnity under the terms of a policy of life insurance the issue is whether insured's death resulted "from external, violent, and accidental means" within the policy provisions, and an issue as to whether death resulted from bodily injuries intentionally inflicted by another does not determine insurer's liability.

APPEAL by defendant from *Frizzelle, J.*, at September Term, 1938, of PITT. New trial.

This case was here at Fall Term, 1937, and is reported in 212 N. C., 354, 193 S. E., 293, where the facts sufficiently appear. The action was instituted to recover double indemnity under the accident insurance provisions of a policy issued by defendant on the life of Alexander Warren.

From judgment upon an adverse verdict, defendant appealed.

H. Hannah, Jr., and Albion Dunn for plaintiff.

Smith, Wharton & Hudgins and J. B. James for defendant.

DEVIN, J. The questions presented by this appeal relate principally to the court's instructions to the jury on the burden of proof, and to the court's rulings as to the admission of testimony, to which exceptions were noted.

Appellant contends that the court erred in charging the jury that the burden of proof as to the determinative issue of defendant's liability for double indemnity, upon the pleadings in the case, was upon the defendant. There is a distinction, with respect to the burden of proof, between the rule applicable to actions upon ordinary life insurance policies containing exceptions, where proof of policy and death of insured imposes upon the insurer the burden of sustaining the pleaded exception, and the rule applicable where the insurance is against death by accident or accidental means. In the latter case well considered authorities in this and other jurisdictions support the view that where unexplained death by violence is shown, the defendant who seeks to avoid liability on the ground that the death resulted from bodily injuries inflicted intentionally by another person, has the burden of going forward with evidence—that is that evidence of death by external violence is sufficient to take the case to the jury—but that the burden of the issue of death by accidental means still remains upon the plaintiff. *Gorham v. Insurance Co.,* 214 N. C., 526; *N. Y. Life Ins. Co. v. Gamer,* 303 U. S., 161; *Jefferson Standard Life Ins. Co. v. Clemmer,* 79 Fed. (2nd), 724.

However, considering the pleadings in this case, we are not disposed to hold for error the instructions given by the court below, of which the defendant now complains. This was the view expressed by this Court in the former appeal which has thus become the law of the case.

The defendant offered on the trial to show that one Willie Tate was duly convicted of murder in the first degree for the felonious slaying of insured, and that his conviction having been affirmed on appeal by this Court (210 N. C., 613), Tate suffered death for the willful and intentional slaying of the insured. Upon objection, this evidence was excluded, in the view that the plaintiff herein was not bound by the verdict and judgment in the criminal action or estopped thereby to show that in fact the death of insured was caused by accidental means. In sustaining objection to the introduction of the record and judgment in that case we find no error. *Bank v. McCaskill,* 174 N. C., 362, 93 S. E., 905.

However, we think there was error in the admission of testimony for which the defendant is entitled to a new trial.

The determinative question at issue in the trial, as the case was submitted to the jury, was whether the death of the insured resulted from injuries intentionally inflicted by Tate, or whether in attempting to assault or shoot the witness Miss Phelps, Tate shot the insured by accident. In support of the plaintiff's contention of accident the witness Phelps was permitted to testify over objection that Tate was a stranger to Warren, the man who was shot and killed by him. This was the

statement of a fact beyond her personal knowledge and of which she was not competent to testify. We think the evidence incompetent and material, as it tended to support plaintiff's contention that the shooting of Warren was accidental rather than intentional.

The same witness was also permitted, over objection, to testify that the pistol of the slayer was first pointed in her face, and that if she had not stuck up her arm the bullet would have struck her. That was a matter of opinion. She could only testify to the fact that the pistol was pointed in her face, and that subsequent to her action it was discharged into the body of the insured. She could not say of her own knowledge that Tate would have shot her or that he intended to do so. Indeed, all the evidence tends to show that his purpose with respect to her was to assault her.

The only issue submitted to the jury for decision, involving the liability of the defendant, was as follows: "Did the death of Alexander Warren result from bodily injuries intentionally inflicted by another person, as alleged in the answer?" It is apparent that this issue does not determine the question of the liability of the defendant under the accident indemnity provision of the policy. The insurance is against death "from external, violent and accidental means." It has not been affirmatively found by the jury that the death of insured was within the terms of the policy. *Whitaker v. Ins. Co.,* 213 N. C., 376, 196 S. E., 328.

For the reasons stated, we think the defendant entitled to a

New trial.

ALBERT H. CLARKE v. WILLIAM MARTIN.

(Filed 12 April, 1939.)

Automobiles § 18c: Negligence § 19b—Evidence held not to show contributory negligence as a matter of law.

The evidence, considered in the light most favorable to plaintiff, tended to show that defendant parked his truck on the right side of the highway, partially on the hard surface thereof, in order to load lumber thereon before light on a foggy morning, that the truck had no red light on the rear but that a searchlight attached to the rear of the cab was casting its rays to the rear, and that plaintiff, driving his automobile about 25 miles per hour, approached the truck from the rear and failed to see the truck in time to avoid colliding with it, either by stopping or driving around it. *Held:* Defendant's motion to nonsuit on the ground of contributory negligence should have been denied upon authority of *Cole v. Koonce,* 214 N. C., 188.

CLARKE *v.* MARTIN.

APPEAL by plaintiff from *Warlick, J.*, at January Special Term, 1939, of CALDWELL. Reversed.

Hal B. Adams and Pritchett, Strickland & Farthing for plaintiff, appellant.

Hunter Martin for defendant, appellee.

SCHENCK, J. This is an action to recover damages for personal injuries alleged to have been proximately caused by the negligence of the defendant.

The evidence, when viewed in the light most favorable to the plaintiff, tended to show that about 6:30 o'clock a.m., on 30 December, 1937, the defendant parked his truck on the right side of a State Highway, partially on the hard surface thereof, in order to load lumber thereon, that it was still dark and a heavy fog enveloped the highway, that there was no red tail light on the rear of the truck, but a search light attached to the cab thereof was casting its rays to the rear of the truck; that the plaintiff, driving his automobile at about 25 miles per hour, approached the defendant's truck from the rear, and, failing to see the truck in time to avoid collision either by stopping or driving around, ran his automobile into the defendant's truck, resulting in injury to his person.

When the plaintiff had introduced his evidence and rested his case the court sustained the defendant's motion for nonsuit, C. S., 567, and signed judgment accordant therewith, from which judgment the plaintiff appealed, assigning error.

On the argument the defendant admitted that there was sufficient evidence to take the case to the jury on an issue of his negligence, but contended that the evidence establishes, as a matter of law, the plaintiff's contributory negligence, and for that reason the court was correct in granting the motion for judgment as of nonsuit.

The defendant, appellee, relies upon *Weston v. R. R.*, 194 N. C., 210, and *Lee v. R. R.*, 212 N. C., 340, and cases therein cited. The plaintiff, appellant, relies upon *Williams v. Express Lines*, 198 N. C., 193, and *Cole v. Koonce*, 214 N. C., 188, and cases therein cited. We are of the opinion, and so hold, that the instant case is governed by the *Williams* and the *Cole cases, supra*, and that his Honor erred in sustaining the motion and signing a judgment as of nonsuit.

The judgment of the Superior Court is

Reversed.

HENRIETTA WILSON, ADMINISTRATRIX OF ERNEST W. JOHNSON, DECEASED, HENRIETTA WILSON, EXECUTRIX OF CHARITY MURPHY, v. HANNAH WILLIAMS, SIMONETTA PICKETT, JANIE BELL, AND ANNIE FRANKS.

(Filed 12 April, 1939.)

1. Trusts § 15—

Where one person furnishes the consideration for land, but title is taken in the name of another, a resulting trust is engrafted upon the title in favor of the person furnishing the purchase price, in the absence of an intention to the contrary or a repugnant presumption of law.

2. Trusts § 18d: Frauds, Statute of, § 12—

Resulting trusts, which arise by operation of law, do not come within the statute of frauds, and may be proved by parol evidence.

3. Trusts § 18c—

A resulting trust must be established by clear, cogent, and convincing proof.

4. Trusts § 18e—Evidence held sufficient for jury on counterclaim to establish resulting trust.

Evidence that defendant furnished the purchase price for the *locus in quo* and gave same to another to purchase the property for her, that such other took title in his own name, and that thereafter plaintiff furnished money for the construction of a dwelling on the land, *is held* sufficient to be submitted to the jury on defendant's counterclaim to establish a resulting trust against the property, the convincing character of the evidence being for the jury.

5. Appeal and Error § 6e—

An objection to the admission of evidence *en masse* is insufficient, it being required that appellant point out the evidence objected to.

6. Trusts § 18d: Evidence § 32—

Upon counterclaim to establish a resulting trust against the estate of a decedent, testimony of disinterested witnesses as to declarations made by decedent tending to establish that defendant furnished the purchase price for the property is relevant and admissible.

7. Appeal and Error § 29—

Exceptions which are not set out and discussed in appellant's brief are deemed abandoned. Rules of Practice in the Supreme Court, No. 28.

8. Insurance § 36a—

Ordinarily, the beneficiary named in a life insurance policy has a vested interest therein which may not be destroyed without her consent in the absence of conditions or stipulations to the contrary.

9. Same: Descent and Distribution § 5—Where wife predeceases husband without surviving children, husband's estate is entitled to proceeds of policy on his life in which she was named beneficiary.

Insured named his wife as beneficiary in policies of insurance on his life. The wife predeceased him. There were no children born to the

marriage. *Held:* Upon the wife's death the husband was entitled to the wife's vested interest in the policies, even before reducing same to possession by administration, C. S., 7, the provision of this statute not having been modified by C. S., 137 (8) in cases in which there are no surviving children, and upon the husband's death his heirs are entitled to the distribution of the proceeds of the policies.

APPEAL by plaintiffs from *Williams, J.,* at January-February Term, 1939, of CRAVEN.

Civil action for recovery of personal assets of the estate of Ernest W. Johnson, and of certain lands conveyed by deed to him, alleged to be wrongfully withheld by defendants, and for order directing proper distribution of personal assets and of proper disposition of proceeds of certain life insurance policies. Defendant Williams files cross action to declare that Ernest W. Johnson held said land as trustee for her under alleged resulting trust.

The record discloses that plaintiff Henrietta Wilson is the duly qualified administratrix of the estate of Ernest W. Johnson, who died intestate, 11 January, 1937, resident of Craven County, North Carolina; that she and Charity Murphy individually joined as plaintiffs in the institution of this action; that pending the action Charity Murphy died leaving a last will and testament in which she named Henrietta Wilson as executrix and, with others, beneficiary thereunder; and that Henrietta Wilson as such executrix became a party plaintiff in place of Charity Murphy.

Plaintiffs alleged that Ernest W. Johnson died seized and possessed of a certain lot of land situated and designated as No. 39 Green Street in the city of New Bern, N. C., leaving as his only heirs at law his sisters, the plaintiffs, Henrietta Wilson and Charity Murphy; that at the time of his death the defendants were residing with him in his residence on said lot, and that they have continued to reside there, and refuse to surrender possession.

Defendants deny that Henrietta Wilson is a sister of, or is of any kin to Ernest W. Johnson. Defendant Hannah Williams, while admitting possession of the lot in question, and that it was conveyed to Ernest W. Johnson by deed from her nieces who live in New York, denies that he was seized of same except in the capacity of trustee for her. In cross action and for affirmative relief, she avers that she furnished "the consideration paid for said deed and entrusted it to Ernest W. Johnson to be paid to the grantors with direction to have the deed made conveying the title to said defendant Hannah Williams, and thought it was so made until the night after the death of Ernest W. Johnson," and that "she furnished in addition to the amount paid for the lot at least $500 toward construction of the residence on the same . . ."

On trial below defendant Hannah Williams, over defendant's objection, offered evidence tending to show that she negotiated with her nieces, who are now living, for the purchase of the lot, and agreed with them on the purchase price of $200; that the deed was thereafter made; that she furnished the money to buy the lot; that a dwelling was built on the lot with her money; and that she and her mother and Ernest W. Johnson and his wife, Nellie, who was her first cousin, all lived in the house. The court, over defendant's objection, admitted the further testimony of several disinterested witnesses as to conversations with Ernest W. Johnson in which he made statements that Hannah Williams suggested, "Let's buy a place and build somewhere"; that she gave him the money to buy a lot; that she furnished the money to buy the lot; that "her money built this house," and other statements of similar intendment. Plaintiffs object to part of the evidence *en masse,* and to parts specifically, for that same has no bearing on the question of parol trust, and on the question as to whether Ernest W. Johnson agreed to hold the property in trust.

The court below overruled motion of plaintiffs for judgment as in case of nonsuit on the cross action of defendant Hannah Williams. Exception.

The plaintiffs, in their contention that he took as the beneficial owner rather than as trustee, relied on the record of the deed to Ernest W. Johnson and upon his acts and conduct in connection with control over and possession of the lot and mortgaging it.

Plaintiffs further allege that Ernest W. Johnson, at the time of his death, owned and possessed certain personal property, which defendants wrongfully withhold. Plaintiffs further allege that at the time of his death he was carrying certain insurance policies in each of which his wife, Nellie Johnson, who predeceased him, was named as beneficiary.

As to these allegations the parties stipulated in open court that upon answers to issues submitted to the jury and admissions and agreed facts, the court should determine to whom the personal property should be distributed, and the proceeds of the insurance policies paid; but that the question of ownership of the personal property seized under claim and delivery in this action should be referred to L. E. Lancaster, as referee.

Thereupon, the following issues were submitted to and answered by the jury:

"1. Is the plaintiff Henrietta Wilson an heir at law of Ernest W. Johnson, deceased? Answer: 'No.'

"2. Was the plaintiff Charity Murphy at the time of her death an heir at law of Ernest W. Johnson, deceased? Answer: 'Yes.'

"3. Did Ernest W. Johnson take and hold title to the property described in the conveyance from Katherine Hammond and others to him,

dated June 11, 1924, and registered in Book 309, page 557, office of the register of deeds of Craven County, in trust for the use and benefit of Hannah Williams? Answer: 'Yes.'"

The parties in open court agreed upon these facts, *inter alia,* with respect to question as to who is entitled to the proceeds of the life insurance policies:

"That Nellie Johnson, his wife, was named as beneficiary in each of said policies; that Nellie Johnson died on the 31st day of May, 1932; that there has been no change in the name of the beneficiary between the dates of the death of said Nellie Johnson and said Ernest W. Johnson. That no child has been born as issue of said Ernest W. Johnson and said Nellie Johnson." The evidence shows that Nellie Johnson was first cousin of defendant Hannah Williams.

The court below "on said stipulations and the verdict and certain admissions" . . . adjudged (1) "That the plaintiffs and the beneficiaries under the will of Charity Murphy are the owners of the personal estate left by Ernest W. Johnson, including one-half of the insurance money collected as administratrix of Ernest W. Johnson on the life of Ernest W. Johnson payable to Nellie Johnson, set forth in the stipulation filed, and one-half of the personal property that shall be awarded to the estate of Nellie Johnson by L. E. Lancaster, referee, under the stipulations filed, and that the nearest of kin of Nellie Johnson, including defendant Hannah Williams, are entitled to one-half of the personal estate of Nellie Johnson, including one-half of the insurance collected by the administratrix of Ernest W. Johnson, as set out in the stipulation and one-half of the furniture that shall be awarded or found to have belonged to Nellie Johnson at the time of her death," and (2) That defendant Hannah Williams is the owner in fee simple and entitled to remain in possession of the land in question, described with certainty.

From the judgment plaintiffs appeal to the Supreme Court, and assign error.

Henry P. Whitehurst and Charles L. Abernethy, Jr., for plaintiff, appellant.

Ward & Ward and R. O'Hara for defendants, appellees.

WINBORNE, J. Two questions arise on this appeal:

1. Is there sufficient evidence of a resulting trust for submission of the case to the jury? We hold that there is.

"It is a well established principle that where, upon a purchase of property, the conveyance of the legal title is taken in the name of one person while the consideration is given or paid by another, at the same

time or previously, and as a part of the same transaction, the parties being strangers to each other, a resulting trust immediately arises from the transaction, and the person named in the conveyance will be a trustee for the party from whom the consideration proceeds," *Shepherd, C. J.,* in *Summers v. Moore,* 113 N. C., 394, 18 S. E., 712; *Gorrell v. Alspaugh,* 120 N. C., 362, 27 S. E., 85; *Norton v. McDevitt,* 122 N. C., 755, 30 S. E., 24; *Harris v. Harris,* 178 N. C., 7, 100 S. E., 125; *Tire Co. v. Lester,* 190 N. C., 411, 130 S. E., 45; *Furniture Co. v. Cole,* 207 N. C., 840, 178 S. E., 579; *Jackson v. Thompson,* 214 N. C., 539, 200 S. E., 16, and other cases.

In *Tire Co. v. Lester, supra, Varser, J.,* paraphrases: "The payment of the purchase money raises a resulting trust in favor of him who 'furnishes' or 'pays' or 'owns' the purchase money, unless a contrary intention or a contrary presumption of law prevents."

Resulting trusts, arising by operation of law, do not come within the statute of frauds and may be proved by parol evidence. Such trusts are in this State generally known as parol trusts. *Gorrell v. Alspaugh, supra.* In order to establish a resulting trust, the proof must be clear, cogent and convincing. *Avery v. Stewart,* 136 N. C., 426, 48 S. E., 775; *Tire Co. v. Lester, supra; Peterson v. Taylor,* 203 N. C., 673, 166 S. E., 800, and cases therein cited.

In *Avery v. Stewart, supra,* the Court said: "It is not for the judge to pass upon the intensity of the proof. That is a matter which lies solely within the province of the jury. . . . The jury should be instructed, to be sure, that the evidence must be clear and satisfactory in cases to which that principle applies, but it is for the jury to say whether the evidence is of that convincing character."

In the present case, applying these principles, we are of opinion that the third issue was fairly presented to the jury under a charge in which applicable principles of law were clearly and plainly declared. The court properly placed the burden of proof as to the issue upon the defendant Hannah Williams. The evidence as to the payment by her of the purchase price of the lot in question and the taking of title in the name of Ernest W. Johnson, as parts of the same transaction, was amply sufficient to be submitted for the consideration of the jury. The intensity of the evidence and its convincing character were for the jury. The facts relied upon, *dehors* the deed, are sufficient to authorize the finding in favor of the resulting trust.

In this phase of the appeal it is not inappropriate to note that some of the plaintiff's objections to testimony are to portions of the evidence *en masse.* If there be part which is objectionable, plaintiff should point it out. This is the firmly established rule. Exceptions to all of it will not be sustained. *S. v. Ledford,* 133 N. C., 714, 45 S. E., 944; *Nance*

v. Telegraph Co., 177 N. C., 313, 98 S. E., 838; *Harris v. Harris, supra; Singleton v. Roebuck*, 178 N. C., 201, 100 S. E., 313; *Kennedy v. Trust Co.*, 180 N. C., 225, 104 S. E., 464. It will be observed, however, that much of testimony so objected to is clearly admissible and pertinent, and that none of it is prejudicial.

We call attention to that portion of Rule 28 of Rules of Practice in the Supreme Court, 213 N. C., 808, which provides that—"Exceptions in the record not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned."

2. Where wife, who is beneficiary under policy of insurance on life of husband, predeceases him, intestate, leaving next of kin, but no child or representative of deceased child, surviving, and there having been no change in beneficiary and no disposition by her of her interest in the policy, who is entitled to the insurance money paid upon death of insured husband? Under similar conditions, does the same rule apply as to other personal property?

"It is the recognized general rule that, in the absence of stipulation or condition affecting it, the beneficiary designated as such in an ordinary life policy . . . has a vested interest therein which cannot be destroyed or altered without his consent, . . .," *Hoke, J.*, in *Walser v. Ins. Co.*, 175 N. C., 350, 95 S. E., 54; *Conigland v. Smith*, 79 N. C., 303, as modified by *Hooker v. Sugg*, 102 N. C., 115, 8 S. E., 919; *Lanier v. Ins. Co.*, 142 N. C., 14, 54 S. E., 786; *Wooten v. Odd Fellows*, 176 N. C., 52, 96 S. E., 654; *Lockhart v. Ins. Co.*, 193 N. C., 8, 136 S. E., 243; *Parker v. Potter*, 200 N. C., 348, 157 S. E., 68; *Russell v. Owen*, 203 N. C., 262, 165 S. E., 687; *Fertilizer Co. v. Godley*, 204 N. C., 243, 167 S. E., 816.

In the instant case the vested interest of the wife as beneficiary was not destroyed or altered and at the maturity of the policy remained a personal asset of her estate, which the administrator of the husband was entitled to receive as other personal property subject to the provision of C. S., 7.

Section 7 of Consolidated Statutes of 1919 provides: "If any married woman dies wholly or partially intestate, the surviving husband shall be entitled to administer on her personal estate and shall hold the same, subject to the claims of her creditors and others having rightful demands against her, to his own use, except as hereinafter provided. If the husband dies after his wife, but before administering, his executor or administrator or assignee shall receive the personal property of the said wife, as a part of the estate of the husband, subject as aforesaid, and except as provided by law."

This statute is codification of an act passed by the General Assembly at its session 1871-72, chapter 193, section 32.

In *Wooten v. Wooten,* 123 N. C., 219, 31 S. E., 491, speaking to this statute, the Court said: "This changed (the) rule of common law, which was that personalty of the wife did not go to the husband when he died without having reduced it to possession by administration. And further, in conformity to this change, it devolves the right of administering upon the wife's estate upon the executor or administrator of the husband *ex officio.*"

After the enactment of this statute, two cases, pertinent to the question involved in the case at bar, were decided in this Court: *Conigland v. Smith, supra* (1878), and *Simmons v. Biggs,* 99 N. C., 236, 5 S. E., 235 (1887).

In the former it is held that where a father insures his life for the benefit of his children, one of whom, a daughter, marries and dies before her father, without issue, the husband of the deceased daughter is entitled as her administrator to her share of the money arising from the policy of insurance upon the death of the father.

In the latter, the Court held that where a husband insures his life for the benefit of his wife and children and the wife dies intestate before her husband, leaving children, her interest after the payment of her debts would go to the husband, if living, as sole distributee, but he being dead, his personal representative shall hold and administer the same as an asset of his estate.

These two cases were decided prior to the enactment of chapter 166, Public Laws 1913, as amended by chapter 37, Public Laws 1915, and by chapter 54, Public Laws 1921—C. S., 137 (8)—in which, in effect, the General Assembly modified the provisions of section 7 of the Consolidated Statutes of 1919 in cases where a married woman dies intestate leaving husband and child or representative of deceased child. But, there has been no modification of the section in cases where a married woman dies intestate, leaving husband, but neither child nor representative of deceased child.

Applying these principles to the case in hand, there is error in the judgment below and the same should be, and is hereby, modified in accordance with this opinion.

The judgment below as here modified is affirmed.

Modified and affirmed.

EVA FLEMING v. THE NORTH CAROLINA JOINT STOCK LAND BANK OF DURHAM, N. C.; INTERSTATE TRUSTEE CORPORATION, TRUSTEE; JOHN L. WINDHAM, WILLIAM H. WOOD, R. D. HARRINGTON AND WIFE, EVA S. HARRINGTON (ORIGINAL PARTIES DEFENDANT); AND ALBION DUNN, TRUSTEE (ADDITIONAL PARTY DEFENDANT).

(Filed 12 April, 1939.)

1. Mortgages § 17—

A mortgagee in possession is chargeable with a reasonable rental and with the value of wood and timber removed from the premises during its possession which must be applied to the mortgaged indebtedness.

2. Same: Mortgages § 30a—Evidence held sufficient to entitle plaintiff to an accounting to ascertain if rents were sufficient to prevent default.

Plaintiff's evidence tending to show that the mortgagee went into possession prior to foreclosure by making a direct rental contract with plaintiff's tenant, and that the reasonable rental of the property, plus the value of timber cut therefrom during the mortgagee's occupancy was sufficient to pay the installments of the mortgage notes, *is held* sufficient to entitle plaintiff to an accounting to ascertain whether at the time of foreclosure the mortgage indebtedness was in default in any sum.

3. Mortgages § 39d—Remedies of mortgagor or trustor for wrongful foreclosure.

If a mortgagee causes foreclosure when no sum is in default on the indebtedness upon a proper accounting by the mortgagee for rents collected by it while in possession prior to foreclosure, the mortgagor or trustor is entitled to redeem the land unless it has been transferred to an innocent purchaser, in which event the mortgagor or trustor is entitled to damages sustained by reason of such wrongful foreclosure.

4. Limitation of Action § 18—

Where plaintiff fails to affirmatively show that her cause of action against a defendant is not barred, such defendant's motion to nonsuit upon his plea of the applicable statute of limitations is properly allowed.

APPEAL by plaintiff from *Frizzelle, J.*, at September Term, 1938, of PITT. Reversed as to North Carolina Joint Stock Land Bank of Durham. Affirmed as to other defendants.

The plaintiff brought this suit to have an accounting made between herself and certain of the defendants, to have a sale of lands made by the Land Bank under deed of trust executed by her declared void, and to have conveyances made thereunder set aside, to recover of the defendants for waste and for the value of timber cut upon the premises, and to be permitted to redeem the lands of which she claims she was deprived by the fraudulent devices of the Land Bank, the defendant Windham, and others.

The plaintiff alleges that she secured a loan from the defendant North Carolina Joint Stock Land Bank, and while this was in force she entered into a contract with the defendant Windham under which he became her tenant on the lands in controversy, and agreed, amongst other things, to pay the installments on the Land Bank debt as they became due; that Windham, with the design to mature the notes and cause default in their payment and bring about a sale of the lands for his own benefit, failed to apply the rent to the installments, and that, in collusion with the Land Bank, Windham undertook to become, and did become, the tenant of the bank as to the lands. That the bank made a separate contract of tenancy with said Windham, in violation of plaintiff's rights, and thereby went into possession of the lands; that the rents from the lands due plaintiff were sufficient to pay all installments as they became due upon the lands, but that the Land Bank refused or neglected to collect a proper rental from Windham and permitted a large amount of waste upon the premises; that the reasonable rental value of the lands while in the possession of the defendant Land Bank was amply sufficient to cover all demands which the said Land Bank might rightfully have against the plaintiff with respect to her deed of trust and the installments due thereon. It is further alleged that the defendant Land Bank and the defendant Windham, fraudulently conspiring together, brought about a sale of plaintiff's land under the power of sale contained in the mortgage deed, in September, 1933, at which the Land Bank became purchaser at a grossly inadequate price. That in 1934 the defendant Land Bank conveyed the land to R. D. Harrington and wife, Eva Harrington, taking a deed of trust therefor in the sum of $4,400 to the Interstate Trustee Corporation, Trustee, codefendant in this action, and that about thirty days thereafter the defendant Harrington and wife conveyed the lands to the defendant Windham; that during all this time the Land Bank and Harrington and wife knew that Windham held the lands under the rental agreement with the plaintiff and the terms thereof, and that he had breached his agreement in order to get a legal title to the land, and aided and assisted him in his unlawful acts.

The plaintiff further states that the defendants Land Bank and Windham have been in possession of the land for the years 1933 to 1937, inclusive, during which time they have farmed the lands and have not accounted to the plaintiff for the rents and profits; that the defendants have permitted a large amount of waste to be committed on the premises and have caused and allowed the defendant William H. Wood to go upon the land and cut and remove timber trees to the value of $2,000; and that the defendant Windham has cut off valuable wood, selling the same and converting it to his own use.

The defendants denied any conspiracy or fraud with reference to plaintiff's lands, the Land Bank alleging that plaintiff's notes became due in regular course and were not paid, and that in the honest execution of the trust imposed the trustee sold the lands, at which sale the Land Bank became purchaser, conveying the property in the regular course of business thereafter. The defendants severally denied that any waste was committed upon the premises by them or anything removed therefrom in violation of the rights of plaintiff.

The corporate defendants denied that any agreement with the plaintiff was violated by the advertising and selling of the lands, and the Land Bank expressly denied that it had any agreement with the plaintiff or John L. Windham with regard to the matter.

The answer of the Interstate Trustee Corporation, defendant, is in agreement with that of the Land Bank, and denied any wrongful act of any nature toward the plaintiff.

The answer of John L. Windham is a substantial denial of the principal allegations of the plaintiff's complaint, and, in addition thereto, Windham pleads the three-year statute of limitations.

The answer of the defendants Harrington and wife is immaterial to such phases of the case as the Court finds it necessary to consider.

There was evidence of the tenancy of Windham, of a contract of Windham to pay rentals sufficient to take care of the installments due on the Land Bank debt, and of a direct contract made later between Windham and the Land Bank, by which Windham became the tenant of the said Land Bank, and further evidence as to the rental value of the lands and as to the value of the timber and wood cut therefrom during the occupancy of the land by Windham and subsequent to the sale by the trustee under the deed of trust to secure the Land Bank note.

At the conclusion of plaintiff's evidence, and at the conclusion of all the evidence, the defendants separately moved for judgment as of nonsuit and the motions were allowed. From this, the plaintiff appealed.

Julius Brown for plaintiff, appellant.

J. B. James and J. S. Patterson for defendants North Carolina Joint Stock Land Bank of Durham and Interstate Trustee Corporation, Trustee.

J. C. Lanier for defendant John L. Windham.

J. W. H. Roberts for defendants R. D. Harrington and Eva Harrington, appellees.

SEAWELL, J. It is not necessary to analyze the voluminous evidence in the record, since upon the judgment of nonsuit, our consideration is narrowed to one phase of the case.

The evidence, considered in the light most favorable to the plaintiff, raises an inference which must be left to the jury that the defendant Land Bank went into the possession of the land through a contract of tenancy with Windham some time prior to its sale under the deed of trust. As the mortgagee in possession, it was the duty of the Land Bank to apply to the notes and mortgage held by it the rentals received from Windham, and it was chargeable as such mortgagee in possession for a reasonable rental to be so applied, and for the value of wood and timber removed from the premises, if any, during its occupancy. *Kistler v. Development Co.*, 205 N. C., 755, 172 S. E., 413; *Green v. Rodman*, 150 N. C., 176, 111 S. E., 408.

Under the evidence in this case, we think the plaintiff had the right to have an accounting, and if it appears therefrom that there was nothing due the Land Bank at the time of the sale of the lands in controversy, and if such sale was brought about through the wrongful action of the Land Bank, she would ordinarily be entitled to redeem the land unless this has been rendered impossible through the conduct of the Land Bank. In that event, she would be entitled to such damages as she may have sustained, and which may be provable under applicable law.

The evidence does not affirmatively show that any cause of action which the plaintiff may have had against Windham accrued within the three years next preceding the institution of the suit; nor is it sufficient to justify a recovery against any defendant other than the Land Bank.

As to the Land Bank, the judgment of nonsuit is

Reversed.

As to the other defendants, it is

Affirmed.

D. E. SAPPENFIELD AND R. C. SAPPENFIELD v. A. F. GOODMAN, TRUSTEE, L. E. BARNHARDT AND M. B. SHERRIN AND WIFE, MARY SHERRIN.

(Filed 12 April, 1939.)

1. Landlord and Tenant § 6—A lease terminable at will of lessee is terminable at will of lessor also.

A lease for the period of time during which a filling station on the premises is occupied by lessee, with provision that if for any reason lessee vacates the property the lease should terminate, is a lease for an uncertain duration terminable at the will of the lessee, and is, therefore, a lease at will terminable at the will of lessor also.

2. Same—Failure of tenant at will to vacate after notice constitutes him tenant at sufferance.

When the lessor notifies his tenants at will of his election to terminate the lease and demands possession of the premises, the lessees holding over

and continuing in possession after such notice become tenants at sufferance, and this result is not affected by the fact that thereafter judgment is entered for lessee in summary ejectment upon payment of the rents accrued, from which judgment lessor fails to perfect his appeal.

3. Equity § 1—

The maxim that "equity suffers no right to be without a remedy" does not contemplate the creation of rights not existing at common law.

4. Mortgages § 30g—

A tenant at sufferance has no interest in the property which entitles him to pay the amount of the mortgage indebtedness against the property and have the note and mortgage transferred to him to prevent foreclosure.

APPEAL by plaintiffs from *Armstrong, J.*, at August Term, 1938, of CABARRUS.

Civil action instituted 19 May, 1938, to compel defendant L. E. Barnhardt, upon payment of indebtedness evidenced by note held by him and secured by deed of trust covering land in question of which plaintiffs are alleged lessees, to assign to plaintiffs the note and deed of trust, and to enjoin foreclosure under power of sale contained in the deed of trust.

The parties having expressly waived trial by jury, and having agreed that the court shall find the facts and render judgment accordingly, the court made findings of fact, substantially these:

1. On 27 July, 1933, defendants M. B. Sherrin and wife to secure the payment of a note in the sum of $2,400 payable to Citizens Building and Loan Association of Concord, North Carolina, in installments of $25 per month, executed and delivered to defendant A. F. Goodman, Trustee, a certain deed of trust, duly registered 8 August, 1933, in the mortgage deed records of Cabarrus County, conveying three tracts of land in said county, including the tract in question on which is located a filling station building, known and designated as the Jackson Park Grill.

2. Thereafter on 1 September, 1933, defendant M. B. Sherrin, as party of the first part, and plaintiffs as parties of the second part, entered into an agreement in which it is provided that: "The party of the first part shall be guaranteed and receive a total sum of at least $40 per month as rental" and that "the party of the first part, in consideration of the foregoing agreement, leases all that lot of land (the lot in question), and said lease shall remain in full force and effect for the period of time which the filling station is occupied by the parties of the second part. If for any reason the parties of the second part vacate the filling station property, then this lease will terminate."

3. On 20 April, 1938, defendant L. E. Barnhardt, who is the law partner of defendant M. B. Sherrin, in good faith and for value, in the sum of $1,697.92, purchased the note and deed of trust from the Citizens

Building and Loan Association and same were transferred and assigned to him, the said L. E. Barnhardt.

4. On 21 April, 1938, the installments due on said note being in arrears in the approximate sum of $200, after frequent demands for the payment thereof, defendant A. F. Goodman, Trustee, at the request of defendant L. E. Barnhardt, the then holder of said note, and under the power of sale contained in said deed of trust, advertised all three tracts of land therein described for sale at noon on Monday, 23 May, 1938, prior to which date the sale of the third tract, the one here in question, was enjoined by order in this action. But at the time named the other two tracts were offered for sale and bid off at $700, which bid has not been raised or increased, though the time therefor has now elapsed. The firm of Armfield, Sherrin & Barnhardt, of which defendants L. E. Barnhardt and M. B. Sherrin are members, are the attorneys in said proposed foreclosure.

5. That although plaintiffs through their counsel have demanded of defendant Barnhardt information as to the amount of balance due on said note and have offered to purchase it and, upon assignment thereof and of the deed of trust, to pay, and are ready, able and willing to pay the amount of the balance due thereon, he has not furnished the information and refuses to assign the note and deed of trust.

6. In the meantime, plaintiffs having failed after demand to pay any rent from and after 1 June, 1937, defendant M. B. Sherrin on 21 March, 1938, gave to plaintiffs "notice of his election to terminate said tenancy and demanded possession of said premises."

7. Thereafter, on 24 May, 1938, defendant M. B. Sherrin instituted before a justice of the peace summary ejectment proceeding against plaintiffs, returnable and which came on for trial on 26 May, 1938, when and where the defendants tendered and paid into court the sum of $480 and costs of the proceeding. The justice of the peace thereupon dismissed the proceeding, and defendant M. B. Sherrin gave notice of appeal to Superior Court, but did not perfect the appeal. Since 1 June, 1938, the plaintiffs have tendered monthly to defendant Sherrin the rents on said premises to the first day of September, 1938.

Upon such findings of fact, the court below entered judgment denying the relief prayed and dissolved the injunction theretofore granted. Plaintiffs appeal therefrom to the Supreme Court and assign error.

Hartsell & Hartsell for plaintiffs, appellants.
Sherrin & Barnhardt for defendants, appellees.

WINBORNE, J. Where one goes into possession of land under a written lease for an indefinite term terminable "for any reason" by the lessee,

and, upon his failure to pay rent as agreed, the lessor gives notice of his election to terminate the tenancy and demands possession of the premises, has the lessee, who thereafter continues in possession, such interest in the land as entitles him, upon payment of balance due on a note, secured by duly registered prior deed of trust covering the land, and for which he is not primarily liable, to compel the assignment of the note and deed of trust, and to restrain a foreclosure sale under the latter? The answer is "No."

The question on factual situation similar to that here presented has not been considered in this or any other jurisdiction, so far as we have been able to ascertain.

The text writers say that the general effect of the decisions is that one who has an interest in property and who is not primarily liable for a debt, secured by a mortgage thereon, and can show that such interest will not be otherwise effectually protected or conserved to him, may, on payment of the indebtedness, compel an assignment to him of the mortgage. Hence, there seems to be no absolute right to an assignment of the mortgage on payment of the indebtedness, but that circumstances of the particular case will determine the action of the court in granting or refusing the relief sought. 19 R. C. L., 482. Subject: Mortgages, sec. 273.

In the present case, conceding that the agreement constitutes a valid lease between plaintiff and defendant M. B. Sherrin, what is the interest created by it? The court below was of opinion that on account of the uncertain duration the lease created a tenancy at will. With this we agree. *Rental Co. v. Justice,* 212 N. C., 523, 193 S. E., 817.

At common law a tenancy at will is created by a letting of land or tenements without the limitation of any certain or determinative estate. It may be created by express words, and exists where the estate can be determined at the pleasure of either party to the lease. Ruling Case Law states: "It is a well settled and well known rule of law that a lease or estate which is at the will of one of the parties is equally at the will of the other party. One is no more and no further bound than the other." 16 R. C. L., Landlord and Tenant, sec. 91, citing *Stedman v. McIntosh,* 26 N. C., 291.

In 35 C. J., 1120, Landlord and Tenant, sec. 339, it is said: "It frequently has been stated that where the lease is made expressly to hold at the will of one of the parties, the law implies that the holding is at the will of the other party also. So a tenancy which is expressly at the will of the lessor is regarded also at the will of the lessee, and according to some authorities the converse of the rule is likewise true, and an estate at the will of the lessee is also at the will of the lessor." *Mhoon v. Drizzle,* 14 N. C., 414, is there cited. In this case, in concurring

opinion of *Henderson, C. J.*, the pith of the decision is clearly stated: "An estate at will is an estate at the will of either party, and if at the will of one, it must be at the will of both. There can be no such estate as one at the will of one party only."

In the case at bar it is provided in effect that the lease shall be in force for the period of time during which the filling station is occupied by the lessees, and, if for any reason the lessees vacate the property, the lease will terminate. In other words, the lease is of uncertain duration, and is expressly terminable at the will of the lessees. Applying the above principles of law, the lease being terminable at the will of the lessees, the plaintiffs, it is terminable at the will of the lessor, the defendant M. B. Sherrin.

A tenant at will, if entitled to any notice to quit, is entitled only to a reasonable notice. *Mauney v. Norvell,* 179 N. C., 628, 103 S. E., 372; *Rental Co. v. Justice, supra.* In 35 C. J., 1130, Landlord and Tenant, section 361, it is stated: "While the law differs in different jurisdictions as to the necessity of notice to terminate a tenancy at will, the rule is universal that such a tenancy may be terminable by notice."

In the present case the court finds as a fact that on 21 March, 1938, M. B. Sherrin, the lessor, gave such notice of his election to end the lease, and demanded possession of the premises. When the plaintiffs thereafter held over and continued in possession, they became tenants at sufferance. In Black's Law Dictionary, tenant at sufferance is defined to be: "One that comes into the possession of land by lawful title, but holds over by wrong, after the determination of his interest."

It is stated in Corpus Juris, that "Since a tenant at sufferance is a wrongdoer, and in possession as a result of the landowner's laches or neglect, he has no term, and no estate or title, but only a naked possession without right, and wrongfully. He acquires no permanent rights because the landowner neglects to disturb his possession, and the landowner is entitled to resume possession, and the tenant is entitled to quit, at any time without notice." 35 C. J., 1134, Landlord and Tenant, section 370.

Such was the status of the plaintiffs in the instant case at the time this action was instituted, 18 May, 1938.

"Equity suffers no right to be without a remedy," *Sumner v. Staton,* 151 N. C., 198, 65 S. E., 902, 18 Am. Cas., 802, but the right must exist before the equitable remedy may be invoked. "Equity does not create rights which the common law denies," Adams on Equity, quoted and applied in *Streater v. Bank,* 55 N. C., 31.

We are of opinion that the situation is not altered by the fact that after the institution of this action the lessor, M. B. Sherrin, instituted summary ejectment proceeding in which, upon the lessee tendering and

paying into court the rents due, judgment was entered dismissing that proceeding, from which judgment the lessor gave notice of, but did not perfect, appeal to Superior Court.

The principles enunciated in authorities cited by counsel for appellant, in our opinion, are distinguishable for different basic factual situations.

The judgment below is

Affirmed.

MRS. MANA HUDSON v. GULF OIL COMPANY AND W. M. BRADDY.

(Filed 12 April, 1939.)

1. Master and Servant § 22—Lease held to constitute lessee an independent contractor in the operation of filling station in question.

The lease in question provided that the lessee should operate the premises as a filling station and sell the products of lessor exclusively, paying as rent a stipulated sum per gallon of gasoline sold; that lessee should keep the premises in a clean and safe condition; comply with all rules and regulations by public authorities; pay all gas and electric charges, water rent, license fees, taxes and other charges, and expressly stipulated that lessor reserved no control over the operation of the business, and that neither the lessee nor any person employed by him should be an agent or employee of lessor. *Held:* The terms of the lease constitute the lessee an independent contractor in the operation of the business, and lessor may not be held liable under the doctrine of *respondeat superior* by a third person injured as a result of alleged negligence in its operation.

2. Same—Evidence held not to show that contract constituting lessee an independent contractor had been modified or abandoned.

The lease contract in question constituted the lessee an independent contractor in the operation of the filling station on the premises. The lease provided that lessee should keep the premises in a clean and safe condition and that only the products of lessor should be sold thereon. Plaintiff's evidence that lessor made suggestions about obtaining new business which lessee was not compelled to follow, that lessee honored courtesy cards issued by lessor, that lessor made suggestions in regard to the neatness of the premises, under the provision of the lease that lessee should keep the premises clean, and that advertising signs of lessor were maintained thereon, *is held* insufficient to show modification or abandonment of the original contract which constituted lessee an independent contractor, nor does it tend to show that lessee and his employees were in fact employees of the lessor.

3. Landlord and Tenant § 11—Evidence held insufficient to show violation of city ordinances in construction of filling station in question.

Plaintiff was injured when she fell on the sidewalk in front of defendant's filling station. Plaintiff alleged that defendant lessee in washing the cement floors of the station forced the water across the pavement

provided by the city for pedestrians, that plaintiff fell on a thin coating of ice on the sidewalk formed by the freezing of the waste water. Plaintiff introduced in evidence ordinances of the city prohibiting the drainage of water from any motor machinery or refrigerator on the sidewalk, open ditches or the street, and requiring drains from buildings to empty into ditches between the street and sidewalk. *Held:* The water alleged to have caused the injury in suit did not come from a drain or from any motor machinery or refrigerator, and there was no evidence that failure to provide any drain required by ordinances in anywise caused the condition of the sidewalk complained of.

4. Master and Servant § 23—

A defendant may not be held liable under the doctrine of *respondeat superior* when the jury finds that the alleged employee was not guilty of negligence proximately causing the injury in suit.

5. Appeal and Error § 41—

Where it is determined on appeal that appellant's motion to nonsuit on the issue of negligence should have been allowed the question of contributory negligence of plaintiff need not be considered.

APPEAL by defendant, Gulf Oil Company, from *Williams, J.*, at January Term, 1939, of CRAVEN.

Civil action to recover damages for personal injury alleged to have been caused by the negligence of the defendants.

The corporate defendant, being the owner of a parcel of land in New Bern, N. C., bordering on Eden, Pollock and George Streets, on which is located a filling station, on 1 August, 1937, entered into an agreement with the defendant W. M. Braddy, by the terms of which it leased the said filling station with enumerated equipment, appliances, machinery and buildings located thereon, to the defendant W. M. Braddy for a term of one year, and thereafter from month to month until terminated under the terms of the agreement. In connection therewith Braddy agreed that he would not sell any gasoline other than Gulf products at said station. At the time of the matters and things complained of by the plaintiff Braddy was in charge of said filling station, operating same under the lease and, in addition to Gulf gasoline, carried in stock and sold soft drinks, crackers, cakes and other similar articles and merchandise. Sixteen Gulf advertising signs were erected and maintained on and about the property. Braddy paid for the gasoline as and when the same was delivered and agreed to pay as rent one cent per gallon for each gallon of gasoline received, with a minimum rent stipulation of $35.00 per month. Among other things, the lessee agreed "to pay all gas and electric charges, water rents, all license fees, taxes, and other charges accruing in connection with the use and operation of said premises and equipment; keep said premises, buildings, equipment and appliances, as well as adjoining sidewalks, approaches and driveways, in good condi-

tion and repair; keep said premises and sidewalks clean, safe and in a healthful condition, and comply with any and all laws or ordinances or rules or regulations of constituted public authority applicable thereto."

It was further expressly agreed that the lessor reserved no right to exercise control over the business and operation of the lessee, or to direct in any manner the conduct of his business; that the entire control and direction of said activities remained in the lessee; and that neither the lessee, nor any person employed by him, should be deemed an employee or agent of the lessor.

The ground surface of the lot from the building to the three streets bordering the lot was paved with concrete, said paving sloping toward and to the edge of the sidewalk on all three sides. The space between the outer edge of the sidewalk and the street was likewise paved so as to slope to the street and make an easy passway for vehicles to and from the station when entering from either of the three streets.

About 9 p.m. on 11 December, 1937, plaintiff and two other ladies were returning home from downtown, passing said station. As they were crossing the sidewalk which formed a part of the driveway on Pollock Street, the plaintiff slipped on the pavement and fell. As a result her left shoulder was broken and she received other physical injuries which necessitated her confinement in a hospital. Just prior to the time plaintiff approached the filling station property defendant Braddy and his employees had washed and scrubbed the pavement on the filling station property and the sidewalks, forcing the water used in connection therewith across the sidewalks into the street. It was cold and at the time the plaintiff approached a skim of ice had formed at places, and the wet, icy sidewalk is what she alleges was the cause of her fall. There was evidence that both the sidewalks which formed a part of the driveways to the filling station, and the other sidewalks adjacent, built and maintained by the city, slope slightly towards the street.

In answer to appropriate issues the jury found: (1) That the plaintiff was not injured by the negligence of the defendant Braddy; (2) that the plaintiff was injured by the negligence of the defendant Gulf Oil Company; and (3) that the plaintiff was not guilty of contributory negligence; and assessed the plaintiff's damages.

From judgment on the verdict the Gulf Oil Company appealed.

H. P. Whitehurst and Ward & Ward for plaintiff, appellee.
L. I. Moore for defendant Gulf Oil Company, appellant.

BARNHILL, J. A contract similar to the one introduced in evidence in this cause has been discussed by this Court recently in the case of *Rothrock v. Roberson,* 214 N. C., 26. The conclusion there was adverse

to this plaintiff's contention. *Inman v. Refining Co.,* 194 N. C., 566, 140 S. E., 289, and other decisions cited in the *Rothrock case, supra,* sustain the defendant's position that under this contract Braddy was an independent contractor and that neither he nor any of his employees were agents or employees of the corporate defendant. The negligence of Braddy and his employees may not be imputed to the defendant Oil Company under the doctrine of *respondeat superior,* unless the plaintiff has shown that the original contract was abandoned and superseded by another contract.

While the evidence tends to show that the wholesale dealer of the Oil Company and its sales representatives at times made suggestions to Braddy about methods for obtaining new business, about the neatness of the premises and about the appearance of his employees, and that Braddy honored courtesy cards issued by the Oil Company, we do not deem this sufficient to establish the abandonment of the original contract or to show the existence of another and a different contract. Braddy testified that the Oil Company never undertook to compel him to comply with any of its suggestions and that he followed suggestions because he considered them to be good. Furthermore, the defendant Braddy was under contract to keep the premises, sidewalks and approaches clean and in good condition. The corporate defendant was within its contract rights in suggesting and insisting that Braddy comply with the agreement in this respect. While he at one time testified that he was manager of the filling station, he explained that he meant by the term manager that he was manager under the lease; that he was a dealer. The existence of the Gulf signs on the premises which were being used for the sale of Gulf products is not inconsistent with the contract, nor does it tend to show that Braddy and his employees were in fact employees of the corporate defendant in contradiction of the terms of the lease.

But the plaintiff alleges in her complaint and contends that the filling station is improperly constructed in that there is not provided a drainage aqueduct or waste line to carry off and dispose of the debris, waste, accumulated drippings, oils and lubricants in and around said station and no provision is made for carrying off and disposing of the water used for scrubbing, washing and cleaning the said concrete floors of the said station, which is used in large and excessive amounts, and which is charged with soap and grease solvent, and thus rendered highly slick and slippery; and that as the same is constructed the said waste, oils, greases and debris accumulating at said station are forced across the pavements provided by the city for pedestrians, thereby rendering the pavements dangerous and insecure and creating an additional hazard to the pedestrians.

In support of this position the plaintiff offered in evidence section 10 of chapter 3; section 29 of chapter 4; and section 12 of chapter 3 of what purported to be the 1913 codification of the ordinances of the city of New Bern. She also offered in evidence section 10 of chapter 3 and section 27 of chapter 4, of what purported to be the 1936 codification of the ordinances of said city. The record discloses that the ordinances were proved and identified by F. T. Patterson. It does not appear what official connection, if any, he has with the city. Nor does it affirmatively appear that such ordinances are printed in book form by authority of the governing body of the city. It is questionable whether such ordinances in the present state of this record were admissible over the objection of the defendant. C. S., 2825. Likewise, it might well be assumed that a 1936 codification superseded a 1913 codification. The existence of a 1936 codification would seem to show affirmatively that the ordinances contained in the 1913 codification are not now in force and effect.

Treating the ordinances as competent evidence, after a careful examination thereof, we are unable to see how either has any material bearing on the question presented. Section 10 of chapter 3 of the 1936 codification provides that every owner of any building from which the drain empties on the sidewalk shall remedy the same by gutter or drain pipe, said gutter or drain pipe to empty into the sand pits, and if there are no sandpits, then into the ditches. Section 27 of chapter 4 of said codification provides that no person shall conduct the water from any motor machinery or refrigerator through pipes or otherwise upon the sidewalk, into the open ditches or upon any street of the city, nor shall any person have gutter pipes or drains of any kind running from any building or roof thereof, or lot in the city, emptying into any street of said city, except into the ditch lying between the street and sidewalk. The 1913 ordinances are of similar import. The soapy and oily water on the sidewalk which the plaintiff alleges was the cause of her injury was placed there by Braddy and his employees in cleaning the paved surface of the filling station lot. It did not empty on the sidewalk from a drain, nor was it conducted to the sidewalk from any motor machinery or refrigerator. Furthermore, the evidence discloses that this station was erected in an approved manner under a permit issued by the city. There is no evidence that a failure to provide any drain or gutter required by the city ordinances was in anywise connected with the condition of the sidewalk at the time complained of.

From whatever angle the evidence in this cause may be viewed it necessarily leads to the conclusion that the wet and slippery condition of the sidewalk on the night the plaintiff was injured was due to the fact that Braddy and his employees, in cleaning the driveways and sidewalks, forced the water used therefor across the sidewalk into the street drain.

The jury, by its verdict, has found that this was not an act of negligence, proximately causing the injury of the plaintiff. Even if it be conceded that he at the time was acting as an employee of the corporate defendant, the said defendant may not be required to respond in damages therefor. If liable at all, it is liable under the doctrine of *respondeat superior.* If the act of the agent or employee is not negligent, or does not proximately cause the injury complained of, the master is not liable. *Morrow v. R. R.,* 213 N. C., 127, 195 S. E., 383; *Whitehurst v. Elks,* 212 N. C., 97, 192 S. E., 850.

The defendant pleads the contributory negligence of the plaintiff. The evidence disclosed that the sidewalk at the time of plaintiff's injury was well lighted. Plaintiff testified: "I never paid any attention to their washing it down. I did not pay any attention to the filling station that night. I could have told whether the sidewalk was wet if I had paid any attention. I did not notice the sidewalk to see whether it was wet or not." Whether this testimony discloses contributory negligence on the part of the plaintiff as a matter of law we need not now decide in view of our conclusion that Braddy was an independent contractor, and that in any event the verdict of the jury in favor of Braddy exculpated the corporate defendant.

We have examined *Ledford v. Power Co.,* 194 N. C., 98, 138 S. E., 424, and similar cases cited and relied on by the plaintiff. We do not consider that these decisions are in point or controlling. Nor is *Stewart v. R. R.,* 202 N. C., 288, 162 S. E., 547, authoritative on the facts in this record.

We are of the opinion that the defendant's motion to dismiss as of nonsuit, renewed at the conclusion of all the testimony, should have been sustained.

Reversed.

MRS. MAE BRIDGERS SCOTT v. R. G. HARRISON.

(Filed 12 April, 1939.)

1. Libel and Slander § 8—Complaint held not to allege facts rendering utterances of alleged slander privileged.

This action was instituted by the wife of a high school principal against the chairman of the county board of education, for slander alleged to have been uttered by defendant in connection with the employment of plaintiff's husband. It was alleged that the slander was uttered by defendant to persons who had called by defendant's office in a bank. *Held:* It does not appear from the complaint that the relation between the defendant and the persons to whom the alleged declarations were made was such as

to bring the declarations within the rule of privilege or qualified privilege, and defendant's demurrer on the ground of privilege was properly overruled.

2. Libel and Slander § 11—

Where the alleged words are not actionable *per se*, the complaint must allege special damage.

3. Libel and Slander § 2—

Our courts adhere to the common law rule that words, to be actionable *per se*, must affect one's business or occupation or tend to hold him up to public hatred or contempt, etc.

4. Same: Libel and Slander § 11—Words alleged held not actionable per se.

Plaintiff alleged that defendant, who was the chairman of the county board of education, made declarations to the effect that plaintiff, who was the wife of a high school principal, had been forbidden to go upon the school grounds and that the reason he was not reëlecting plaintiff's husband to his position as principal was due to the character and reputation of the plaintiff. *Held:* The words alleged are not actionable *per se* in their ordinary meaning, and in the absence of allegation of any special meaning or "innuendo," the complaint is insufficient to charge words actionable *per se*.

5. Same—Held: Complaint failed to allege words actionable per se or special damage, and demurrer should have been sustained.

This action for slander was instituted by the wife of a high school principal, who had herself theretofore been employed as a teacher, against the chairman of the county board of education for slander alleged to have been uttered in connection with the employment of plaintiff's husband. Plaintiff alleged that as a result of the alleged slander her husband was forced to accept reëlection to his position for one year upon condition that thereafter he would not seek reëlection. *Held:* The complaint is insufficient to allege words actionable *per se*, since plaintiff was not at the time actually or constructively engaged in the profession of teaching, and the fact that the alleged slander might eventually lead to the unemployment of her husband is too remote and speculative to constitute an allegation of special damage, and defendant's demurrer to the complaint should have been sustained.

6. Pleadings § 23—

Where, on appeal, the judgment of the lower court overruling defendant's demurrer is reversed, plaintiff may be allowed a reasonable time to amend her complaint.

APPEAL by defendant from *Parker, J.*, at October Term, 1938, of VANCE. Reversed.

This is an action to recover damages for an alleged slander of plaintiff by the defendant. The slander charged is that the defendant falsely and maliciously uttered concerning the plaintiff: "That the plaintiff while her husband, B. A. Scott, was the principal of the public schools in

Northampton County, North Carolina, was forbidden by the authorities in charge from going upon the school grounds or premises of the Jackson High School at Jackson, North Carolina, for a period of six months." The charge is further supplemented by an allegation that the defendant stated that "the reason he was not reëlecting Mr. B. A. Scott was due to the character and reputation of his wife." Plaintiff's husband was at the time of the alleged slanderous utterance, or immediately preceding that time, prineipal of the Dabney High School, which position he had held for ten years, and to which he had not been reëlected; the defendant Harrison was chairman of the county board of education of Vance County, having something to do with the selection of principals and teachers in Dabney District. The plaintiff "for some time was employed by the Public School System in North Carolina."

The plaintiff alleges that because of the slanderous remarks of the defendant, her husband was required to accept as a condition to his reelection that he would not seek reëlection to his present position of principal.

No special damage is alleged other than the above, and the slander was not laid with an "innuendo," attaching a special meaning to the words "character" and "reputation" used concerning the plaintiff.

The defendant demurred, setting forth that under the circumstances alleged the communication was privileged; and that the words alleged to have been uttered concerning the plaintiff were not actionable *per se,* and that since no special damage was set up in the complaint no sufficient cause of action was alleged therein against the defendant. From the judgment overruling the demurrer, defendant appealed.

J. P. & J. H. Zollicoffer for plaintiff, appellee.

Jasper B. Hicks, A. A. Bunn, and J. H. Bridgers for defendant, appellant.

SEAWELL, J. 1. It is alleged in the complaint that the slanderous words uttered of and concerning the plaintiff were made by the defendant to persons who had called by defendant's office in the bank. It does not appear from the complaint that the relation between the defendant and these persons was such as to bring the declarations within the rule of privilege, or qualified privilege, and the complaint is not objectionable in that respect, and defendant's demurrer to the complaint in that regard is without merit. *Alexander v. Vann,* 180 N. C., 187, 104 S. E., 360.

2. Where slanderous words or accusations are not actionable *per se* so that general damages may be awarded therefor, the courts will not sustain a complaint as sufficiently setting up a cause of action which does not allege some special damage sustained by the plaintiff by reason

of the slanderous remarks. In this respect the courts of this State adhere to the common law doctrine pertaining to libel and slander. The distinction between slanderous utterances actionable *per se* and those in which special damage must be alleged is traditional and does not always appear to be philosophical. The standards employed and the sense of moral values implied belong, perhaps, to a more practical age, and the rationale of some of the classifications is weakened or destroyed by changes which have come about through the years in the subjects to which they apply. It has been surmised that it was intended to confine actions of that sort to the graver accusations and those obviously calculated to result in damage. But the distinctions are too challengeable to support that view. Apparently they are not based on any desire to aid the litigant but upon social implications, and seem to be punitive in origin. "It is believed that in truth the requirements about special damages rest not upon any analytical distinction but wholly upon the historical division between defamations which were originally punished as sins, in ecclesiastical courts, and those inflicting temporal harm and remedial in the King's tribunals." McCormick on Damages, p. 464, note 28. See also note 5, p. 416.

Whatever may have been the origin, the courts are not permitted to go outside of the categories established by long usage to hold words, which to the layman may appear equally malicious and harmful, as actionable *per se*. Under this rule, false and slanderous utterances affecting one's business or occupation (*Deese v. Collins,* 191 N. C., 749, 133 S. E., 92); false and malicious accusations of crime calculated to expose the person accused to public hatred or contempt (*McKee v. Wilson,* 87 N. C., 300; *Cotton v. Fisheries Products Co.,* 177 N. C., 56, 97 S. E., 712), and slanders of like kind, are actionable *per se,* and on account of their nature and relation, when properly charged, the law will presume that injury or compensable general damage has resulted, without allegation of special damage. *Fields v. Bynum,* 156 N. C., 413, 72 S. E., 449; *Cotton v. Fisheries Products Co.,* 181 N. C., 151, 106 S. E., 487. When the words do not come within this category, special damages must be alleged and proved. In the complaint under consideration none of the charges of slander is laid with an "innuendo" attaching any special meaning to the words used other than that which is obvious, and under the ordinary meaning they are not actionable *per se.*

We have carefully examined the allegations of the complaint and given due consideration to those allegations which have been pointed out as an averment of special damages.

Embarrassment, humiliation, and mental suffering, caused by the defamation, may be considered in connection with slanders which are actionable *per se; Baker v. Winslow,* 184 N. C., 1, 113 S. E., 570; *Fields*

v. Bynum, supra; but, standing alone, will not be sufficient as an allegation of special damage. The injury must be material and pecuniary. "It is not usually enough for the plaintiff to plead that the publication of the slander has humiliated or embarrassed him or has been productive of mental anguish." McCormick on Damages, Hornbook Series, section 114, p. 419. Perhaps because humiliation and the poignancy of mental distress are not easily measured in money values, they have been, at least in slander cases, considered merely in aggravation of damages. Southerland on Damages, 4th Ed., Vol. 4, section 1220, *et seq.*

It is suggested that the condition imposed upon plaintiff's husband at the time of his reëlection might eventually lead to his unemployment and result in damage to her. This, we think, is too remote and speculative for present consideration. Newell, Slander and Libel, 4th Ed., section 746, quotes *DeGrey, C. J.,* in *Onslow v. Horne,* 3 Wils., 177, 2 W. Bl., 750: "I know of no case where ever an action for words was grounded upon eventual damages which may possibly happen to a man in a future situation;" and refers to the established rule that the damages must have accrued before the institution of the suit.

The plaintiff alleges that "for some time she was employed by the Public School System in North Carolina." Had she been presently so employed, there is no question but that the words complained of, in the connection used, would be actionable *per se* as words tending to bring her into disrepute and injure her in her occupation. *Castelloe v. Phelps,* 198 N. C., 454, 152 S. E., 163. We might question whether a mere temporary period of unemployment or cessation of occupation, which had not been abandoned by the party aggrieved, would affect the slander as actionable *per se,* although authorities in this State are rather strongly to the contrary; *Edwards v. Howell,* 32 N. C., 211; *Gattis v. Kilgo,* 128 N. C., 402, 424, 38 S. E., 931. In this case there is no allegation that the plaintiff was there engaged in the profession of teaching, actually or constructively.

For these reasons, the judgment overruling the demurrer must be reversed. Since the court below ruled with the plaintiff, and she was under no necessity of asking to amend her complaint at that time, no presumption arises here, as in *Ballinger v. Thomas,* 195 N. C., 517, 142 S. E., 761, as to her reliance upon the complaint as drawn. Plaintiff will be given reasonable time to amend her complaint, if she so desires.

The judgment overruling the demurrer is

Reversed.

T. H. SANSOM, JOE T. WARREN, AND N. M. JOHNSON v. CLIFFORD WARREN.

(Filed 19 April, 1939.)

1. Deeds § 10b—Person claiming as purchaser for value under Connor Act must show that very deed under which he claims is supported by consideration.

While the cancellation of a preëxisting debt may be sufficient consideration to constitute the grantee in a registered deed from the debtor a purchaser for value within the protection of the Connor Act, so as to take free from the claim of the grantee in a prior unregistered deed from the debtor, where the debtor transfers the property without consideration to a third person, who in turn transfers the property to the creditor without any consideration moving from the creditor to such third person, the creditor cannot maintain that the cancellation of the debt constitutes him a purchaser for value so as to be protected under the Connor Act, since his deed from the third person is not supported by any consideration, and it is required that the creditor be a "purchaser for value from the donor, bargainor, or lessor" in order to be protected. C. S., 3309.

2. Same—Creditor taking title through third person may not claim that debt was consideration for debtor's deed unless he establishes parol trust.

A debtor transferred title to the lands in question to a third person without consideration, and the third person transferred the lands to the creditor without consideration, but the creditor claimed that the deed to the third person was for his benefit, and that the cancellation of the debt was a sufficient consideration to constitute him a purchaser for value within the protection of the Connor Act. *Held:* Mere privity of title and the fact that the transactions were for his benefit are insufficient to establish consideration for the deed to the third person or from the third person to the creditor, so as to constitute the creditor a purchaser for value, it being required that the creditor establish a parol trust upon the deed to the third person in order to take the transaction out of the operation of the Connor Act, C. S., 3309, and to make parol evidence thereof competent as an exception to the parol evidence rule and the statute of frauds sufficient basis must be laid in the complaint.

3. Trusts § 15—Party having deeds executed absolute in form with full knowledge of equities held estopped from setting up parol trust.

A creditor who, with full knowledge of the facts, has the debtor execute a deed absolute in form to a third person, and has such third person execute a deed to him, is estopped from setting up a parol trust on the deed to such third person on the ground that it was executed for his benefit, especially when the creditor puts his legal title on record and institutes suit thereon, since in such instance the creditor makes his election to stand on his legal rights, and since the instruments were written as intended. In this case the debtor transferred the lands to another by unregistered deed supported by consideration prior to the execution of the

registered deed to the third person for the creditor's benefit: Whether a parol trust based upon instruments executed after the absolute conveyance of the unregistered deed may be set up, *quære.*

4. Appeal and Error § 41—

Where it is determined on appeal that defendant's motion to nonsuit should have been allowed, exceptions relating to the instructions on the issues submitted need not be considered.

APPEAL by defendant from *Grady, J.,* at October Term, 1938, of SAMPSON. Reversed.

The evidence, introduced under appropriate pleadings, was substantially as follows:

Stated in chronological order: Joe T. Warren conveyed the 12.4 tract of land in controversy to Clifford Warren by deed dated 19 September, 1934, which was registered 22 September, 1934, reciting a consideration of $475.00; Clifford Warren conveyed the land back to Joe T. Warren by deed dated 26 October, 1934, filed for registration the same day, reciting a consideration of $475.00. Joe T. Warren and wife executed to Clifford Warren a deed upon the same land dated 28 November, 1934, filed for registration 31 October, 1938, reciting a consideration of $475.00. Joe T. Warren and wife, Bertha Warren, conveyed the same land to T. H. Sansom by deed dated 12 August, 1936, and filed for registration the same day. Sansom and wife conveyed the land to N. M. Johnson by deed dated 3 January, 1938, which deed was filed and registered 27 July, 1938. It recites a consideration of $100.00 and other valuable considerations.

The tract of land which was the subject of these various conveyances had been allotted to Joe T. Warren as his homestead, and, upon the first deed made to Clifford Warren, N. M. Johnson having been advised that the homestead right had fallen in, brought an action against Clifford Warren to subject the lands to the lien of the judgment against J. T. Warren, which had been transferred to Johnson. Thereupon, following some negotiations between Clifford Warren and Joe T. Warren, Clifford Warren reconveyed the lands to Joe T. Warren, and Johnson abandoned his suit. This was followed by another conveyance of Joe T. Warren to Clifford Warren, this being the conveyance of 28 November, 1934.

The plaintiff N. M. Johnson testified that Joe T. Warren had sent for him and offered to convey to him the lands in controversy in settlement for an old account of $817.00 and a judgment that had been assigned to Johnson; that his lawyer advised him that it would be better to have the deed made to Sansom; that Sansom did not know anything about the making of the deed until a long time thereafter, and did not pay Warren anything for the deed; that although the deed made by

Sansom and wife to this plaintiff recited $100.00 and other valuable considerations, plaintiff paid nothing for it. Johnson did not take the deed in satisfaction of any indebtedness of Sansom, as Sansom was not indebted to the plaintiff. Johnson further testified that he had brought the suit against Clifford Warren after the latter received his deed from Joe T. Warren, because he had been advised that he could not collect it out of Joe T. Warren so long as it was held as a homestead; that he knew a deed from Joe T. Warren to Sansom would subject the lands to his judgment just as quickly and effectively as a deed from Joe T. Warren to Clifford Warren.

Plaintiff further testified that when Sansom got the deed, plaintiff was advised to get up an agreed statement of facts between him and Sansom and take the thing up to the Supreme Court and "see what they would do for me." "I got Mr. F. T. Dupree, of Angier, for my opposing counsel. Mr. Williams, I believe, represented me. I believe I am right. I know Mr. Dupree was Mr. Sansom's attorney and I reckon Mr. Williams was mine. I guess I will pay both lawyers for the charges, whatever they are."

Plaintiff further testified that Warren owed him about $1,000 principal and interest on the assigned judgment, and an account of $817.92; that he had not canceled the judgment or account, but was to do so when the matter was cleared up.

The plaintiff Sansom testified (as a witness for defendant), that while the deed of Joe T. Warren and Bertha Warren to him recites a consideration of $100.00, he did not pay anything; that neither Joe T. Warren nor Bertha Warren were indebted to him in any amount; that on 9 January, 1939, he (Sansom) and his wife executed a deed for the land to N. M. Johnson, reciting a consideration of $100.00; that Johnson did not pay them any sum whatever, and at the time neither Sansom nor his wife were indebted to Johnson.

As a further source of title, the defendant put in evidence a deed from Carlyle Jackson, sheriff of Sampson County, to Clifford Warren, dated 15 January, 1937, and filed for registration on that day, reciting the levy of execution and the advertisement of sale of the lands in controversy at an execution sale upon a judgment rendered in the recorder's court of Dunn, on 1 April, 1920, for $292.06 and interest, and in support thereof the judgment roll in the action.

On cross-examination, over objection of defendant, the plaintiff Sansom testified: "The land was deeded to me to be held for Mr. Johnson, and, when we got the title straightened out, I was to deed it to Mr. Johnson."

It was admitted that the deed of J. T. Warren to the defendant Clifford Warren was made for a valuable consideration.

At the conclusion of plaintiff's evidence, and again at the conclusion of all the evidence, the defendant moved for judgment as of nonsuit, which was overruled, and defendant excepted.

Upon the issues submitted to the jury, which upon instruction by the court were answered in favor of the plaintiff, judgment was rendered declaring the plaintiff to be the owner and entitled to possession of the lands, and ordering the defendant's muniments of title to be canceled upon the record. From this judgment the defendant appealed.

I. R. Williams and W. H. Fisher for plaintiffs, appellees.
Butler & Butler for defendant, appellant.

SEAWELL, J. The plaintiff N. M. Johnson has evidenced a chain of paper title from the common source sufficient, nothing else appearing, to establish his right to be declared the owner of the lands in controversy. So has the defendant. However, although defendant has a priority in point of time of conveyance, the plaintiff's deeds were recorded first. But for our Registration Act, C. S., 3309, known as the Connor Act by virtue of the 1885 Amendment, the defendant, having the first conveyance, would have the superior title. This familiar statute reads in part: "No conveyance of land, or contract to convey, or lease of land for more than three years shall be valid to pass any property, as against creditors or purchasers for a valuable consideration, from the donor, bargainor or lessor, but from the registration thereof within the county where the land lies."

Although there are other features to which we will refer, the case hinges upon the question whether N. M. Johnson is a purchaser for a valuable consideration within the purview of this statute. Upon the record before us we are compelled to hold that he is not.

The valuable consideration urged by the plaintiff as sufficient to give him the status of a purchaser for value within the meaning of the statute is the release of a preëxisting debt owing to him by J. T. Warren, from whom he indirectly derived title. While contrary inferences might be drawn from the evidence as to the actuality of that consideration, which seems to have been contingently postponed, we may pass to phases of the controversy more pertinent to the decision. The chief difficulty with the plaintiff Johnson is his inability to unscramble the transactions by which he sought to acquire title and assemble the grantor, the valuable consideration, and himself as purchaser, in the same conveyance.

In this State, under an analogous statute—C. S., 311—(*King v. McRackan,* 168 N. C., 621, 624, 84 S. E., 1027), a mortgagee who takes a conveyance of lands in security for a preëxisting debt is held to be a

purchaser for value—*Weil v. Herring,* 207 N. C., 6, 175 S. E., 836; *Cowan v. Dale,* 189 N. C., 684, 128 S. E., 155; *Bank v. Cox,* 171 N. C., 76, 87 S. E., 967, 969; *Fowle v. McLean,* 168 N. C., 537, 84 S. E., 852—and, *a fortiori,* where the property itself is taken by an absolute conveyance in consideration of the cancellation of such preëxisting debt, the grantee in the conveyance might be considered a purchaser for value. *Perry & Sons v. Mand,* 80 A. L. R., 932; *Empire State Trust Co. v. Wm. F. Fisher & Co.,* 67 N. J. E., 602, 60 Atl., 940, 941; *Lee Tire & Rubber Co. v. Gay,* 164 Wash., 569, 4 P. (2d), 492, 495. But it does not appear that there is any such consideration to support the deed made by J. T. Warren to Sansom, as Warren owed Sansom nothing; and the same is true with regard to the deed and the transaction between Sansom and N. M. Johnson. It is not contended there was any other consideration of value, and the evidence is conclusive that there was not.

The valuable consideration which would bring the subsequent purchaser within the protection of the statute against a prior purchaser under an unrecorded deed is a consideration moving between the parties to the deed, including as parties the beneficiaries, or *cestui que trustent* in a deed of trust. He must be "a purchaser for a valuable consideration from the donor, bargainor, or lessor." Consideration is an incident confined to the deed which it supports; and in this respect each deed in the series presented to us for inspection must stand on its own bottom.

Plaintiff's method of acquiring title has been unfortunate. The interposition of a third person as an unlabeled conduit for the title broke the continuity of the transaction between plaintiff and Warren. In order to establish his status as a purchaser for value under the statute by virtue of the suggested consideration, it is necessary for the plaintiff to connect himself with the Warren-Sansom deed as party or as beneficiary in the sense above defined. Mere privity of title is not sufficient. Since this deed is absolute on its face and the plaintiff is an apparent stranger to it, nothing will avail him which does not impress upon the deed the character of a trust. A mere parol explanation that the deed, or the series of transactions in which it is involved, was intended for his benefit is not sufficient while the legal aspect of the conveyance is unchanged, and such evidence offends against the rule excluding parol evidence to contradict, vary, or add to the terms of a written instrument; *Kindler v. Trust Co.,* 204 N. C., 198, 187 S. E., 845; *Miller v. Farmers Federation, Inc.,* 192 N. C., 144, 134 S. E., 407; *Wilson v. Sandifer,* 76 N. C., 347; especially since the contract is within the statute of frauds; *Byrd v. Power Co.,* 205 N. C., 589, 172 S. E., 183; *Walters v. Walters,* 172 N. C., 328, 90 S. E., 304; *Ward v. Gay,* 137 N. C., 397, 49 S. E., 884. Certainly parol evidence would be admissible to establish a parol trust, but if the facts of this case could be consid-

ered as coming within any category leading to such a result, plaintiff has laid no foundation for it in his pleading—has merely made a casual gesture toward it in the evidence. *Buchanan v. Harrington,* 141 N. C., 39, 53 S. E., 478; *Moore v. Moore,* 151 N. C., 555, 66 S. E., 598; *Fisher v. Owens,* 132 N. C., 686, 44 S. E., 369.

We think, however, that under the evidence in this case plaintiff N. M. Johnson was estopped from asserting any such equity if it existed. He deliberately chose to have the title to the property made to a third person, by deed absolute on its face, and inconsistent with any trust relation between himself and Sansom, and without the knowledge of Sansom. This was a deliberate transaction, carried out on the advice of counsel, and was intended to avoid legal complications affecting the title, should it be taken in his own name, and, we may assume, designed to cut off all opposing rights and equities. With an intimate knowledge of any equitable right that he might have asserted, the plaintiff put his legal title on record and brought suit upon it. Besides, the evidence is clear that the instrument was written as intended. He must abide by his choice.

An interesting question is raised as to whether the establishment of a parol trust upon a transaction taking place after the acquisition of the title for a valuable consideration by the defendant would avail the plaintiff anything where he is relying solely upon a priority created by the statute, and the defendant has put his legal title on record before any proceeding was begun in which the trust could be established. The Connor Act—C. S., 3309—is held not to apply to a parol trust but only to written instruments capable of registration. *Spence v. Pottery Co.,* 185 N. C., 218, 220, 117 S. E., 32; *Sills v. Ford,* 171 N. C., 733, 88 S. E., 636; *Pritchard v. Williams,* 175 N. C., 319, 97 S. E., 570; *Eaton v. Doub,* 190 N. C., 14, 21, 128 S. E., 494; *Wood v. Tinsley,* 138 N. C., 507, 51 S. E., 59. It is not necessary to decide the matter here, but the opinion of the Court, *per Stacy, J.,* in *Spence v. Pottery Co., supra,* contains a complete exposition of the law on this subject, and a study of this opinion will obviate a more detailed search of the other authorities cited.

Since this case is decided on defendant's motion for judgment as of nonsuit, it becomes unnecessary to consider the instructions given to the jury or the issues submitted to them. Defendant's motion for nonsuit should have been allowed and the final judgment of the court, including the orders therein with respect to defendant's muniments of title, becomes void and inoperative.

The judgment overruling the nonsuit is

Reversed.

STATE v. JAMES DIXON.

(Filed 19 April, 1939.)

1. Jury § 1—

The court has the discretionary power to allow a veniremen to become one of the panel, notwithstanding that he has testified on the *voir dire* that he has formed and expressed an opinion as to defendant's guilt when he also testifies that he can disabuse his mind of such opinion and give the defendant a fair and impartial trial on the evidence produced.

2. Same—

Defendant's exception to the refusal of a denial of a challenge for cause cannot be sustained when he does not exhaust his peremptory challenge before the panel is completed.

3. Jury § 3—Challenge to the array held properly denied in absence of showing of misconduct, partiality or irregularity in making up the list.

A challenge to the array on the ground that the sheriff and his deputies selected for the special venire, under instructions by the sheriff, freeholders of good character, who had not served on the jury within the past two years and who lived in townships in the county other than the township in which the crime was committed and townships contiguous thereto, is properly refused, the instructions of the sheriff being in compliance with C. S., 2338, and the action of the sheriff and the deputies showing no partiality, misconduct or irregularity in making out the list.

4. Criminal Law § 33—

It is not necessary to the competency of confessions not obtained at a judicial hearing before a magistrate that defendant be warned that anything he says or admits will be used against him.

5. Homicide § 27h: Criminal Law § 53d—Evidence held not to require submission of question of defendant's guilt of manslaughter.

In this prosecution for homicide defendant's confessions, properly admitted in evidence, tended to show that defendant killed his wife with premeditation and deliberation an hour or more after having formed a fixed intent to commit the act. *Held:* The refusal of the court to submit to the jury the question of defendant's guilt of manslaughter is not error, and the instruction limiting the jury's consideration to the questions of murder in the first and second degrees and acquittal is without error.

APPEAL by defendant from *Armstrong, J.*, at October Term, 1938, of CABARRUS. No error.

A written confession, purporting to be signed by the defendant and introduced in evidence by the State, reads: "(On September 8, 1938) I ate supper at Mrs. Trieces about 6:30 and went on home. But before eating supper I went by my house and asked my wife about 6:00 why she had not started cooking supper earlier than she had, and she said that she was cooking that for her and someone else and for me to go up

to Mrs. Trieces and get my supper. I went up to Mrs. Trieces and ate my supper and returned home about 6:00 to 6:45 and when I returned home I asked my wife if she had supper ready and she said 'No, supper was not done' and my wife asked me if I had not eaten up at Mrs. Trieces, and I said 'Yes, but I always go home and eat a little too' and we did not speak for a while—about 10:00 she began to curse me and I tried to get her to stop but she kept on cursing me and we had a fist fight and she tried to hit me with a bottle but hit herself and fell down on the floor and I got on top of her and beat her with my fist—she lay on the floor after I had hit her on the floor for about 5 or 10 minutes and when she got up she got a small clock and hit me in the head. From the fight at 10:00 my wife and I did not have anything or very little to say to one another until about 2:00 A.M., Sept. 9, 1938. I went in the kitchen and got my axe and hid it with my right side or back and brought the axe into the bedroom where my wife was laying down on the bed and raised the axe over my wife while she was laying down and hit her in the head two or three times with the head of the axe and I guess I killed her at that time because she never said anything but just moved a little the first time I hit her. I then took newspapers and set the house on fire with my wife in the house on the bed. I immediately left the house went to the railroad, down the railroad to Concord and to the Concord Police Station where I gave myself up and told some of the policemen, I think his name was Mr. Sloop, all about the killing of my wife but did not tell him about burning the house. My wife made me awful mad when we had the first fight and I never did get over my mad spell until I hit her with the axe and burnt the house. I would have hit my wife with the axe earlier in the night but it was raining and I did not want to get out in the rain myself. I knew I was going to leave as soon as I hit her and I did not want to get wet. I decided to kill my wife a little more than an hour before I killed her but the rain kept me from doing it, as I did not want to get wet."

The defendant offered no evidence.

The defendant was convicted of murder in the first degree, and from judgment of death appealed, assigning errors.

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

E. Johnston Irvin and Robert H. Irvin for defendant.

SCHENCK, J. The exceptive assignments of error may be discussed in four groups.

The first group of assignments of error relate to the failure of the court to sustain challenges to certain veniremen who, on the *voir dire,*

testified in effect that they had, from what they had heard and read, formed the opinion that the defendant was guilty, but that they could disabuse their minds of such opinion and go in the jury box and give the defendant a fair and impartial trial upon the evidence produced.

The court, after hearing the testimony, in each case found that the venireman was a fair and competent juror, and permitted him to become one of the panel. The finding that a juror is a fair one, though he has formed and expressed an opinion, is a matter in the discretion of the trial judge and is not reviewable on appeal. *S. v. Banner,* 149 N. C., 520, and cases there cited. These assignments cannot be sustained.

This group of assignments is likewise untenable for the further reason that it appears from the record that after the court had refused to allow the defendant's challenge for cause of the last of the veniremen who said he had formed an opinion as to the defendant's guilt, and after the defendant had made his last challenge for cause, he still had remaining seven peremptory challenges. It is well settled that the defendant cannot object to the acceptance of a juror, so long as he has not exhausted his peremptory challenges before the panel is completed. *S. v. English,* 164 N. C., 498, and cases there cited.

The second group of assignments of error relate to the court's refusal to sustain the defendant's objection to the special venire. The defendant in his brief treats this objection and motion based thereon as a challenge to the array.

"Challenges to the array are at once an exception to the whole panel, in which the jury are arrayed or set in order by the sheriff in his return; and they may be made upon account of partiality or some default in the sheriff or his under-officer who arrayed the panel." 3 Blackstone Comm., 359. ". . . a challenge to the array can only be taken when there is partiality or misconduct in the sheriff, or some irregularity in making out the list." *S. v. Speaks,* 94 N. C., 865 (873); *S. v. Levy,* 187 N. C., 581. It appears in the record that when the objection was first lodged the court inquired of defendant's counsel if they had any evidence upon which to base their objection to the special venire "on the grounds of irregularity in making out the list and partiality or misconduct on the part of the sheriff in selecting the jurors," and the said counsel answered, "No, sir." It also appears in the record that "The court, at the time the motion was made, offered to permit the defendant's counsel to offer any evidence of partiality or misconduct of the sheriff," and that "Defendant's counsel states in open court that he has no evidence."

Notwithstanding the foregoing statements by defendant's counsel, they offered the sheriff and his two deputies who summoned the special venire who testified substantially that the deputies were instructed by the

sheriff "to go out and select men that had not been on the jury within the past two years, freeholders, and men of good character," and "to get them from townships other than 3-5-12, because they bordered on No. 4, where the crime was committed," and that such instruction was carried out in summoning the jury. The writ of *venire facias* is in compliance with C. S., 2338, and reads: "Now, therefore, you are commanded to summon a such number of persons qualified to act as jurors from the body of said county . . ." The elimination of those who had served on a jury in two years, non-freeholders, men not of good character, and those living in the vicinity of where the crime was alleged to have been committed, showed no partiality or misconduct on the part of the sheriff, or irregularity in making out the list, and indicated a compliance with the writ to summon "persons qualified to act as jurors." Those who were eliminated from the list by instruction of the sheriff were either subject to challenge for cause, or likely so to be, and the venire as far as possible should consist of men qualified to serve, and to encumber it with those subject to challenge for cause would restrict the number of *legales homines* from whom the jury was to be taken. The very object of a special venire is to get a body of men less liable to challenge for cause. *S. v. Cody,* 119 N. C., 908. There was no error in disallowing the challenge to the array.

The third group of assignments of error relate to testimony relative to confessions made orally and in writing by the defendant, when defendant had not been warned that anything he said or admitted would be used against him.

In *S. v. Grier,* 203 N. C., 586, it is written: "This argument raises the question whether a confession of crime must be rejected unless it appears from the evidence that the person charged is informed at the time that he is at liberty to refuse to answer any question and that his refusal to answer shall not be used to his prejudice. Such information must be given to a prisoner who is examined by a magistrate in relation to the offense charged. C. S., 4561. This caution is essential to the examination at the hearing after arrest because the proceeding is judicial and after the examination of the complainant and his witnesses 'the magistrate shall then proceed to examine the prisoner,' but not on oath. This warning is not required in an extra-judicial conference between an officer and a person charged with crime who is under no constraint to answer. *S. v. Conrad,* 95 N. C., 666; *S. v. Howard,* 92 N. C., 772; *S. v. Suggs,* 89 N. C., 527." Neither the oral confessions mentioned in the testimony nor the written admissions introduced in evidence were obtained at a judicial hearing before a magistrate, but were freely and voluntarily made and signed before witnesses, without any promise of

reward or threat of violence as an inducement. There was no error in overruling these assignments of error.

The fourth group of assignments of error relate to the fact that the court in its instructions excluded from the jury any and all consideration of the charge of manslaughter, and restricted their deliberations to the questions of murder in the first and second degrees and acquittal. In this there was no error. The evidence discloses no evidence upon which a verdict of manslaughter could have been rendered.

The defendant's written confession is to the effect that he and his wife, the deceased, had a fight about 10 or 10:30 o'clock p.m., that she then lay on the bed, and that he got the axe about 2 o'clock a.m., and struck her over the head with it, that he had determined to kill her about an hour before he actually struck her with the axe, but as he was going to leave as soon as he killed her he waited because it was raining and he did not want to go out in the wet. There was no evidence that his reason was dethroned by sudden passion caused by provocation at the time the fatal blow was stricken. *S. v. White,* 138 N. C., 704, and cases there cited; *S. v. Levy, supra.*

We have given to this case the careful consideration that its gravity demands and we find in the trial

No error.

A. J. BRADSHAW, PETITIONER, v. WILLARD WARREN AND WIFE, MARY WARREN, RESPONDENTS.

(Filed 19 April, 1939.)

1. Boundaries § 1—Instruction in this processioning proceedings held erroneous in failing to sufficiently state the evidence and explain law arising thereon.

The parties to this processioning proceedings owned adjoining lots in a subdivision and their deeds made identical references to a registered survey and blueprint of the subdivision. The front of the lots constituted a straight line and petitioner contended that the dividing line between the lots should be at right angles to the front line as shown by the registered blueprint; although the course called for in the deeds did not make a right angle and the course described in the registered blueprint did not agree with the course in the deeds or the line as drawn. There was some evidence of an actual survey upon the land and the setting out of markers at the time respondents purchased their lot. *Held:* The court should have instructed the jury as to the establishment of the corner by configuration of the actual lines of the lots in question and those adjacent thereto as shown by the map; the relative importance of the different elements of the descriptions in the deeds; and the actual corners placed upon the land at the time respondents purchased their lot if sustained by the

evidence; and an instruction merely giving the respective lines on the map as contended for by the parties and explaining the effect of the adoption of one or the other of them is insufficient, C. S., 564.

2. Pleadings § 23—

Where new trial is awarded on appeal, a motion to be allowed to amend is more properly made in the trial court after the certification of the opinion, rather than in the Supreme Court.

3. Same—

A motion to be allowed to amend is addressed to the discretion of the trial court, but such discretion should be liberally exercised in aid of justice.

APPEAL by petitioner from *Warlick, J.*, at January Special Term, 1939, of CALDWELL. New trial.

Townsend & Townsend for petitioner, appellant.
G. W. Klutz and R. L. Huffman for respondents, appellees.

SEAWELL, J. This was a processioning proceedings brought by A. J. Bradshaw against Willard Warren and wife, Mary Warren, to determine the location of the dividing line between their respective properties.

The litigant parties owned adjoining lots in a real estate development lying upon the highway between Lenoir and Blowing Rock. It is conceded that the line on the highway bounding the development and the lots of the litigants is a straight line running north 10½ degrees west. The petitioner contends that the true dividing line makes a right angle with this boundary, although the call in his deed and *mesne* conveyances is mistakenly marked on the map "North 89½ degrees West." The respondents contend that the true line must be located on the ground in accordance with the course named in the deeds.

The description in petitioner's deed carries forward the descriptions from the *mesne* conveyances referred to, a significant portion of which is: "Being Lot No. 2, as shown on the plat of the L. E. Dimette and S. S. Jennings subdivision, said plat being made by M. M. Williams, Civil Engineer, on March 10, 1926, and registered in the office of the Register of Deeds for Caldwell County, North Carolina, in Book of Plats No. 1, at page 47, to which plat and the record thereof reference is hereby made for a more definite description."

The respondents' land is described as: "Being Lot No. 1 of the lands of S. S. Jennings and L. E. Dimette, as shown on plat made by M. M. Williams, Civil Engineer, on March 10, 1936, which plat is of record in the office of the Register of Deeds of Caldwell County, North Carolina, in Plat Book No. 1, and page 47, reference being hereby made to the said plat and the record thereof for greater certainty of description."

The parties, therefore, claim by similar descriptions. There are further references by way of description, which at this time do not aid us, since the deeds to which they refer are not in evidence.

The configuration of the lines, as shown on the plat to which reference is made in the deeds, shows the line in question, as well as other lines dividing the lots in the development, at a 90 degree angle to the eastern boundary referred to, bordering both lots on the highway. The stated course of this line, however, as marked on the map (blueprint), is "South 89½ degrees East," which would be an incorrect notation if the shape of the lots, as indicated in the plat, is to be consulted.

There was some evidence in the case that at the time of the purchase of Lot No. 1 by respondents there were markers of an actual survey upon the land, that is, an iron stake at the highway and at the other end of the line. The evidence is not clear as to where this was. There was other evidence of actual survey on the ground when the subdivision was mapped.

The petitioner complains that the charge of the court was insufficient as a statement of the evidence and the application of the law thereto required by C. S., 564, and we think there is merit in his exception.

Beyond instructing the jury substantially that it was their duty, under the evidence, to decide which of the two suggested lines—the one in black representing the petitioner's contention and the one in red representing the respondents' contention—was the true line and explaining the effect upon the several properties which would be caused by the adoption of one or the other, or the shifting of the lines, there is little in the charge to enable the jury to pass upon the evidence in the light of the law.

There are a number of elements to be considered on the question of the true location of the dividing line beside that of the course marked on the map, amongst them the actual configuration of the blueprint referred to in the several deeds showing lines running at right angles from the highway, and the substantive evidence which this affords of the true location; the distances of the lines set down in the map and their relation to each other; the comparative importance which the law attaches to the different elements of description in deeds, and their interrelation; and the actual marks of the survey upon the ground, according to which the land may have been purchased, should the evidence be susceptible to such inference.

For example, another straight line is shown upon the map bounding respondents' lot and running from the highway south 59½ degrees east 340 feet to this dividing line and continuing in the same direction 149 feet thence to a stake on the bank of Briars Fork Creek. This lot is a triangle, and the other sides of it measure respectively 200 feet and 275 feet. This is some evidence bearing upon the issue as tending to show,

by mathematical calculation, where the true corner of respondents' lot is located in the line referred to and as fixing the location of the dividing line, and as to whether the dividing line, according to such calculation, makes a right angle with the highway.

The examination of the court surveyor discloses other conditions in the plat (and possible discrepancies), which is referred to for the purpose of more certain description in the deeds of both petitioner and the respondents, which have a bearing on the location of the line. Witnesses testified as to lines actually run upon the ground when the original survey of the development was made. All these were subjects of proper and, we think, necessary instruction as to the law involved.

It is not our purpose now to suggest what instructions might be given to the jury on the evidence as it may be presented on a new trial, since we are not considering the subject of erroneous instructions but the absence of sufficient instructions.

The petitioner moved in this Court to be allowed to amend his petition. Such a motion would be made more properly in the court below, to which the case is sent back for a new trial. While such a motion is ordinarily in the discretion of the trial court, that discretion should be liberally used in aid of justice.

There must be a

New trial.

THE NORTH CAROLINA JOINT STOCK LAND BANK OF DURHAM v. W. H. MOSS AND R. G. MOSS.

(Filed 19 April, 1939.)

1. Mortgages § 39a—

Where a deed of trust is foreclosed prior to the time the power of sale becomes absolute the sale is voidable, but only the trustors can assert the right to have the deed from the trustees declared void.

2. Mortgages § 39c: Estoppel § 1—Trustors held estopped by their subsequent deeds from attacking foreclosure.

Husband and wife executed mortgage on lands owned by him in fee. The mortgage was foreclosed prior to the time the power of sale therein became absolute, and the land was purchased at the foreclosure sale by the wife. Thereafter the husband joined with his wife in executing a deed of trust upon the lands with full covenants of title. *Held:* The wife by accepting deed as purchaser at the foreclosure sale of the mortgage, and the husband in joining in executing the deed of trust with full covenants of title are estopped from attacking the validity of the mortgage foreclosure, and the purchaser at the foreclosure sale of the deed of trust regularly had, obtains title which he may convey free from any claims arising from irregularity of the foreclosure of the mortgage.

3. Estoppel § 1: Estates § 4—Mortgagee later obtaining title in fee to one-third undivided interest held estopped by his deed to the purchaser at the foreclosure sale from asserting title to the undivided interest.

Husband and wife executed a mortgage on the *locus in quo* and on the same day executed a deed in fee to the mortgagee for a one-third undivided interest in the property upon consideration *inter alia* of the mortgagee's assumption of one-third of the debt, thereafter the mortgagee foreclosed the instrument under the power of sale and executed deed to the purchaser in fee. *Held:* The interest conveyed by the mortgage, in so far as it affected the one-third interest in the property, was not merged in the fee conveyed by the deed to such one-third interest so as to prevent the purchaser at the foreclosure sale of the mortgage from obtaining the fee in the entire lands, since a merger of estates does not obtain when it would be inimical to the interest of the owner, and since the mortgagee is estopped by his deed to the purchaser at the foreclosure sale from asserting any interest in the land.

APPEAL by defendants from *Harris, J.*, at March Term, 1939, of WAKE. Affirmed.

J. S. Patterson and W. G. Mordecai for plaintiff, appellee.
Jones & Brassfield for defendants, appellants.

SCHENCK, J. This is an action for specific performance of a contract to purchase real estate heard upon an agreed statement of facts.

The determinative facts are substantially as follows: (1) The defendants agreed to purchase from the plaintiff the two tracts of land described in the complaint for the price and upon the terms alleged; the plaintiff tendered the defendants deed sufficient in form to convey a fee simple title to the *locus in quo* and demanded compliance with the contract of purchase by payment of cash and delivery of purchase price notes and deed of trust in accord with the said contract, and defendants refused to comply therewith for the alleged reason that plaintiff's title was defective and its deed tendered would not convey to them a fee simple title. (2) The plaintiff derived title from a foreclosure deed from the receivers of the First National Company (formerly the National Trust Company), said receivers having foreclosed a deed of trust on the *locus in quo* executed by L. M. Gould and Mary W. Gould to the National Trust Company, Trustee, dated 15 January, 1925. (3) Mary W. Gould derived title from a foreclosure deed from M. S. Chamblee, mortgagee, dated 12 July, 1922, said Chamblee having foreclosed a mortgage to him on the *locus in quo* executed by L. M. Gould and wife, Mary W. Gould. (4) The mortgage from L. M. Gould and Mary W. Gould to M. S. Chamblee was dated 5 October, 1920, and secured principal and interest payable five years after date. (5) On 5 October,

1920, the same day they executed the mortgage to M. S. Chamblee, L. M. Gould and wife, Mary W. Gould, executed and delivered a deed to said Chamblee for an undivided one-third interest in the *locus in quo,* the consideration mentioned in said deed being, *inter alia,* the assumption of one-third of the debt secured by the mortgage of even date from said Gould and wife to said Chamblee. (6) On and prior to 5 October, 1920, L. M. Gould owned a fee simple title to the *locus in quo.*

It is the contention of the defendants that Mary W. Gould at the time she executed the deed of trust to the National Trust Company, 15 January, 1925, did not have a fee simple title to the *locus in quo* for two reasons: First, because the foreclosure deed to her by M. S. Chamblee, mortgagee, was made before the expiration of the five years fixed in the mortgage for the power of sale to become absolute; and second, if the court should be of a contrary opinion as to the first reason assigned, by the delivery of the deed for an undivided one-third interest in the *locus in quo* from L. M. Gould and Mary W. Gould to M. S. Chamblee on 5 October, 1920, the mortgage of the same date from said Gould and wife to said Chamblee, so far as it affected an undivided one-third interest in the *locus in quo,* was merged in the deed, and when the mortgage was foreclosed only a two-thirds undivided interest was sold, and the purchaser, Mary W. Gould, acquired title to only a two-thirds undivided interest, and thereby became a tenant in common with M. S. Chamblee, the owner of the other one-third undivided interest, and, therefore, the deed of trust from L. M. Gould and Mary W. Gould to the National Trust Company conveyed only an undivided two-thirds interest in the *locus in quo,* and that when the plaintiff purchased at a foreclosure of this last named deed of trust it only acquired a two-thirds undivided interest in the *locus in quo,* and could only convey such interest to the defendants.

It is the contention of the plaintiff that while the mortgage from L. M. Gould and Mary W. Gould to M. S. Chamblee, dated 5 October, 1920, recites it secures principal and interest payable five years after date, and the deed from Chamblee, mortgagee, to Mary W. Gould is dated 12 July, 1922, the deed at most is rendered only voidable at the option of the mortgagors, and that the mortgagors are estopped to deny the validity of the foreclosure deed by their action in accepting the deed made pursuant to the foreclosure, and subsequently making a deed of trust wherein they warranted their title to the *locus in quo.*

It is further contended by the plaintiff that by the execution and delivery of the foreclosure deed by M. S. Chamblee, trustee, to Mary W. Gould, purporting to convey the entire interest in the *locus in quo,* Chamblee is estopped to assert any claim to title to an undivided one-third interest therein.

With the first reason assigned by the defendants for declaring the title of Mary W. Gould void we cannot concur. While it has been held that a deed given pursuant to a foreclosure held prior to the time that the power of sale in the deed of trust became absolute was voidable at the behest of the trustor, and that "a court of equity will never decree a foreclosure until the period limited for payment of the money is passed," *Hinton v. Jones,* 136 N. C., 53, where a foreclosure has been so held and a deed given pursuant thereto the only party aggrieved thereby is the trustor, and he alone can assert the right to have such deed declared void. The trustors in the instant case were L. M. Gould and his wife, Mary W. Gould. Mary W. Gould accepted a deed executed and delivered pursuant to the foreclosure, and she and her husband subsequently executed and delivered a deed of trust to the National Trust Company wherein they warranted their title to the *locus in quo.* The reception of the foreclosure deed estops Mary W. Gould from assailing such deed, and the subsequent execution and delivery of a deed of trust, with covenants warranting their title, by L. M. Gould and Mary W. Gould estops both of them from assailing the foreclosure and the deed made pursuant thereto. "Recitals in a deed are estoppels when they are of the essence of the contract; that is, where, unless the facts recited exist, the contract, it is presumed, would not have been made." *Brinegar v. Chaffin,* 14 N. C., 108.

With the contention of the defendants that Mary W. Gould was a tenant in common in the *locus in quo* with M. S. Chamblee at the time she and her husband delivered the deed of trust to the National Trust Company we cannot concur. While it is the general rule that when one who holds a mortgage on real estate becomes the owner of the fee, the two estates are thus united in the same person, and ordinarily the former estate merges in the latter, this rule does not apply where the merger would be inimical to the interest of the owner. *Furniture Co. v. Potter,* 188 N. C., 145. We are of the opinion, and so hold, that M. S. Chamblee is estopped by his action in executing and delivering the deed to Mary W. Gould for the entire interest in the *locus in quo* from asserting title to a one-third undivided interest therein. ". . . it is familiar learning that the grantor will not, as against his grantee, be heard to aver anything contrary to it (his deed)." *Hutton v. Cook,* 173 N. C., 496; *Walker v. Taylor,* 144 N. C., 175.

The judgment below is

Affirmed.

JOHN L. DAVIS v. JOHN WHITE MOORE, NATIONAL SURETY CORPORATION OF NEW YORK, CARL BAILEY, EPH PRIVETTE, CHARLIE GILBERT AND R. H. WEBER.

(Filed 19 April, 1939.)

1. Sheriffs § 6c—Evidence that deputy negligently injured prisoner held sufficient for jury.

The evidence tended to show that plaintiff prisoner was in a cell with the door partly open talking to the deputy sheriff in charge of the jail, that the deputy started to close the cell door, that plaintiff's thumb had inadvertently been placed in the door jamb, that plaintiff pushed against the door to release his thumb and told the deputy "Let up, . . . you are cutting my hand off," that thereupon the deputy put his shoulder to the door and pushed it closed, cutting plaintiff's thumb off. *Held:* The evidence, considered in the light most favorable to the plaintiff, is sufficient to be submitted to the jury on the issue of the deputy's negligent injury of plaintiff, and as to the deputy the judgment as of nonsuit, entered in the trial court, is erroneous, C. S., 4407, but the evidence fails to show liability on the part of other deputies of the sheriff, and as to them the judgment as of nonsuit is without error.

2. Sheriffs § 6b—Evidence held sufficient for jury on issue of sheriff's liability for negligent act of deputy.

Where the evidence is sufficient to be submitted to the jury as to the negligence of a deputy in charge of a jail in causing injury to a prisoner in closing the cell door on the prisoner's thumb, it is sufficient to be submitted to the jury as to the liability of the sheriff, since the act of the deputy is within the scope of his authority and in the line of his duty, and the liability of the sheriff for acts of his deputy is governed by the law applicable to the law of principal and agent. C. S., 3944.

3. Principal and Surety § 5a—

Where, in an action against the surety on a sheriff's bond, the bond does not appear in the record it will be presumed that the obligation of the bond conforms to the terms prescribed by the statute. C. S., 3930.

4. Same—Sheriff's bond held not to cover negligent acts committed in incarcerating prisoner.

The liability of the surety on the bond of a public officer is limited by the terms of the bond, and the condition of the bond of a sheriff for the "faithful execution of his office" refers to the specific condition for the "due execution and return of process" and the terms of the statutory bond do not impose liability on the surety for the negligent act of a deputy unconnected with the execution and return of process, C. S., 3930, and the surety's motion to nonsuit is properly granted in a prisoner's action to recover for negligent injury inflicted by a deputy while he was in jail.

APPEAL by plaintiff from *Armstrong, J.*, at September Term, 1938, of ROWAN.

As to defendant National Surety Corporation, and defendants Privette, Gilbert and Weber: Affirmed.

As to defendants Moore and Bailey: Reversed.

Action for damages for personal injury in the loss of a thumb, for which it is alleged the sheriff of Iredell County, the surety on his official bond, and four of the sheriff's deputies are liable. From judgment of nonsuit as to all defendants, plaintiff appealed.

J. F. Flowers and Hudson & Hudson for plaintiff.

Lewis & Lewis, Charlie Price, and John R. McLaughlin for defendants.

DEVIN, J. The only question presented by this appeal is whether judgment of nonsuit was properly entered at the close of plaintiff's evidence.

Plaintiff testified that he was arrested and placed in the Iredell County jail on the charge of assaulting his wife, and that he was inside a cell with the door partly open and talking to defendant Bailey, the jailer and deputy sheriff, when the injury complained of occurred. He described the circumstances as follows: "I had both hands extended, fingers up, resting easily against the bars of the jail, in a natural position. When Mr. Bailey finished with his conversation he closed the door, but my right thumb at that moment had inadvertently slipped into the crack where the back of the metal door hinges, and as my thumb was caught I shoved my left leg and left hand out to the front where the door closes, next to Mr. Bailey, and said, 'Let up, Carl, you are cutting my hand off.' Instead of opening the door and looking inside to investigate, he threw his shoulder against the door, and then is when my thumb came off."

Plaintiff also testified that defendants Gilbert and Weber were deputy sheriffs of Iredell County. It was admitted that defendant Moore was the sheriff of Iredell County, and that the defendant National Surety Corporation was surety on the sheriff's official bond.

It is apparent that the evidence, considered in the light most favorable for the plaintiff, is sufficient to warrant its submission to the jury as to the defendant Bailey, and that as to him the motion for judgment of nonsuit was improperly allowed. C. S., 4407. It is also apparent that there is no evidence upon which liability on the part of defendants Privette, Gilbert and Weber can be predicated, and that as to them the judgment of nonsuit was properly entered.

Two other questions remain for decision: (1) Is evidence of negligent injury inflicted on plaintiff by the jailer and deputy sheriff sufficient to impute liability to the defendant Moore, the sheriff of the county? (2) If there is evidence of liability on the part of the sheriff, is the surety on his official bond obligated therefor?

The liability of the sheriff for the acts of his deputy is governed by the law applicable to the relation of principal and agent. *Hanie v. Penland,* 194 N. C., 234, 139 S. E., 380; *Lanier v. Greenville,* 174 N. C., 311, 93 S. E., 850. It was said in *S. v. Roane,* 24 N. C., 144: "As a general rule, he (the sheriff) is liable for the act or omission of his deputy as for his own." *Lyle v. Wilson,* 26 N. C., 226. By statute the sheriff has the care and custody of the jail in his county and appoints the keeper. C. S., 3944. In this case there was evidence tending to show that defendant Bailey, in closing the door of the cell wherein the plaintiff was incarcerated, negligently caused the injury to plaintiff's thumb. The act complained of was done by Bailey while acting within the scope of his authority and in the line of his duty as deputy sheriff in charge of the jail. In *R. R. v. Fisher,* 109 N. C., 1, 13 S. E., 698, this Court said: "A sheriff is liable to answer in damages for any wrongful act of his deputy, done under color of his office, for which the sheriff would have incurred such liability had he done the act himself; and in all such cases he and his deputy are, in contemplation of law, one person." To the same effect is the holding in *Sutton v. Williams,* 199 N. C., 546, 155 S. E., 160; *Styers v. Forsyth County,* 212 N. C., 558 (562), 194 S. E., 305; *Somers v. Commissioners,* 123 N. C., 582, 31 S. E., 873; *Piland v. Taylor,* 113 N. C., 1, 18 S. E., 70; *S. v. Long,* 30 N. C., 415; 57 C. J., 797.

Under the evidence in this case, therefore, it must be held that testimony sufficient to warrant submission of the case to the jury as to defendant Bailey, the deputy sheriff in charge of the jail, would also carry the case to the jury as to defendant Moore, the sheriff, and that as to him also judgment of nonsuit was improperly entered.

However, it does not follow that evidence of liability on the part of the sheriff necessarily involves the surety on his bond. It was said in *Sutton v. Williams, supra:* "An officer may be liable personally although not liable on his bond." The liability of the surety is limited by the terms of the bond. In this case the bond does not appear in the record, but it is admitted that defendant executed the sheriff's process bond of defendant Moore and it is presumed that the obligation of the bond conformed to the terms prescribed by C. S., 3930. The statute provides that the sheriff shall execute a bond payable to the State of North Carolina conditioned for "the due execution and return of process . . . and the faithful execution of his office as sheriff." The terms of the statutory bond do not impose liability for the negligent act of a deputy unconnected with the execution and return of process.

In *Crumpler v. Governor,* 12 N. C., 52, it was held that the words of general obligation in a sheriff's bond, "for the faithful performance of the duty of sheriff," when added to the specific obligation in the bond with respect to process, "can only be construed in subservience to the

specific object which the bond is designed to secure." The same view is expressed in *S. v. Long, supra; S. v. Brown,* 33 N. C., 141; and *Prince v. McNeill,* 77 N. C., 398, and these cases are cited with approval in *Sutton v. Williams,* 199 N. C., 546.

It was held in *Sutton v. Williams, supra,* that the sheriff's statutory bond did not cover liability to others for injury resulting from negligence in permitting an escape, and that the phrase in the bond in that case "performing the duties incumbent upon him by reason of his election as sheriff" meant the duties incumbent upon him in the execution of his office. Said *Adams, J.,* speaking for the Court in that case: "It (the bond) does not impose on the surety an obligation that the sheriff shall do no wrong and should in all respects observe the law." *Eaton v. Kelly,* 72 N. C., 110, and *Holt v. McLean,* 75 N. C., 347, are cited in support of the decision in that case. See, also, 24 R. C. L., 969.

In *State of North Carolina ex rel. Wimmer v. Leonard,* 68 F. (2nd), 228, where recovery against the surety on the sheriff's bond was sought for an injury to the relator when shot and wounded by the sheriff, it was held that the decision in *Sutton v. Williams, supra,* was controlling and precluded recovery against the surety under the general terms contained in the sheriff's process bond.

We think the trial judge in the case at bar correctly ruled that the evidence was insufficient to import liability upon the defendant surety corporation.

For the reasons stated the judgment of nonsuit as to defendant National Surety Corporation, and defendants Privette, Gilbert and Weber is affirmed, and the judgment of nonsuit as to defendants Moore and Bailey is reversed.

As to defendant National Surety Corporation, and defendants Privette, Gilbert and Weber:

Affirmed.

As to defendants Moore and Bailey:

Reversed.

I. J. SPARROW v. JOHN MORRELL & COMPANY.

(Filed 19 April, 1939.)

1. Money Received § 3—Allegations held sufficient to state cause of action for money received.

Plaintiff's allegations were to the effect that defendant's agent represented that plaintiff owed a certain sum on an open account, when in fact no amount was due thereon, and that plaintiff paid said amount through fraud, inadvertence or mistake and that said amount in law and

good conscience should be refunded to him. *Held:* The allegations are sufficient to state a cause of action for the recovery of money paid under a mistake of fact, and defendant's motion of nonsuit is erroneously granted notwithstanding the absence of allegations sufficient to support a cause of action for fraud.

2. Pleadings § 15—

Demurrer to a complaint on the ground that it fails to state a cause of action should be overruled if the complaint liberally construed alleges facts sufficient to constitute a cause of action or if facts sufficient for the purpose can be gathered from it.

APPEAL by plaintiff from *Grady, J.*, at October Term, 1938, of LENOIR. Reversed.

John G. Dawson and J. A. Jones for plaintiff, appellant.
Wallace & White and L. I. Rubin for defendant, appellee.

SCHENCK, J. This is an action to recover money alleged to have been overpaid by plaintiff to defendant on a running account for merchandise sold and delivered.

The complaint alleges that the plaintiff, a merchant, "had a number of transactions with the defendant, through which transactions he purchased merchandise, chiefly meats, from the defendant, . . ." and "by said transactions of purchase and payments therefor, this plaintiff paid unto the defendant the sum of $2,925.74 in excess of the amount purchased from the defendant, and, therefore, in excess of the indebtedness of this plaintiff to the defendant," that defendant, through its agent, represented to the plaintiff that "said sum of $2,925.74 was due by the plaintiff to the defendant on account of goods and merchandise purchased by the plaintiff from the defendant, which said statements and representations . . . were false and inaccurate, and said statements . . . were either made through inadvertence and mistake on the part of the said defendant . . . or with the fraudulent design and purpose on the part of the said defendant to obtain from this plaintiff the said sum of $2,925.74 . . . when in truth and in fact the said amount was in excess of all amounts rightfully due to the defendant by the plaintiff . . . ; that said amount so paid either through fraud or mistake should in law and in good conscience be refunded to him by the said defendant and that the said defendant should not be permitted in law or equity to take advantage of either its fraud, mistake or inadvertence in the collecting and receiving from the plaintiff of funds to which it was not rightfully entitled;" and that demand has been made by plaintiff upon the defendant for the payment of "said sum so overpaid," which demand has been refused.

The defendant filed a demurrer to the complaint upon the ground that it failed to state facts sufficient to constitute a cause of action, for that it did not set forth the facts constituting the fraud therein alleged. The court sustained the demurrer and entered judgment dismissing the action, from which judgment the plaintiff appealed, assigning error.

We are of opinion, and so hold, that his Honor erred in sustaining the demurrer, since the complaint alleges payments to the amount of $2,925.74 over all amounts due by the plaintiff to the defendant by reason of mistake of facts, namely, a mistake as to the amounts due when payments were made.

A payment made under a mistake of fact may be recovered. *Simms v. Vick,* 151 N. C., 78, and cases therein cited. ". . . it is clear that the money was paid and received in discharge of a debt then believed to subsist. In that there was a total mistake on the part of the person making the payment, and, probably, on that of the receiver also, and it is plain that the money thus got under a mistake, and for no consideration, cannot be kept *ex equo et bono.*" *Pool v. Allen,* 29 N. C., 120. "An action to recover money paid under 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." *Morgan v. Spruill,* 214 N. C., 255.

If the complaint in any portion thereof or to any extent presents facts sufficient to constitute a cause of action, or if facts sufficient for that purpose can be fairly gathered from it, the pleading will stand, for, contrary to the common law rule, every reasonable intendment and presumption must be made in favor of the pleader. The complaint must be fatally defective before it will be rejected as insufficient. *Hoke v. Glenn,* 167 N. C., 594.

Reversed.

R. O. ABERNETHY v. C. T. MORRISON ET AL.

(Filed 19 April, 1939.)

Process § 15—Evidence held insufficient to show misapplication of process of the court.

Evidence tending to show that defendant's appeal from conviction in the municipal court to the Superior Court was continued five times extending over a period of twenty-two months, allegedly at the instance of the private prosecutor, and was finally "*nol. prossed*" with leave, *is held* insufficient to sustain an action for abuse of process against the private prosecutor, since it appears that the jurisdiction of the Superior Court

was invoked by plaintiff and that the control of the appeal after it was docketed passed to the solicitor, and the continuances were ordered by the court, and since it does not appear that the continuances were ordered without the consent of the plaintiff.

APPEAL by defendants from *Warlick, J.*, at September Term, 1938, of CATAWBA.

Civil action to recover damages for alleged (1) malicious prosecution, (2) abuse of process, (3) trespass, and (4) wrongful conversion.

The (1), (3) and (4) causes of action were dismissed as in case of nonsuit, from which no appeal has been taken.

The (2) cause of action, or the one alleging abuse of process, was tried before a jury, and resulted in verdict and judgment for the plaintiff, the damages being assessed at $325.00.

The evidence tending to show alleged abuse of process follows: On 14 August, 1929, the plaintiff was tried and convicted in the Hickory municipal court on three warrants, one charging an assault and two alleging trespass, including the one which forms the basis of the present action. Judgment was suspended in the assault case; and a fine of $25.00 and costs was imposed in each of the trespass cases. Appeals to the Superior Court were taken in all three cases. They were continued from term to term until the July Term, 1930, when the assault case was tried, resulting in a conviction, and the verdict was set aside on motion. All three cases were then continued from term to term until the February Term, 1931, when the assault case was *"nol. prossed"* with leave, and the two trespass cases were again continued. At the July Term, 1931, the trespass cases were *"nol. prossed"* with leave. The continuances from term to term over a period of 22 months, allegedly at the instance of the defendants, is the gravamen of plaintiff's complaint on the charge of abuse of process.

From an adverse verdict and judgment thereon, the defendants appeal, assigning as error the refusal of the court to sustain their motion for judgment as in case of nonsuit.

W. A. Self and G. A. Warlick, Jr., for plaintiff, appellee.

Thomas P. Pruitt, D. M. McComb, Jr., and J. L. Murphy for defendants, appellants.

STACY, C. J. The question for decision is whether five continuances of a criminal prosecution, procured at the instance of the private prosecutor and extending over a period of 22 months, is evidence of abuse of process. On the facts of the present record, we think the question must be answered in the negative.

In the first place, the jurisdiction of the Superior Court was invoked by the plaintiff. His appeal was from a fine of $25 and the costs. The control of the appeal, when docketed, passed to the solicitor of the district and the judge presiding over the Superior Courts. The continuances were ordered by the court. *Abernethy v. Burns*, 206 N. C., 370, 173 S. E., 899.

Secondly, it does not appear that the continuances were ordered without the consent of the plaintiff. He was interested in more than one case. It was his privilege to insist upon trial, which he failed to do so far as the record discloses. At any rate, we think the evidence is wanting in sufficiency to establish liability for abuse of process on the part of the defendants. *Klander v. West*, 205 N. C., 524, 171 S. E., 651; *Martin v. Motor Co.*, 201 N. C., 641, 161 S. E., 77.

The perverted use of process is the gist of an action for its abuse. *Ledford v. Smith*, 212 N. C., 447, 193 S. E., 722; *Abernethy v. Burns*, 210 N. C., 636, 188 S. E., 97; *Griffin v. Baker*, 192 N. C., 297, 134 S. E., 651; *Stanford v. Grocery Co.*, 143 N. C., 419, 55 S. E., 815. The record discloses no actionable perversion or misapplication of the court's process on the part of the defendants. *Martin v. Motor Co., supra.*

Reversed.

M. D. TEW v. LEONA HINSON, ADMINISTRATRIX OF LULA LEE, DECEASED.

(Filed 19 April, 1939.)

Limitation of Actions § 3b—Facts held insufficient to establish mutual, open, and current accounts, and statute began to run from date of each item.

Plaintiff instituted this action against the administratrix of deceased to recover for services rendered deceased, and it appeared that plaintiff alone kept the account of charges for such services and that he entered thereon from time to time credits for rent for decedent's land. *Held:* The facts are insufficient to establish mutual, open, and current accounts, C. S., 421, and the statute of limitations began to run against plaintiff's claims from the date of each item, but the judgment of the lower court is modified to include an item which was not denied, for taxes paid within three years prior to the death of deceased.

APPEAL by plaintiff from *Grady, J.*, at September Term, 1938, of SAMPSON. Modified and affirmed.

Plaintiff instituted his action to recover for services rendered defendant's intestate, Lula Lee. Plaintiff filed a statement of account showing amounts charged for his services from 1924 to 1932, and for

amounts expended by him for taxes, and on this statement he credited defendant with rent of decedent's land at the rate of $80.00 per annum up to and including the year 1936. Lula Lee died March, 1936.

Defendant pleaded the statute of limitations as to plaintiff's action, and also set up counterclaim for rent of land and for waste alleged to have been committed thereon by the plaintiff.

The court below ruled that all items charged on plaintiff's account which did not accrue within three years of the death of defendant's intestate were barred by the statute of limitations, and instructed the jury that the only item not barred was $3.20 paid by plaintiff for premiums on the burial association policy of decedent. The court also held, and so charged the jury, that defendant was entitled to recover of plaintiff rent of the land for three years at the admitted rate of $80.00 per annum. It also appeared on plaintiff's account that he had paid taxes on the land in October, 1933, in the sum of $21.70. This was not denied.

The jury answered the issues in conformity with the rulings of the court, and from judgment limiting plaintiff's recovery to $3.20, and allowing defendant judgment against the plaintiff for $240.00, the plaintiff appealed.

Butler & Butler for plaintiff.
P. D. Herring for defendant.

DEVIN, J. The appellant assigns as error the ruling of the court below that all the items in his account except one were barred by the statute of limitations. It was admitted that the services for which claim was made were rendered, and all taxes (except one item) were paid, more than three years before the death of the intestate, but plaintiff contends that this was a mutual, open and current account between him and decedent, and that by virtue of C. S., 421, the cause of action accrued only from the last item on the account, which was a credit for rent within the three years' period. The evidence, however, shows that plaintiff alone kept an account of his charges against the decedent for services rendered, and that he entered thereon from time to time credits for rent of land. These facts are insufficient to invoke the rule as to mutual, open and current accounts, or to prevent the running of the statute from the date of each item. *Supply Co. v. Banks,* 205 N. C., 343, 171 S. E., 358; *Phillips v. Penland,* 196 N. C., 425, 147 S. E., 731; *Brock v. Franck,* 194 N. C., 346, 139 S. E., 696; *McKinnie v. Wester,* 188 N. C., 514, 125 S. E., 1; *Wood v. Wood,* 186 N. C., 559, 120 S. E., 194; *Hollingsworth v. Allen,* 176 N. C., 629, 97 S. E., 625.

The court instructed the jury that the only item on plaintiff's claim not barred was one of $3.20. However, it appears that there was another item of $21.70 for taxes paid in October, 1933. This not being denied should have been allowed plaintiff.

The judgment must be modified to add to plaintiff's recovery the sum of $21.70 with interest from October, 1933. Except as hereby modified the judgment of the Superior Court is affirmed.

Modified and affirmed.

STATE v. L. F. COX.

(Filed 19 April, 1939.)

Criminal Law § 68c—Defendant may appeal to the Supreme Court only from final judgment.

After defendant's appeal to the Superior Court had been docketed, the county court attempted to modify its judgment, conditioned upon the appeal being withdrawn, and thereafter the Superior Court remanded the case to the county court with provision that either the State or defendant might appeal. Upon trial in the county court after remand, the State appealed from judgment entered upon defendant's plea of *nolo contendere*. Thereafter the Superior Court entered an order striking out the order remanding the case and restored the case to the docket for trial *de novo*. From this last order the defendant appealed to the Supreme Court. *Held:* In a criminal prosecution an appeal will lie to the Supreme Court only from a judgment on conviction or some judgment in its nature final, C. S., 4650, and the order appealed from is interlocutory and the appeal therefrom is dismissed.

APPEAL by defendant from *Armstrong, J.*, at November Term, 1938, of ROWAN.

Criminal prosecution tried upon warrant charging the defendant with the unlawful possession of certain gambling devices, to wit, slot machines and tip books.

The case was tried 28 July, 1938, in the Rowan county court, and there resulted in conviction and sentence. The defendant gave notice of appeal to the Superior Court. On 2 September, and after the appeal had been docketed in the Superior Court, the court of first instance attempted to modify its judgment, conditioned upon the appeal being withdrawn.

At the September Term, 1938, Rowan Superior Court, due to "some difference of opinion as to just what had occurred in the county court," an order was entered remanding the case to the county court for judg-

ment, and providing "that either the State or the defendant may appeal from the judgment." See *S. v. McKnight,* 210 N. C., 57, 185 S. E., 439.

The case was again called for trial in the county court on 17 November, 1938, at which time the defendant entered a plea of *nolo contendere.* Judgment was entered thereon, from which the State gave notice of appeal to the Superior Court. See *S. v. Nichols, ante,* 80.

At the November Term, 1938, Rowan Superior Court, an order was entered striking out the order of remand made at the September Term, as having been improvidently granted, and restoring the case to the docket for trial *de novo.*

From this order the defendant appeals, assigning errors.

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

Walter Murphy and Walter Woodson for defendant.

STACY, C. J. The procedural right of appeal in criminal cases, C. S., 4650, is slightly different—less liberal perhaps—from what it is in civil actions. C. S., 638; *S. v. Blades,* 209 N. C., 56, 182 S. E., 714. It was said in *S. v. Webb,* 155 N. C., 426, 70 S. E., 1064, that "an ordinary statutory appeal will not be entertained except from a judgment on conviction or some judgment in its nature final." The order appealed from is interlocutory. *S. v. Polk,* 91 N. C., 652.

The fragmentariness of the appeal precludes a determination of the questions sought to be presented. *Johnson v. Ins. Co., ante,* 120. Mayhap the final judgment will be acceptable without appeal. At any rate, its correctness will presently be presumed. *S. v. Rooks,* 207 N. C., 275, 176 S. E., 752.

Appeal dismissed.

CONSOLIDATED REALTY CORPORATION v. E. S. KOON.

(Filed 19 April, 1939.)

1. Appeal and Error § 19—

Upon appeal from judgment entered in a submission of controversy without action, the agreed facts with the required affidavits, C. S., 3236, are necessary parts of the record proper. Rule of Practice in the Supreme Court 19.

2. Controversy Without Action § 4—

Where the facts agreed in the submission of a controversy without action are insufficient to support a judgment, the court may allow amend-

ments concurred in by all the parties, but may not hear evidence and find additional facts, since judgment may be entered only upon facts agreed submitted in writing in compliance with the statutory requirements. C. S., 3236.

3. Trial § 52—

The court may not hear evidence and find the facts, even with the consent of the parties, in the absence of pleadings properly filed.

APPEAL by defendant from *Pless, Jr., Judge,* at Chambers in Asheville, 28 March, 1939, of BUNCOMBE.

Daniel M. Hodges for plaintiff, appellee.
Reed Kitchin for defendant, appellant.

BARNHILL, J. The record contains a statement that summons dated March ...., 1939, appears in the original record, but the same is not included in this record. The record on appeal further states that this is a submission of controversy without action, and the judgment recites that the cause is heard upon the agreed statement of facts, exhibits and affidavits thereto attached, and admissions of counsel. However, while the affidavits required to be filed by C. S., 626, in the submission of a controversy without action are included in the record, the controversy without action, including the agreed statement of facts, is not. This is an essential part of the record under the rules of practice in this Court. Rule 19, 213 N. C., p. 816. The agreed facts, with the required affidavits, constitute the pleadings within the meaning of this rule.

It further appears that the court below found facts from evidence offered and that the defendant excepted to the facts found. Thus, apparently new matter was injected, which is inadmissible, because the controversy is to be determined solely upon the facts contained in the agreement. *R. R. v. Reidsville,* 101 N. C., 404, 8 S. E., 124. If the introduction of evidence and the finding of facts by the judge are to be taken as indicating that the cause was submitted on an oral agreement and no writing other than the statutory affidavit was filed, that is, no agreed statement of facts in writing was submitted, this is wholly insufficient.

In the present state of the record we are unable to proceed to a determination of the questions attempted to be submitted. If a controversy without action containing the facts agreed was filed in the court below judgment should be entered on the agreed facts. If the facts agreed are insufficient to support a judgment the court has the discretionary power to permit amendments thereto which are concurred in by the parties.

The record discloses that no pleadings were filed. Therefore, the cause cannot be disposed of upon controverted issues of fact presented by parol evidence. In the absence of a written stipulation of facts agreed no cause is pending. If this be the condition of the record judgment of dismissal should be entered.

This cause is remanded to the end that the court below may make disposition of the case in accord with this opinion.

Remanded.

JOHN B. VANDIFORD v. HENRY G. VANDIFORD ET AL.

(Filed 19 April, 1939.)

1. Trial §§ 38, 50b—Verdict in this case held at variance with the pleadings, evidence, and theory of trial, and should have been set aside upon motion.

Plaintiff alleged that defendant took title to the *locus in quo* as trustee for his benefit, and breached the trust by selling the lands to a third person. The jury sustained plaintiff's contention as to the trust, but found that plaintiff was not indebted to defendant for any sum for the purchase price, taxes, interest, and improvements and that defendant was not indebted to plaintiff in any sum for amounts paid by plaintiff during the years in question, although the court instructed the jury as to the respective contentions of the parties as to the amount the jury should find under each of the issues, and answered a subsequent issue as to the amount plaintiff was entitled to recover in a sum between the respective contentions of the parties. *Held:* It would seem the jury undertook to compromise the case and the verdict is at variance with the pleadings, evidence, charge of the court, and the theory of trial, and defendant's motion to set it aside should have been allowed.

2. Appeal and Error § 41—

When a new trial is awarded on one exception, other exceptions relating to matters which may not arise on the subsequent hearing need not be determined.

APPEAL by defendants from *Frizzelle, J.*, at December Term, 1938, of GREENE.

Civil action tried upon the following issues:

"1. Did the defendant, Henry G. Vandiford, verbally agree with the plaintiff, John B. Vandiford, at or before the execution and delivery of the deed by the Land Bank to Henry G. Vandiford, that he, Henry G. Vandiford, would take title to the lands described in the complaint and hold them in trust for the plaintiff, as alleged in the complaint? Answer: 'Yes.'

"2. Was the plaintiff ready, willing and able at all times to comply with the terms of the agreement as alleged in the complaint? Answer: 'Yes.'

"3. Is the plaintiff's cause of action barred by the three year statute of limitations as alleged in the answer? Answer: 'No.'

"4. Is the plaintiff, John B. Vandiford, by reason of atornment estopped to maintain this action as alleged in the answer? Answer: 'No.'

"5. Is the plaintiff, John B. Vandiford, estopped to maintain this action by reason of his laches as alleged in the answer? Answer: 'No.'

"6. Did the defendant, Henry G. Vandiford, in violation of his agreement, sell and convey the lands in the sum of $11,000.00 and retain the proceeds thereof as alleged in the complaint? Answer: 'Yes.'

"7. In what amount, if any, is the plaintiff, John B. Vandiford, indebted to the defendant, Henry G. Vandiford, for the purchase price, interest, improvement and taxes? Answer: 'None.'

"8. In what amount, if any, is the defendant, Henry G. Vandiford, indebted to the plaintiff for money paid to the defendant for the years 1933, 1934, 1935, 1936, and 1937? Answer: 'None.'

"9. What amount, if any, is the plaintiff, John B. Vandiford, entitled to recover of the defendant, Henry G. Vandiford, on account of the breach of contract in the sale of said lands in the sum of $11,000.00, as alleged in the complaint? Answer: '$5,000.00.' "

There was a motion by the defendants to set aside the verdict, which was overruled. Exception.

From judgment on the verdict, the defendants appeal, assigning errors.

J. Faison Thomson and Walter G. Sheppard for plaintiff, appellee.

K. A. Pittman and J. A. Jones for defendants, appellants.

STACY, C. J. It is apparent from a perusal of the record that the last three issues were answered without regard to the pleadings, the evidence, the contentions of the parties, or the charge of the court. Mayhap the jury undertook to compromise the case. *Bartholomew v. Parrish,* 186 N. C., 81, 118 S. E., 899; *Gulley v. Raynor,* 185 N. C., 96, 116 S. E., 171.

The defendant contended from the evidence that the 7th issue should be answered in the sum of $16,348.40; while the plaintiff contended that it should be answered in the sum of $8,665.44. The court instructed the jury to answer the issue accordingly as they should find the facts to be. The answer is "Nothing."

The eighth issue was submitted under an instruction that it should be answered in the sum of $10,047.83, according to plaintiff's evidence and contention, or $9,026.82 according to the defendant's admission. It is answered "Nothing."

The verdict is at variance with the pleadings, the evidence, and the theory of the trial. The defendants' motion to set it aside should have been allowed. *Daniel v. Belhaven,* 189 N. C., 181, 126 S. E., 421; *Nall v. McMath,* 177 N. C., 183, 98 S. E., 374; McIntosh N. C. Prac. & Proc., 665. It is manifestly wanting in legal requirements. *Daniel v. Belhaven, supra.* It bears the earmarks of compromise. *Watts v. Greenlee,* 13 N. C., 87; Note, 134 A. S. R., 1061.

There are other exceptions appearing on the record worthy of consideration, especially those pertaining to the cross-examination of the defendant, but as they are not likely to arise on the further hearing, present rulings thereon will be omitted.

A careful perusal of the record engenders the thought that a *venire de novo* should be ordered. *Kinney v. Beverley,* 12 Va., 318. It is accordingly decreed.

Venire de novo.

HUBERT LAMB v. L. C. SMITH, EXECUTOR OF LESSIE ROBINSON, DECEASED, AND ISABELLA ROBINSON AND CHARLIE ROBINSON.

(Filed 19 April, 1939.)

Wills § 5—

Evidence *held* insufficient to show a contract by testator to devise property to plaintiff and defendants' motion to nonsuit was properly granted upon authority of *Brown v. Williams,* 196 N. C., 247.

APPEAL by plaintiff from *Grady, J.,* at September Term, 1938, of SAMPSON. Affirmed.

The defendant, L. C. Smith, is the executor of Lessie Robinson, deceased; and Isabella and Charlie Robinson are the legatees under the will.

This is an action brought by plaintiff against defendants to recover $1,000, being the fair net value of all property left by Lessie Robinson, deceased. The plaintiff claimed that he built a house on a lot owned by Lessie Robinson. The complaint alleges: "That the said Lessie Robinson informed this plaintiff that she was unable to finish said house and told plaintiff that if he would finish said house that she, the said Lessie Robinson, would make a will devising all of her property, including said house and lot, to this plaintiff. That plaintiff accepted

her said proposition thereby making same a binding contract between the said Lessie Robinson and this plaintiff; and thereupon the plaintiff secured materials and workmen and completed the house on the said lot described above, according to his contract and agreement with the said Lessie Robinson, expending in all upon said building the sum of $401.50, which was reasonable and necessary to complete same, thereby performing in full his contract with the said Lessie Robinson. That the said Lessie Robinson died on 26 November, 1936, testate, leaving a will appointing L. C. Smith her executor, and devising all of her property to the defendants Isabella Robinson and Charlie Robinson, said will has been probated in common form and filed in the clerk's office of Sampson County on 17 December, 1936, and recorded in Will Book No. 9, p. 365, to which reference is hereby made and the contents of said will is hereby incorporated as a part of this article. And that the said L. C. Smith is the duly qualified and acting executor under the will of Lessie Robinson, deceased. That the said Lessie Robinson, having failed to repay the plaintiff the $401.50 and interest, or any part thereof, and having died on 26 November, 1936, without making and leaving a last will and testament, devising said house and lot and other property to this plaintiff; but, to the contrary, devised same to the defendants Isabella Robinson and Charlie Robinson, in violation of her said agreement and in breach of her said contract with this plaintiff, whereby he has been damaged to the extent of the full value of said property, which at the date of her death was $1,000.00, with interest thereon from said date."

The defendants denied the material allegations of the complaint.

Butler & Butler for plaintiff.
J. D. Johnson, Jr., for defendants.

PER CURIAM. At the close of plaintiff's evidence, the court below on motion of the defendants, rendered judgment as in case of nonsuit against plaintiff. C. S., 567. In this we can see no error.

After a careful review of the evidence, we think it too vague and indefinite to be construed as a contract or to give plaintiff a cause of action against defendants. What was said as to mutual wills was no contract, but was evidence of an intention performed by neither. There was no meeting of the minds that the one that outlived the other would get the property.

As was said in *Brown v. Williams,* 196 N. C., 247 (250): "There is nothing to indicate, in the expressions made by defendant's testator, any certain or definite promise or contract, either express or implied, to make a testamentary provision in his will in favor of plaintiff. The

expressions were not even made to plaintiff, but to others. It was an appreciation and intention, but not an obligation. *Dodson v. McAdams,* 96 N. C., 149; *Avitt v. Smith,* 120 N. C., 392."

We think the *Brown case, supra,* similar to the present action. In the judgment we can see no error.

Affirmed.

MARY M. CROOM v. A. W. PETTY.

(Filed 19 April, 1939.)

Automobiles §§ 13, 18g—

The evidence tended to show that defendant stopped his automobile in the line of travel of pedestrians at the intersection of streets in a city, and that as plaintiff pedestrian, whose path was thus blocked, attempted to walk behind the car in crossing the street, defendant put the car in reverse without warning, causing the injury in suit. *Held:* The overruling of defendant's motion to nonsuit was not error.

APPEAL by defendant from *Harris, J.,* at February Term, 1939, of WAKE. No error.

This is an action for damages for an injury sustained by the plaintiff through the alleged negligence of the defendant.

The evidence is substantially as follows:

On Saturday, January 29, 1938, at about the hour of five o'clock p.m., the plaintiff was walking along the north sidewalk of Hillsboro Street, going west, in the city of Raleigh, North Carolina. Defendant at said hour of the day was driving his automobile along Harrington Street, going south, and was crossing the intersection with Hillsboro Street. On reaching Harrington Street, which crosses Hillsboro Street at right angles, plaintiff observed the approach of defendant's automobile, which was coming from her right. Defendant stopped his car directly in the line connecting the sidewalks and the course or line of walk followed by pedestrians. As her path was blocked, plaintiff proceeded to walk back of defendant's automobile, and, when she had practically gotten by the same, defendant put his automobile in reverse, and, without signal, ran it backward against the plaintiff, knocking her down and seriously injuring her.

There is further evidence as to the injury received by plaintiff.

At the close of plaintiff's evidence and at the close of all the evidence, defendant moved for judgment of nonsuit, which motion was denied, and defendant appealed.

Bunn & Arendell for plaintiff, appellee.

Carmon J. Stuart, Wm. H. Yarborough, Jr., and J. M. Broughton for defendant, appellant.

PER CURIAM. A careful examination of the exceptions in this case discloses no error justifying a retrial. The judgment is affirmed. *Johnston v. Johnston,* 118 A. L. R., 233, 279 N. W., 139.

No error.

JOHN A. FARRIS v. FIRST CITIZENS BANK & TRUST COMPANY, ADMINISTRATOR OF THE ESTATE OF ELLIS THOMAS, DECEASED, J. C. LITTLE, ATTORNEY IN FACT; KEZHAYA THOMAS AND MRS. KEZHAYA THOMAS, HIS WIFE.

(Filed 19 April, 1939.)

Trial § 47—

Where the trial court grants plaintiff's motion, aptly made, for a new trial for newly discovered evidence but does so as a matter of law and not as a matter of discretion, the cause will be remanded on appeal in order that the court, at the next succeeding term, may determine the motion as a discretionary matter, the cause having been kept alive by defendants' appeal.

APPEAL by defendants from *Frizzelle, J.,* at January Term, 1939, of WAKE.

Civil action to recover damages for breach of alleged contract.

The court, on the trial below, sustained motion of defendants made at close of plaintiff's evidence for judgment as in case of nonsuit. Plaintiff excepted. During the same term and after judgment of nonsuit had been entered, plaintiff made a motion for new trial on the ground of new evidence discovered during the term. By consent, the matter was heard out of term and out of the district on depositions and affidavits as of the January Term, 1939, of Superior Court of Wake County. After finding certain facts "from the evidence taken thereupon" the court, by judgment 11 March, 1939, "as a matter of law and not as a matter of discretion," set aside the judgment as of nonsuit and ordered a new trial. Defendants appeal therefrom to the Supreme Court, and assign error.

No counsel contra.

J. C. Little and P. H. Wilson for defendants, appellants.

PER CURIAM. A motion for new trial on the ground of new evidence, discovered during the trial term, is addressed to the discretion of the trial judge, and his decision, whether granting or refusing to grant the new trial, when made in the exercise of such discretion, is not ordinarily subject to review. *S. v. Casey,* 201 N. C., 620, 161 S. E., 81; *Bullock v. Williams,* 213 N. C., 320, 195 S. E., 791, and numerous other decisions of this Court. But where, as here, the court allows such motion of plaintiff as a matter of law without the exercise of discretion, the defendants are entitled to have the motion reconsidered and passed upon as a discretionary matter. See *Tickle v. Hobgood,* 212 N. C., 763, 194 S. E., 474, where similar procedure was followed with respect to the denial as a matter of law of an application for a bill of particulars.

In the present case, the motion, having been timely made, and kept alive by appeal, may be considered at a succeeding term. *S. v. Casey, supra,* and cases there cited. Therefore, the case is remanded to the court below for further proceedings in accordance with this opinion.

Error.

HODGIE WILLIAMS REDWINE v. W. R. BASS.

(Filed 19 April, 1939.)

Negligence § 21—

Where the facts alleged in the complaint do not present the doctrine of last clear chance, and plaintiff fails to plead same by reply to the answer setting up a version of the accident which might require the application of the doctrine, it is not error for the court to fail to instruct the jury in regard to the doctrine in the absence of a request for a special instruction.

APPEAL by plaintiff from *Harris, J.,* at November Term, 1938, of FRANKLIN.

This is an action by a parent to recover hospital, nursing and medical bills, and other expenses incurred in the care and treatment of an infant child who suffered certain personal injuries as a result of being struck by an automobile operated by the defendant, the plaintiff alleging that the collision and resulting injury were proximately caused by the negligence of the defendant.

Plaintiff backed her car into a path leading into the main highway so as to have her car headed toward the gate to her residence. She then

sent her child, about five years of age, across the road to open the gate. The defendant was at the time approaching in an automobile and admittedly struck the child at or near the bridge over the ditch or drainway of the road.

Theretofore, the plaintiff as next friend for her infant child, instituted an action for damages against the defendant based on the same facts set out in the complaint. The jury in that cause exonerated the defendant, finding that he was not guilty of negligence which proximately caused the injuries to the infant.

The jury, in its answer to the first issue, found that said child was not injured through the negligence of the defendant. From judgment on the verdict, plaintiff appealed.

W. L. Lumpkin, E. C. Bulluck and Yarborough & Yarborough for plaintiff, appellant.

White & Malone for defendant, appellee.

PER CURIAM. The assignments of error contained in the record are directed to alleged errors in the charge. Plaintiff relies particularly upon the alleged erroneous failure of the court to explain the doctrine of the last clear chance and to apply the same to the evidence in the case. The acts of negligence alleged in the complaint do not give rise to the application of the doctrine of the last clear chance. When the defendant answered, pleading contributory negligence of the plaintiff parent, and setting up a version of the occurrence which might require the application of the doctrine, the plaintiff did not reply and plead the same. Under the present state of the pleadings, in the absence of special prayer, the charge of the court may not be successfully challenged.

The case is essentially one of fact. The plaintiff offered sufficient evidence of negligence to be submitted to a jury. The evidence offered by the defendant tended to show want of negligence and to exculpate the defendant. This evidence has been submitted to a jury in two separate trials. Each jury has found that the defendant was not guilty of negligence causing injury to plaintiff's infant child. We can find no sufficient cause for disturbing the verdict and judgment.

No error.

RALPH L. REID, ADMINISTRATOR OF THE ESTATE OF DOROTHY VIRGINIA REID, v. CITY COACH COMPANY, INC., A CORPORATION.

(Filed 3 May, 1939.)

1. Trial § 22b—

On motion to nonsuit, the evidence which makes for plaintiff's claim or tends to support his cause of action is to be considered in its most favorable light for plaintiff, and he is entitled to every reasonable intendment thereon and every reasonable inference therefrom.

2. Automobiles § 18g—Evidence of negligent operation of bus in residential district resulting in injury to four-year-old child held for jury.

The evidence tended to show that the highway at the scene of the accident was built up on both sides, for about 300 feet, with residences and buildings, including a post office, church and several stores, that a large number of children were leaving the church from a Sunday school Christmas Eve party, and that defendant's bus, running at a speed estimated by a witness at from 40 to 50 miles an hour, struck and fatally injured plaintiff's intestate, a child four and one-half years old, and that the wheel of the bus skidded on the shoulder of the highway 133 feet before it stopped with intestate lying in front of the rear wheel. *Held:* The evidence was plenary to be submitted to the jury on the question of the negligent operation of the bus.

3. Negligence § 11—In action for wrongful death of minor, contributory negligence of parents is a defense.

In an action to recover for the wrongful death of a child, whether brought by one of its parents as administrator or not, the negligence of either or both of the parents will constitute contributory negligence barring recovery, since the parents would be the beneficiaries of any recovery as heirs of the child, and the law will not permit a person to benefit by his own tort.

4. Same—Evidence held not to show contributory negligence on the part of parents.

This action was instituted by the father of a four-and-one-half-year-old child as administrator to recover for the wrongful death of the child. The evidence tended to show that the father consented to the child's attending a Sunday school Christmas Eve party two blocks away, in company with the child's ten-year-old sister, who had unusual presence of mind and sense of responsibility, and that in going to the church the children had to cross a railroad track and a public highway, and that the fatal accident occurred as the children were returning from the entertainment when intestate ran onto the highway before her sister could stop her, and was hit by defendant's bus, which was traveling at an excessive speed. *Held:* The evidence does not show contributory negligence on the part of the father in permitting the four-and-one-half-year-old child to go two blocks from home to the Sunday school entertainment in company with her ten-year-old sister.

5. Negligence § 12—

A child four and one-half years old is legally incapable of negligence, primary or secondary.

6. Negligence § 21—

The refusal of the trial court to submit an issue of contributory negligence in this action to recover for the wrongful death of a four-and-one-half-year-old child *is held* without error, there being no evidence of negligence on the part of the child's parents, and the child being incapable of contributory negligence.

7. Automobiles § 12d—Instruction defining "residential district" held without error.

A charge defining a "residential district" as being "the territory contiguous to a highway, not comprising a business district, when the frontage on the highway for a distance of 300 feet or more is mainly occupied by dwellings and buildings in use for business" *is held* without error, the definition of a residential district in chapter 148, Public Laws 1927, Art. 1, sec. (s), not having been repealed by Public Laws of 1937, chapter 407, sec. 2 (a), since sec. 145 of the later act repeals only prior laws in conflict therewith.

8. Automobiles §§ 12b, 12d—Instruction as to speed limit in residential district and requirement to slacken speed at special hazards held without error.

This action was instituted to recover for the death of a four-and-one-half-year-old child who was struck by defendant's bus. The evidence tended to show that the injured child was one of a large number of children leaving a Sunday school entertainment. *Held:* The trial court's instruction correctly defining "residential district" and charging that the lawful speed therein was 25 miles an hour, but that this limitation did not relieve the driver from further reducing his speed if made necessary by special hazards in order to avoid colliding with any person or vehicle, is without error, whether the scene of the accident was in a "residential district" as defined by statute and the conflicting evidence as to the speed of the bus, being left to the determination of the jury.

9. Statutes § 10—

Repeals by implication are not favored.

APPEAL by defendant from *Hamilton, Special Judge,* and a jury, at December Term, 1938, of GASTON. No error.

This is an action for actionable negligence brought by plaintiff, administrator of the estate of Dorothy Virginia Reid, against the defendant City Coach Company, Inc., to recover damages for the death of his intestate.

The evidence is to the effect that on 24 December, 1937, Christmas Eve, about 3:00 p.m., plaintiff's intestate, Dorothy Virginia Reid, was struck and seriously injured by a bus belonging to the defendant company and being driven by Robert Carpenter, and died the following Thursday. Near the scene of the injury is Flint Grove Baptist Church, which Ralph L. Reid and his family attended. It is located on the south side of the street from the main highway on which the injury occurred. His children attended the Sunday school. On Christmas

Eve a party or "treat" was given for the children of the Sunday school. Helen Reid, ten years of age, took her little sister, Dorothy Virginia Reid, four and a half years old, with Thelma Ballard, five years old, to the Sunday school entertainment. The father gave his consent for them to go. He lived two blocks off and away from and on the north side of the church and highway. In going to the church the children had to cross the P. & N. Railroad and the State Highway No. 7, on which the injury occurred. The mother was at home. She usually went with the children to Sunday school, but this time they went alone.

Ralph L. Reid testified, in part: "In that settlement there is the church and a good many houses, people live all the way down the road for about a half mile this side and I don't know just how far on the side toward Lowell. The section is called East Gastonia—we have a post office that is about one hundred and fifty yards from the scene of the accident. There are five mills out there, two stores, a barber shop and a church—four or five hundred people attend the church. . . . The Court: What he is asking you is: What is there bordering on the highway—whether houses, residences or places of business? Ans.: Most of them is homes of people who work in the mill except the church, the barber shop and the post office. *It is thickly built all up and down the road.* There is a church on a side street entering the highway near where the accident occurred—I don't know the name of the street, but the church is about fifty feet, maybe a hundred, from the highway, and fronts on the side street."

Robert Carpenter was employed by the defendant and was operating the bus which was going from Cramerton to Gastonia, through Lowell and McAdensville, and picked up passengers along the way. After the Christmas party, where the children received presents, Helen Reid and her sister, Dorothy, left the church to go home the way they had come. Thelma Ballard was with them. They reached the State Highway, which was 18 feet hard-surfaced in the center with four to six feet dirt shoulders on each side and a ditch where the water drained off the road.

Helen Reid testified, in part: "We were crossing a ditch and got to the road and I lifted her across the ditch. We started down the road and went a little tiny piece and started crossing the road. We didn't get across. I went to take hold of her hand and she wouldn't let me. I caught her dress and she pulled away and I told her to run and she ran. I saw the bus coming around the curve. It was as far away as from here to that wall (indicating side wall of courthouse). I hollered to Dorothy. I don't know how fast the bus was coming. She just lacked about two more steps being across when the bus hit her. The bus ran on to the post and stopped. I went over to where she was. I saw her. She was kind of close to the back wheel. She had not been

moved. I was among the first ones to get there. She was on the right of the bus. She was the first one to get to the highway; the least children got to the highway first. *There were a lot of little ones going down the highway.* The least children left the church first. I am eleven years old. My mother is at home sick. She couldn't come to court. . . . When we got the treat me and Dorothy and Billy Ballard came to the highway and started toward Gastonia. Billy Ballard is five. We started toward Gastonia on the highway. I don't know how far from the barber shop. I tried to hold my little sister's hand and she jerked loose and I grabbed her dress and she pulled away and I hollered to her to run. I tried to keep her from crossing and she pulled away from me and went on."

L. F. Hefner testified, in part: "As the bus passed me, it seemed like it was running pretty fast—*that was before it struck the child—something like fifty yards before. To the best of my knowledge I'd say it was traveling 40 to 50 miles an hour.* I heard him hitting something and jumped out of my car and went down there and the little girl was laying there in the road about two feet on the hard surface and a little girl came running—the child's sister—and grabbed her right behind there and picked her up and I walked up to her and said, 'She is too heavy and she is hurt, too.' *And she sat down right in the road out on the dirt and pulled her up on her lap and sat there and held her.*"

Fred Ware testified, in part: *"There were a good many people on the highway and on the side.* I noticed the kids who got the 'treat.' They all know me as 'Fred' and came by and showed it to me. That was about five minutes before the wreck happened. Two hundred or more children attended the party. Some of them went back of the church, but those who lived down, up and across the highway would come down there to that point. Your Honor, I had to go about sixty feet to the accident. I'd say I was there in two minutes. There was just two fellows there. The driver was just stepping out of the cab. The people crowded around so fast—I'd say there were a hundred or more there. The bus stopped against the curb where they put rock on there at a telephone pole—it knocked the telephone pole down. We measured where the bus went and it was 133 feet from where the bus started sliding until it hit the post. We got a tape measure and measured it on the marks on the road where it slid. *It started to slide and went to the right—it slid practically all of the 133 feet on the dirt shoulder.* When I got there I saw the child—she was laying about middle ways of the bus right up on the rocks. I don't think the bus had been moved. *The other little girl had her head in her lap.* That is about all I know."

Clarence Rogers testified, in part: "I don't know exactly the number of people live there. In the vicinity—counting both sides, and stores, there would be fifteen or twenty buildings. The road extends on beyond

the scene of the accident toward Lowell. It is built up about three hundred yards, roughly speaking. It is a mill village on both sides of the road—the houses are close together."

Craig Starnes testified, in part: "Nothing in the way of houses stopping or farms to show you are outside the city. (Witness is handed paper for identification.) On that map, the right-hand side of the road is thicker settled than it is on the left going out toward Lowell. There are houses and stores and post office on the left going out and houses, stores and barber shop on the right going out. There are practically fifteen houses on the right and on the other side something like seven or eight. There are mills in that locality and community streets. *Whenever I got there the other little girl was sitting down and had her little sister's head on her lap.*"

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

"1. Was the plaintiff's intestate killed as a result of the negligence of the defendant, as alleged in the complaint? Answer: 'Yes.'

"2. What amount, if any, is the plaintiff entitled to recover of the defendant? Answer: '$8,000.' "

The court below rendered judgment on the verdict. The defendant made numerous exceptions and assignments of error and appealed to the Supreme Court. The material ones and other necessary facts will be set forth in the opinion.

Jake F. Newell for plaintiff.

J. Laurence Jones and J. L. DeLaney for defendant.

CLARKSON, J. At the close of plaintiff's evidence and at the close of all the evidence, the defendant in the court below made motions for judgment as in case of nonsuit. C. S., 567. The court below overruled these motions and in this we can see no error.

The evidence which makes for plaintiff's claim, or tends to support his cause of action, is to be taken in its most favorable light for the plaintiff, and he is entitled to the benefit of every reasonable intendment upon the evidence, and every reasonable inference to be drawn therefrom.

The evidence as set forth above is plenary to have been submitted to the jury on the question of negligence. *Goss v. Williams,* 196 N. C., 213 (221-2); *Kelly v. Hunsucker,* 211 N. C., 153.

The court below was requested by defendant to submit the following issue: "Did plaintiff's intestate, by reason of the negligence of her parents, contribute to her injury and death, as alleged in the answer?" The court below denied the request and defendant excepted and assigned error, which cannot be sustained.

Helen Reid was at the time of the injury ten years old. She was given permission by her father to take her sister, Dorothy Virginia Reid, four and a half years old, to a Christmas Eve Sunday school entertainment to be held at the church, which was about two blocks from her home, on 24 December, 1937, some time before three o'clock p.m. We cannot see how the parents were negligent and contributed to the injury of Dorothy Virginia Reid, who was killed by the defendant. Her sister, Helen, who had her in charge, was ten years old. The defendant cites *Davis v. R. R.*, 136 N. C., 115, for its authority, which we do not think sustains its contentions.

In the *Davis case, supra,* it is said, at pp. 116-117: "The plaintiff, as administrator of his infant son, two and a half years old, who having wandered off without the knowledge of his parents was injured on the track of the defendant by its train so that the child died, and the plaintiff alleges this was the negligence of the defendant. . . . The real point in the case is in the refusal of the court to submit the issue of contributory negligence upon the ground that negligence would not be imputed to the infant. This is true in an action in behalf of an infant. *Bottoms v. R. R.*, 114 N. C., 699, 41 Am. St. Rep., 799, 25 L. R. A., 287; *Duvall v. R. R.*, 134 N. C., 331."

In the *Bottoms case, supra,* at p. 713, is the following: "These numerous authorities which we have thought proper to cite very abundantly sustain the position enunciated by the Supreme Court of the United States, and adopted by this Court in *Murray v. R. R.*, 93 N. C., 92, that in the law of negligence the degree of care and discretion required of an infant of tender years 'depends upon his age and knowledge,' and they also sustain the position that where the child is too young, as in this case, to exercise any discretion whatever, the negligence of his parent or other custodian in permitting him to escape and place himself in a perilous position will not be imputed to him so as to defeat his action for damages sustained by reason of the negligence of another."

In the *Davis case, supra* (pp. 117, *et seq.*): "The doctrine generally sustained is that of *Robinson v. Cone,* 22 Vt., 213, 54 Am. Dec., 67, known as the Vermont rule, and is followed by us in *Bottoms v. R. R., supra,* and which we deem still the proper rule. This latter rule has the weight of authority in judicial decisions, and standard law writers. That eminent text writer, Mr. Bishop (Non-Contract Law, sec. 482), criticising the New York rule, says: 'This new doctrine of imputed negligence, whereby the minor loses his suit, not only where he is negligent himself, but where his grandfather, grandmother or mother's maid is negligent, is as flatly in conflict with the established system of the common law as anything possible to be suggested. The law never took away a child's property because his father was poor or thriftless or a scoundrel, or because anybody who could be made to respond to a suit

for damages was a negligent custodian of it.' . . . (p. 119). When, however, the parents are authorized, as in some states, to bring an action, their contributory negligence can then be pleaded. S. & R. Neg., sec. 71; *Williams v. R. R.*, 60 Tex., 205; *Westerberg v. R. R.*, 142 Pa. St., 471, 24 Am. St. Rep., 510, *provided the parent be actually in fault.* (Italics ours.) *Ibid.*, sec. 72. The same rule applies where the parent is suing as administrator but is also the beneficial plaintiff or the *cestui que trust* of the action as distributee of the child's estate. . . . (p. 120). The underlying principle in our view is that no one shall profit by his own wrong, and if the father's negligence, and not that of the railroad company, was the proximate cause of the death (under the doctrine of the 'last clear chance'), it would be obviously wrong to permit him to put money into his pocket for damages proximately caused by his own negligence, because sued for through an administrator (whether himself or another), yet for his benefit. In such cases the contributory negligence of the father is a defense just as is actions brought by the father for loss of services. 1 Fetter Carriers, sec. 199, pp. 534, 535; Beach, Contributory Negligence, sec. 31; Tiffany, Death by Wrongful Act, sec. 69; *Wolf v. R. R.*, 55 Ohio St., 530, 36 L. R. A., 812, . . . (p. 121). Of course, as in all other cases, the preliminary question to be decided is whether there was contributory negligence of one parent (or both), which was the proximate cause of the death, *i.e.*, whether the defendant had or not the 'last clear chance' to avoid killing the intestate."

The defendant in its brief says: "We do not think the lower court would have had any hesitancy in approaching this question along the lines argued by the appellant had it not been that *the ten-year-old sister was along with the child.* We do not think that this should change the rule."

That the ten-year-old sister was along with the child is the crux of the case. We cannot see how it can be held as contributory negligence for a father to allow a four-and-a-half-year-old child to go two blocks from home to attend a Christmas Eve entertainment, given by the Sunday school of which both children were members, in company with her ten-year-old sister.

Const. of N. C., Art. IX, sec. 2, in part, reads: "The General Assembly, at its first session under this Constitution, shall provide by taxation and otherwise for a general and uniform system of public schools, wherein tuition shall be free of charge to all children of the State *between the ages of six and twenty-one years,*" etc. N. C. Code 1935 (Michie), sec. 5383.

We cannot say that a parent was guilty of contributory negligence who allowed a child of 6 to 10 years of age to go to a Sunday school—a

matter of all importance to the rising generation. It is a matter of common knowledge that a normal child ten years of age is fully competent to care for a child four and a half years of age. Her conduct at the time of the accident showed that her watchfulness never ceased. The pathos, "Whenever I got there the other little girl was sitting down and had her little sister's head in her lap."

In *Kelly v. Hunsucker,* 211 N. C., 153 (159), it is written: *"Varser, J.,* speaking for the Court in a well-considered opinion in *Campbell v. Laundry,* 190 N. C., 649 (651-652), citing a wealth of authorities, says: 'There must, of necessity, be a period within which a child is incapable of exercising care to such a degree as may be otherwise legally applicable to the given situation. We are of the opinion that a child four years old is incapable of negligence, primary or contributory. . . . This ruling is in accord with the decisions throughout the country, as indicated by the following: *McDermott v. Severe,* 202 U. S., 600. In this case the Court affirmed the judgment for plaintiff, a boy six years and 10 months old. The trial court instructed the jury that, since plaintiff was under seven years of age, contributory negligence could not be attributed to him.' "

The child four and a half years old was incapable of negligence, primary or contributory. In the *Kelly case, supra,* the child was four and a half years old. We see no error in the charge of the court below, as follows: "The court instructs you, gentlemen of the jury, that in this case, there is no issue of contributory negligence; that the child was of such tender years—four or four and one-half years of age—as presumed to be incapable of exercising that degree of care and caution which would impute to her or to him negligence. The only issue on that for you, gentlemen, to determine is whether or not there was negligence on the part of the defendant and whether that negligence proximately resulted in the injury from which the child died."

The court further charged the jury: "The plaintiff contends that the death of his intestate, Dorothy Virginia Reid, resulted from the negligence of the Coach Company in that the operator of one of its buses, as contended by the plaintiff, operated the bus through the residential district in a careless and negligent manner and that that carelessness on the part of the driver resulted in the death of his intestate, Dorothy Virginia Reid. The Legislature of North Carolina, in its wisdom and discretion in the interest of life and property, has seen fit to enact certain laws with respect to the operation of motor vehicles upon the public highways and thoroughfares of the State and in those enactments the Legislature has prescribed certain speed limits of operation and certain other conditions for the conduct and guidance of the operators of motor vehicles on the public highways. Among other things, the Legislature has pre-

scribed that no person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions then existing. It has further provided or enacted that where no special hazard exists, the following speed shall be lawful: 20 miles per hour in business district, 25 miles per hour in any residential district, and 45 miles per hour on the main highways. The residential districts, gentlemen of the jury, has been defined by the Legislature as being the territory contiguous to a highway, not comprising a business district, when the frontage on such a highway for a distance of 300 feet or more is mainly occupied by dwellings or by dwellings and buildings in use for business. The Legislature further has said that the fact that the speed on a highway is lower than that prescribed shall not relieve the driver from the duty to decrease speed when approaching and crossing an intersection, when approaching and going around a curve, when approaching a hillcrest, when traveling upon narrow and winding roadways, and when special hazards exist with respect to pedestrians and other traffic, by reason of weather or highway conditions, and speed shall be decreased as may be necessary to avoid colliding with any person, vehicle or conveyance upon or entering the highway. In compliance with legal requirements, it is the duty of all persons to use due care. Other enactments, of course, have been made by the Legislature, but the ones read to you are the principal ones controlling with respect to the matters and things in controversy and at issue in this cause. . . . Now, on that, gentlemen of the jury, the court instructs you that if you find from the evidence that the car was being operated at this point in a territory designated as a residential district under the definition read to you, as laid down by the court, then the lawful rate of speed for operating was 25 miles an hour. If you should not so find by the evidence—that is, if you should not so find that it was a residential district in the contemplation of the law and fixed and determined by the statutory definition given, nor that it was a business district where the speed limit is 20 miles an hour, then the court instructs you that the lawful rate of speed would have been 45 miles an hour."

The defendant excepted and assigned error to the above excerpts from the charge. From a careful review of the entire charge, the statutes and charge above quoted, we can see no prejudicial or reversible error from the facts in this case.

Public Laws of 1937, ch. 407, Art. X, sec. 103—speed restrictions (2) Twenty-five miles per hour in any residence district.

It was contended by plaintiff and not seriously controverted, that the child was killed in a residence district. The driver of the motor bus contended he was running 25 miles an hour within the law. On the other hand, the plaintiff's witnesses testified he was running 35, 40 and

50 miles per hour. These contentions were carefully left to the jury as questions of fact for them to determine under the law.

The defendant contends ch. 407, Public Laws of 1937, was intended and did cover the entire motor law on the subject. We cannot so hold. The repealing clause, sec. 145, says: "That all laws and clauses of laws in conflict with the provisions of this act or laws or clauses of laws providing otherwise for the subject matter of this act are hereby repealed." "Repeals by implication are not favored." *Kelly case, supra,* p. 156.

Chapter 148, Public Laws 1927, Art. I, sec. (s), defines "business district" as follows: The territory contiguous to a highway when fifty per cent or more of the frontage thereon for a distance of three hundred feet or more is occupied by buildings in use for business." "Residence District—The territory contiguous to a highway not comprising a business district when the frontage on such highway for a distance of three hundred feet or more is mainly occupied by dwellings or by dwellings and buildings in use for business."

Laws 1935, ch. 311, sec. (1), 20 miles per hour in any business district. (2) 25 miles per hour in any residence district.

Ch. 407, Public Laws 1937, sec. 2 (a): "Business District—The territory contiguous to a highway when fifty per cent or more of the frontage thereon for a distance of three hundred feet or more is mainly occupied by dwellings or by dwellings and buildings in use for business." It nowhere repeals or defines "Residence districts," as theretofore set forth in the statutes on the subject.

The evidence would indicate that after Helen Reid lifted her little sister, Dorothy Virginia Reid, across the ditch and started crossing the road, the child must have seen the bus swinging around the curve at a rapid rate of speed, and, being frightened, and to avoid being hit, she pulled away from her older sister and started running across the road. Her sister told her to run and she began running and lacked only some two steps from being across the road when the bus hit her.

According to plaintiff's evidence, the driver of defendant's bus was running through a "residence district" crowded with people coming from a Christmas Eve Sunday school entertainment, at about 3:00 o'clock p.m., at from 35 to 50 miles an hour, going around a curve in a thickly settled community. The speed is indicated by the fact that the bus skidded 133 feet. It struck the child, who died a few days later. The sister, Helen, 10 years of age, picked the wounded child up and tenderly held her little sister's head on her lap before any person reached the scene. This presence of mind and heroic conduct fully justified her father in allowing the ten-year-old child to take her sister to the Christmas Eve Sunday school "treat."

On the whole record we see no prejudicial or reversible error.

No error.

UNEMPLOYMENT COMPENSATION COMMISSION OF NORTH CAROLINA v. JEFFERSON STANDARD LIFE INSURANCE COMPANY.

(Filed 3 May, 1939.)

1. Taxation § 19—Term "Federal instrumentality" should be strictly construed in determining immunity from State taxation.

In determining immunity from taxation by the State, the term "Federal instrumentality" should be given a restricted meaning, and the tendency is to restrict its scope even more sharply, and the term does not cover a private corporation existing primarily for profit, even though it is granted certain incidental duties or privileges by the Federal Government.

2. Same: Master and Servant § 59—

Mere membership of an insurance company in a Federal Home Loan Bank does not constitute the insurance company a "Federal instrumentality" so as to exempt it from unemployment compensation taxes under the State law.

3. Master and Servant §§ 57, 58—Terms of Unemployment Compensation Act must be liberally construed to effectuate its purpose.

The terms "employment," "employer," "employing unit," "wages," and "remuneration" as used in the State Unemployment Compensation Act must be liberally construed to effectuate the purpose of the act to relieve the evils of unemployment, and the definition of the terms as contained in the act are controlling and are broader than the common law meaning of the terms, and the act includes in its scope relationships which might be excluded by a strict common law application of the definition of an independent contractor. N. C. Unemployment Compensation Act, secs. 19 (e), (f), (g), (m), (n).

4. Same—Employer has burden of showing that services for remuneration are within the exemptions of the Unemployment Compensation Act.

Where services are rendered for remuneration, the North Carolina Unemployment Compensation Act provides that the burden is on the party for whose benefit the services are rendered to prove that they are rendered free from his control or direction over the performance of such services, that they are outside the usual course of the business for which the services are performed, and that the person performing the services is customarily engaged in an independently established trade, occupation, profession, or business, sec. 19 (6), A, B, C, and since the matters of exemption are stated conjunctively, all three elements must be shown in order that exemption from the act be secured.

5. Same—Insurance agents and managers, in their capacity as soliciting agents, are engaged in employment within the coverage of the Unemployment Compensation Act.

Soliciting agents and managers, in their capacity as soliciting agents, are subject to a high degree of control by the insurance company employing them under their written contracts, and usually their services are rendered to the company in the offices of the company, and are directly related and contribute to the primary purpose for which the company

is organized, and therefore their services constitute an "employment" within the coverage of the North Carolina Unemployment Compensation Act.

6. Master and Servant § 56: Courts § 9—

The construction and interpretation of the North Carolina Unemployment Compensation Act is for our State courts.

7. Constitutional Law § 6a—

The courts must interpret a statute as it is written, the wisdom of the act being the legislative function.

8. Statutes § 5a—

The primary rule for the construction of a statute is to effectuate the intent of the law-making body.

9. Constitutional Law § 4a—

The General Assembly has the power to broaden or restrict common law concepts and definitions.

10. Master and Servant § 59—

Since the services of soliciting agents and managers, in their capacity as soliciting agents, constitute "employment" within the meaning of the Unemployment Compensation Act, the insurance company for which the services are performed is liable for contributions for such employment under the Unemployment Compensation Act.

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

BARNHILL, J., dissenting.

SCHENCK, J., concurs in the dissenting opinion.

APPEAL by defendant Jefferson Standard Life Insurance Company from *Olive, Special Judge,* at September Term, 1938, of WAKE. Affirmed.

This is a civil action to recover alleged contributions due the unemployment compensation fund upon the commissions paid by defendant to its soliciting agents and its managers in their capacity as soliciting agents. Upon specific waiver of a jury, the judge found the facts.

To the following findings of fact there were no objections or exceptions: That defendant is a member of the Federal Home Loan Bank of Winston-Salem but has never availed itself of this source of credit, nor has it ever discharged any functions or duties of the bank or of the Government by reason of its membership in said bank; that the typical agent and the typical manager (in his capacity as soliciting agent) of defendant are under written contracts to defendant, are required to give bonds satisfactory to defendant, are subject to direction as to territory and as to duties, are required to perform such further duties as may be assigned by the defendant, are required to devote their full time, talents and energies to defendant's business, and are prohibited from soliciting insurance for any other company without defendant's written permission. From ample evidence, but over defendant's objection, the judge found:

That the soliciting agents and managers (in their capacities as soliciting agents) are required to deliver policies in accordance with defendant's instructions in its manuals furnished to them by defendant; that defendant furnishes such agents and managers account books, vouchers, and other books and papers necessary for their work and all such books, papers, etc., remain the property of defendant, subject to its inspection at any time and subject to be returned upon termination of the contract; that the soliciting agents and managers (in their capacities as agents) are governed strictly by instructions given them by defendant at the time of the making of the contract and thereafter, and are at all times held to strict compliance with the conditions of the contracts, which may be terminated by either party on ten days written notice; that defendant's agents are under the supervision and control of defendant's managers; that defendant furnishes desk space to its soliciting agents in all its offices and the agents and managers (as agents) use this space in performing part of their duties for defendant; that defendant advances money to its agents and district managers to aid them in conducting their business of soliciting for defendant; that education and recreational meetings for the agents are held by defendant and their expenses, generally, at such meetings are paid by defendant; "that the services performed by the soliciting agents and managers in their capacity as soliciting agents is a necessary and integral part of the business in which the defendant is engaged and for which it was originally chartered; and further that said agents are not customarily engaged in an independently established trade, occupation, profession or business."

Based upon the above, and other, findings of fact, the trial judge concluded, as a matter of law that the defendant was not, by reason of its membership in the Federal Loan Bank of Winston-Salem, an instrumentality of the United States such as is exempt from the provisions of the Unemployment Compensation Law; and, further, that the employment of the soliciting agents and the district managers (as soliciting agents), and the remuneration paid them, is such as to bring them under the provisions of the Unemployment Compensation Law and thus require defendant to make proper contribution for such purpose. From a judgment to this effect, defendant appealed, assigning as its principal errors the two conclusions of law indicated above.

Adrian J. Newton, Ralph Moody, and J. C. B. Ehringhaus, Jr., for plaintiff.

Smith, Wharton & Hudgins for defendant.

CLARKSON, J. Two questions are decisive of this appeal: (1) Is the membership of a North Carolina insurance corporation in the Federal

Home Loan Bank of Winston-Salem sufficient to constitute the corporation such an instrumentality of the United States as to exempt it from the provisions of the N. C. Unemployment Compensation Law? We think not. (2) Does the relationship between defendant and its soliciting agents and managers (in their capacity as soliciting agents) constitute "employment," and the compensation paid them constitute "wages" and "remuneration," as those terms are defined and used in the N. C. Compensation Law? We think so.

(1) *Home Loan Bank Member as Federal Instrumentality.* In *Capitol Building & Loan Assn. et al. v. Kansas Commission of Labor and Industry,* 148 Kansas, 446, 83 P. (2nd), 106, recently decided, a building and loan association sought exemption from a state unemployment compensation act by reason of its membership in a Federal Home Loan Bank. In a clear and logical opinion speaking to the subject, it is stated: "Tested by all the light the diligence of counsel for the litigants has supplied us, as well as by our own researches, we do not regard the plaintiffs' mere stockholder membership in the Federal Home Loan Bank of Topeka, with the privileges and duties attendant on that relationship, as sufficient to constitute them Federal instrumentalities, nor to relieve them from making contributions to the unemployment compensation fund created by the statute of 1937."

Although we recognize that, as stated in *Metcalf & Eddy v. Mitchell,* 269 U. S., 514, 522, 70 L. Ed., 384, "Just what instrumentalities of either a state or the Federal Government are exempt from taxation by the other cannot be stated in terms of universal application," we think that the conclusion in the *Capitol Building & Loan Assn. case, supra,* indicates the sound view in the instant case. We agree with the view indicated in *Clallam County v. United States,* 263 U. S., 341, 68 L. Ed., 328, that there is a very real distinction between the creation of an agency primarily and fundamentally to discharge a function of the Federal Government and the grant of incidental powers, functions or duties of the Federal Government to a private enterprise existing primarily for profit. See the opinion by *Justice Holmes, Clallam County v. United States,* 263 U. S., 341 (344). A similar distinction was recognized in *Federal Land Bank v. Priddy,* 295 U. S., 229 (233-4), where it was pointed out that, although Federal Land Banks are "Instrumentalities of the Federal Government," "joint stock land banks are privately owned corporations for profit to their stockholders through the business of making loans on farm mortgages" and "there is nothing in their organization and powers to suggest that they are governmental instrumentalities." Again, in *Federal Compress & Warehouse Co. v. McLean,* 291 U. S., 17, 78 L. Ed., 622, a private warehouse business sought to escape state taxation on the ground that it had been licensed

for the storage of agricultural products by the Federal Government; in answer to this the Court said, "It can no longer be thought that the enjoyment of a privilege conferred by either the national or a state government upon the individual, even though to promote some governmental policy, relieves him from the taxation by the other of his property or his business used or carried on in the enjoyment of the privilege or of the profits derived from it. *Susquehanna Power Co. v. Tax Commission,* 283 U. S., 291, 75 L. Ed., 1042; *Fox Film Corp. v. Doyal,* 286 U. S., 123, 76 L. Ed., 1010; *Broad River Power Co. v. Query,* 288 U. S., 178, 77 L. Ed., 685." It thus appears that the meaning of the term "Federal instrumentality" has consistently been treated as having a more precise meaning than that assigned it by defendants here, and that the term is not properly applicable to a private corporation, existing primarily for profit but granted certain incidental duties or privileges by the Federal Government. This doctrine of immunity, protecting instrumentalities of either the State or the Federal Government from interference at the hands of the other, developed by *Marshall* (*McCulloch v. Maryland,* 4 Wheaton, 316, 432, 436) to aid the perpetuation of the dual sovereignty established by our Constitution, is not undergoing a process of expansion. Rather, the more recent cases indicate a tendency to restrict more sharply than ever the various exemptions which arise out of the doctrine. See *Clallam County v. United States, supra; Helvering v. Gerhardt,* 304 U. S., 405, 82 L. Ed., 1427. In view of the restricted meaning which has always been given the term "Federal instrumentality," it seems doubtful whether at any time in the history of our highest Court a private insurance corporation owning stock in a Federal Home Loan Bank would have been considered a "Federal instrumentality"; certainly the possibility of such a determination today, in the light of recent cases touching upon the subject, is extremely remote. See *Helvering v. Gerhardt, supra; Clallam County v. United States, supra; Rogers v. Graves,* 299 U. S., 401. We are constrained to hold that, in this record, the defendant insurance corporation is not such a Federal instrumentality as would exempt it from the unemployment contributions here sought.

(2) *"Employment" of Agents and Managers for "Remuneration."* An examination of the pertinent definitions in the Unemployment Compensation Act makes it readily apparent that such words as "employment," "employer," "employing unit," "wages," and "remuneration," when used in the act, are not used as words of art having rigid, precise and restricted meanings, but rather, as defined by the act itself, are used as broad terms of description, evidencing a legislative intent to give to the act a broad and liberal coverage to the end that the far-reaching effects of unemployment may be alleviated. For example, " 'Employing

unit' means any individual or type of organization, including any partnership, association, trust, estate, joint stock company, *insurance company, or corporation, whether domestic or foreign.*" (Section 19e); "'Employer' means (1) any employing unit which in each of twenty different weeks within either the current or the preceding calendar year (whether or not such weeks are or were consecutive) has or had in employment, eight or more individuals (not necessarily simultaneously and irrespective of whether the same individuals are or were employed in each such week;" (Section 19f.1); "'Employment' means service, including service in interstate commerce, performed for remuneration or under any contract of hire, written or oral, express or implied" (Section 19g.1); "'Wages' means all remuneration payable by employers for employment" (Section 19m); "*'Remuneration' means all compensation payable for personal services including commissions and bonuses and the cash value of all compensation payable in any medium other than cash.*" (Section 19n.) Insurance companies such as defendant are expressly included under the term "employing unit." Since it is an employing unit having more than eight soliciting agents and district managers, defendant is an "employer" under Section 19f.1, if the relation of these agents and managers to the defendant constitute "employment." Soliciting agents and district managers (as soliciting agents), each under individual contract with defendant, to solicit and write insurance and perform other services for defendant, perform such services in return for commissions. Accordingly, if commissions constitute "remuneration," as defined by Section 19n, the relationship of the soliciting agents and managers (as soliciting agents) to defendant is "employment" within the definitions of the Unemployment Compensation Act. Since "remuneration" includes "all compensation payable for personal services including commissions and bonuses" (Section 19n), the relationship of the soliciting agents and the district managers (as soliciting agents), by the definitions of the Unemployment Compensation Act, is clearly brought within the terms "employment." Accordingly, defendant is an "employing unit" as to these agents and managers and is their "employer" and, within the terms of this act, such agents and managers are within the "employment" of defendant.

This conclusion is further reinforced by the act. Section 19 (6), A, B, and C, provides that where "services" (in the present case, soliciting insurance) are performed for "remuneration" (in this case, commissions), such services are "deemed to be employment subject to this act unless and until it is shown to the satisfaction of the commission that: (A) Such individual has been and will continue to be free from control or direction over the performance of such services, both under his contract of service and in fact; and (B) such service is either outside the

usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and (C) such individual is customarily engaged in an independently established trade, occupation, profession, or business." The burden of showing these matters of exemption is placed by the statute on the defendant, and, since they are stated conjunctively and not disjunctively, all three of these elements must be shown in order that exemption from the act be secured. Without entering here upon an elaborate analysis of the application of this rule to the instant case, it is significant (a) that the soliciting agents and managers (as soliciting agents) were subject to a high degree of control by the defendant by reason of their written contracts, (b) that their services were rendered in the manner usual and customary for such services were generally performed in the offices of defendant, and (c) that such services were directly related to, and contributed to, the primary purpose for which defendant was organized. Further, the Commission decided that the exemption did not exist here, and the extent to which this Court may review the determinations of the Commission is, at least, open to doubt. See *Unemployment Compensation Commission v. Kirby,* 212 N. C., 763.

In passing upon a similar Unemployment Compensation Act as it applied to soliciting and district agents of an insurance company, the Colorado Supreme Court, since the argument of this cause, filed an opinion on 14 February, 1939, in accord with the view here expressed to the effect that the agents of the company are covered by the act. It is there said (*Industrial Commission of the State of Colorado v. Northwestern Mutual Life Insurance Company*), "Even if the test of coverage in this case is a technical relationship of master and servant, notwithstanding the legislative tests of 'employment' . . . of the statute, the company's agents are servants within the relationship and not independent contractors. Since it is our opinion that the activities of the company's agents are within the legislative definition of 'employment,' . . . it is unnecessary for us to make a determination of the master and servant issue." The Connecticut Supreme Court, at the December Term, 1938, in *Northwestern Mutual Life Insurance Company v. Joseph M. Tone et al.,* reached a contrary decision (*Maltbie, C. J.,* writing the opinion), but the act there construed places a greater emphasis than does ours upon the common law concepts involved of master and servant, principal and agent.

Likewise, the case of *The Texas Company v. Leon L. Wheeless et al.,* decided recently (but not yet reported) by the Supreme Court of Mississippi, is clearly distinguishable from the instant case; there the status of retail oil and gas distributors under independent contracts was in-

volved, a status much more clearly that of independent contractor than is the case with the insurance agents here discussed.

It is not surprising that a wide disparity of views is appearing, since not only are the different cases raising the question argued upon a number of different theories, but there are numerous variations apparent in the respective state unemployment compensation acts. Such variations in the state laws and the interpretations given them are but reflections of the considerable latitude necessarily allowed the individual states to the end that they may work out compensation acts suited to their own peculiar needs. In the words of the late *Justice Cardozo,* speaking to this point in *Steward Machine Company v. Davis,* 301 U. S., 548 (593-4), 81 L. Ed., 1279: "A wide range of judgment is given to the several states as to the particular type of statute to be spread upon their books. . . . What they may not do, if they would earn the credits, is to depart from those standards which in the judgment of Congress are to be ranked as fundamental. Even if opinion may differ as to the fundamental quality of one or more of the conditions, the definer will not avail to vitiate the statute." Accordingly, it would appear settled that the matter here involved is one of state law, to be interpreted finally by this Court.

The scope and purpose of the present act are exceptional in breadth. The draftsmanship of the definition section, which gives flesh and sinew to the whole, shows a carefully considered and deliberate purpose to leap many legal barriers which would halt less ambitious enactments. As far as language will permit it, the act evinces a studied effort to sweep beyond and to include, by redefinition, many individuals who would have been otherwise excluded from the benefits of the act by the former concepts of master and servant and principal and agent as recognized at common law. In the words of the late *Justice Holmes,* in *Johnson v. U. S.,* 163 Fed., 30 (32), (C. C. A., 1st): "The legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed. The major premises of the conclusion expressed in a statute, the change of policy that induces the enactment, may not be set out in terms, but it is not an adequate discharge of duty for the courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before." This is quoted with approval in *Keifer and Keifer v. Reconstruction Finance Corporation et al.,* decided by the United States Supreme Court, 27 February, 1939. It is our task to interpret the law, as it is written, fairly and accurately. "Whether wisdom or unwisdom resides in the scheme . . . it is not for us to say." *Helvering v. Davis,* 301 U. S., 619 (644), 81 L. Ed., 1307.

"The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used. . . . The courts have no function of legislation and simply seek to ascertain the will of the legislature." *United States v. Goldenburg,* 168 U. S., 95, 102-3, 42 L. Ed., 394. The General Assembly, in the instant act, in order to discharge more precisely its legislative function, assumed the role of definer. This is not unusual. *Fox v. Standard Oil Co.,* 294 U. S., 87; *Steinberg v. U. S.,* 14 Fed. (2nd), 564; *Spano v. Fruit Growers, Inc.,* 83 Fed. (2nd), 150; also see *Supply Co. v. Maxwell,* 212 N. C., 624, 626, where it was said: "The act contains its own glossary or definition of terms." The clear and unequivocal meanings of those definitions are strongly indicative of the legislative intent as to the detailed applications of the act, and in them the legislative intent to disregard a number of the neat categories of the common law is apparent. "The heart of a statute is the intention of the law-making body. *Trust Co. v. Hood, Comr.,* 206 N. C., 268, 173 S. E., 601." *Supply Co. v. Maxwell, supra* (627); *Belk Bros. v. Maxwell, ante,* 10.

The power of the General Assembly to broaden or restrict common law concepts is widely recognized (*N. Y. Central Railroad v. White,* 243 U. S., 300, 61 L. Ed., 667; *McDermott v. State of Washington,* 82 P. 2nd, 568) and is not here challenged. Although the extent of the area encompassed by some of the definitions may cause surprise, the duty of this Court is to expound and to interpret the law as it is given to us, not to redraft it along lines which may seem to us more conservative and more desirable. The economic and social evil of unemployment in its broad sweep frequently disregards man-made geographic and political boundaries; perhaps, it follows that former boundaries must be surrendered in seeking a remedy for such an evil. If new social evils produce, as counter-forces, new ideas of control of these evils, and such ideas are brought to us from the legislative forum, we must guard against falling victims to that suspicion which is born of the mere novelty of things.

Upon a careful examination of the record in this case and the act itself, giving due consideration to the meanings assigned by the General Assembly to the "key words" of the act, we are constrained to hold that defendant's soliciting agents and district managers (in their capacities as soliciting agents) are in the "employment" of defendant, as the same is used in the N. C. Unemployment Compensation Act. Accordingly, defendant is liable for the contributions here sought.

The judgment of the court below is

Affirmed.

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

BARNHILL, J., dissenting: The majority opinion herein holds that, within the purview of our Unemployment Compensation Act, soliciting agents of an insurance company are employees of such company. With this view I cannot agree.

The decision herein turns upon the meaning of certain key-words such as "employer," "employment," and "wages." All of these words have precise and definitive meanings as they have come to be accepted at common law. They relate essentially to the law of master and servant and their use necessarily implies the existence of the master and servant relationship. The status of an independent, soliciting agent, acting under and by virtue of a written contract with an insurance company, is that of an independent contractor rather than that of a servant. As an individual he agrees to engage in the solicitation of insurance, upon a commission basis. He is the judge of the method, the manner, the time, and the extent of particular solicitations. If he at times uses the company's offices as a convenience, this is not essential to efficient salesmanship of insurance. If he uses certain books, forms, and blanks furnished by the company, this, too, is but in the interest of convenience; it does not affect the essential status of the insurance solicitor. He may, and often does, with the consent of the insurance company, engage in some other business or vocation, thus devoting only part of his time to the writing of insurance. Such control as is exercised over him by the company is not direct, but only such general supervision as is required by the company in determining the quality and quantity of the insurance which it accepts for coverage. In my opinion, that detailed supervision and direct control which is essential to the master-servant relationship is lacking here.

Section 19g, 6, A, B, and C, indicate three tests to be employed in determining whether or not the necessary relationship of employer-employee exists. These tests are: (A) Freedom from control or direction in the performance of the services, (B) performance of services outside of all the places of business of the enterprise, and (C) customary activity in an independently established trade, occupation, profession, or business. In my opinion, a soliciting agent meets all of these tests: He is free from direct control and direction in soliciting insurance; he may, and often does, perform all of the necessary services of his relationship outside the offices of the insurance company; and, he may, consistent with his contract relationship, engage in an independent calling or vocation. These "tests" are standard ones which have long been recognized as valuable in determining whether the status of an individual is that of servant or of an independent contractor. Restatement of the Law of Agency, s. 220. The able draftsmen of the Restatement of Agency—each an authority on the subject in his own right—make this very perti-

nent observation, "The important distinction is between service in which the actor's physical activities and his time are surrendered to the control of the master, and service under an agreement to accomplish results or to use care and skill in accomplishing results. *Those rendering service but retaining control over the manner of doing it are not servants.* They may be agents, agreeing only to use care and skill to accomplish a result and subject to the fiduciary duties of loyalty and obedience to the wishes of the principal; or they may be persons employed to accomplish or to use care to accomplish physical results, without fiduciary obligations, as where a contractor is paid to build a house. *An agent who is not subject to control as to the manner in which he performs the acts that constitute the execution of his agency is in a similar relation to the principal as to such conduct as one who agrees only to accomplish mere physical results. For the purpose of determining liability, they are both 'independent contractors' . . .*" *Restatement of the Law—Agency,* "Independent Contractors," p. 485.

The essential difference between a servant and an independent contractor is the degree of control or right of control exercised with respect to the individual's physical conduct in the performance of services. This control of the physical conduct of the individual is present in the case of a servant, but lacking in the case of an independent contractor. *Creswell v. Publishing Co.,* 204 N. C., 380, 168 S. E., 408; *Texas Co. v. Mills,* 171 Miss., 231, 243, 156 So., 866, 869; *Carter Publications, Inc., v. Davis* (Tex. Civil App.), 68 S. W. (2nd), 640, 644; *Washington News Co. v. Satti,* 169 Md., 489, 492, 182 Atl., 286, 287; *Keller v. Equitable Life Assur. Soc.,* 246 App. Div., 565, 282 N. Y. Supp., 841 (judgment affirmed in 271 N. Y., 511, 2 N. E. 2nd, 670).

In the case of an insurance agent, in my opinion, that necessary degree of control over the physical conduct of the agent is lacking to constitute him a servant. In effect the insurance company gives him a rate book and general instructions as to the manner of preparing and filing applications, but thereafter relies almost entirely upon the desire of the agent for commissions as a sufficient motivating force to keep the agent alert to new prospects. To resort to the crisp but descriptive vernacular of the streets, he is "put on his own" and told to "go to it," and the company "pays off" on the basis of results produced. The only provision in the contract in respect to the amount of business the agent is required to produce stipulates that the company may at its option consider the failure of the agent to send in a completed examined application in any consecutive period of three months as a termination of the contract *unless* the agent was disabled during said period.

The individual's initiative counts high in such a calling and matters of sales psychology and technique are left to his individual choice. This

is scarcely a description of a "servant," as defined at law; rather, it seems to me that such an agent is an excellent example of an "independent contractor."

The objective of the Unemployment Compensation Act is commendable and the definitions therein contained are broad and comprehensive. And yet I do not consider that the Legislature intended, or that the definitions are sufficiently broad, to include insurance soliciting agents. The provisions of our insurance law indicate that the State treats the occupation of soliciting insurance as a business independent of the company the agent may represent. The Insurance Commissioner, rather than the company, determines the qualifications and moral character of the agent. C. S., 6299. The agent is required to obtain a license, which license is issued to him as a person authorized to solicit insurance, rather than to the company. C. S., 6298. He may be discharged by the Insurance Commissioner through a revocation of his license. C. S., 6300. When the soliciting agent represents a company which is not licensed to do business in this State he is personally liable on any contract of insurance he may make. C. S., 6303. He must carry with him and exhibit on demand his personal license, notwithstanding the fact the company he represents is licensed to do business in the State, and a failure to do so is a misdemeanor. C. S., 6306. As between the Insurance Company and the applicant for life insurance the soliciting agent is deemed to be the agent of the company and not of the insured. C. S., 6457. This latter provision seems to me to be particularly pertinent. If the agent occupies the position of an employee rather than that of an independent contractor he would be, as a matter of law, the representative of the company. It is evident that the Legislature did not so consider him. On the other hand, in this section and throughout the insurance law, the business of soliciting insurance is treated as an independent calling and the soliciting agent as an independent contractor or person engaged in a business separate and apart from the insurance business, as such.

The provisions for the payment of unemployment compensation is a national plan. Provision is made for crediting employers paying the Federal Social Security tax with 90 per cent of the amount paid to the State to cover unemployed eligible under the Federal Act. The Commissioner of Internal Revenue has ruled that soliciting agents are not within the Federal Act. In 29 states and in the District of Columbia they are excluded either by statutory or judicial declaration. In five states in which it has been held that local soliciting agents are included, the rulings were not made by the Court of last resort. As the plan is national in scope and contemplates a coöperative legislative effort by state and national governments for carrying out a public purpose com-

mon to both, which neither could fully achieve without the coöperation of the other, the judicial interpretations of the act should be uniform unless there is a compelling reason to the contrary. *Ins. Co. v. Tone* (Conn.), Dec. Term, 1938. I can see no such reason why we should depart from the generally accepted view of the proper scope of the Social Security Act. On the contrary, I am convinced that a local soliciting agent is not embraced within the terms of the legislation.

As to the contention of defendant that it is an instrumentality of the Federal Government, I concur in the majority view that this position is not sound and cannot be sustained. The defendant is a North Carolina corporation exercising the powers conferred by its charter. If it has the authority to exercise the privileges incident to membership in the Home Owner's Loan Corporation it is by virtue of the terms of its certificate of incorporation. Such privileges may be withdrawn by the Federal Government, but this does not destroy its corporate entity. The exercise thereof is merely incident to the corporate existence, dependent upon compliance with the requirements of the Home Owner's Loan Corporation. In respect to this aspect of the case the ruling of the Commissioner of Internal Revenue is not supported by reason or logic, and we cannot accept his opinion or follow his conclusion.

SCHENCK, J., concurs in this opinion.

UNEMPLOYMENT COMPENSATION COMMISSION OF NORTH CAROLINA v. WACHOVIA BANK & TRUST COMPANY.

(Filed 3 May, 1939.)

1. Taxation § 19—Constitutionally authorized activities of Federal Government are necessarily governmental in nature and exempt from taxation.

Since our State Constitution is a limitation of powers and therefore the General Assembly may authorize the State or political subdivisions to engage in activities not strictly governmental in nature unless prohibited by express provision of, or necessary implication from, the State Constitution, all activities of the State or its political subdivisions are not necessarily exempt from taxation by the Federal Government; but since the Federal Constitution is a grant of powers and Congress may exercise only the express and implied powers therein granted, all activities of the Federal Government, or agencies selected or created by it, constitutionally authorized by Congress, are necessarily governmental in nature and therefore exempt from taxation by the State.

2. Same—

Whether an agency is an instrumentality of the Federal Government so as to be exempt from taxation by the State will be determined in each case as it arises.

3. Same—Ordinarily, privately owned agency created for profit under State law is not an instrumentality of Federal Government.

Ordinarily, any agency created and wholly owned by the Federal Government for the convenient prosecution of its governmental functions, and existing at the will of the Government, is an instrumentality of the Government; while privately owned corporations or associations organized primarily for profit and created by the State are not instrumentalities of the Government, notwithstanding they may have been granted incidental duties or privileges by the Federal Government to promote some governmental policy.

4. Same—Elements for consideration for determining whether agency is instrumentality of government entitled to tax exemption by the State.

In the determination of whether an agency is an instrumentality of the Federal Government so as to be exempt from taxation by State, whether it was created by the Federal Government, wholly owned by it, primarily engaged in the performance of some essential governmental function, whether it is created for profit, and whether the proposed tax will impose an economic burden upon the Government, are all elements to be considered, and while no one of these factors alone may be sufficient and the presence of all is not required for immunity, if the proposed tax places an economic burden upon the Government or if it constitutes an undue interference of the agency in the performance of the governmental functions, the agency may usually be classed as a governmental instrumentality.

5. Master and Servant § 59—Bank chartered by the State is liable for Unemployment Compensation taxes even though it is a member of the Federal Reserve System.

A bank organized under the laws of this State is not an instrumentality of the Federal Government so as to exempt it from the tax imposed by the Unemployment Compensation Act, notwithstanding that the bank may be a member of the Federal Reserve System, since its existence and powers are derived from its State charter and its membership in the Federal Reserve System is voluntary and may be relinquished by it without destroying its corporate existence.

6. Master and Servant § 56: Courts § 9—Interpretation of the North Carolina Unemployment Compensation Act is a matter for our State courts.

Our State Unemployment Compensation Act was passed pursuant to a plan national in scope, and therefore serious consideration is to be given to the construction placed upon similar language of the Federal statute by the Commissioner of Internal Revenue, but the interpretation of the act is finally for our courts, and neither the ruling of the Commissioner nor that of the State Unemployment Compensation Commission is conclusive.

7. Appeal and Error § 29—

A contention not discussed in appellant's brief will be deemed abandoned.

8. Taxation § 19: Master and Servant § 59—

A State bank which is a member of the Federal Reserve System is not exempt from taxation under the Unemployment Compensation Act because of its connection with the Federal Deposit Insurance Corporation nor may it claim such exemption because the tax would discriminate against it in favor of national member banks, since to relieve it from such taxation would discriminate in favor of it against nonmember State banks.

9. Master and Servant § 59: Taxation § 8b—Taxes levied for year 1936 under Unemployment Compensation Act held void as contravening Art. I, sec. 32.

Since the State Unemployment Compensation Act, ch. 1, Public Laws of 1936, is in effect a tax upon an act or acts, and since the statute was not ratified until 16 December, 1936, and the determination of "employment" within the coverage of the act must be determined from records for the calendar year 1936, and since no benefits therefrom could be obtained by employees for the calendar year 1936, in so far as the act attempts to require the payment of contributions for the calendar year 1936, it is retroactive and void as being in conflict with Art. I, sec. 32, of the State Constitution.

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

APPEAL by defendant from *Harris, J.*, at October Civil Term, 1938, of WAKE. Modified and affirmed.

This is a civil action instituted against the defendant, an employer, to recover $19,421.84, alleged to be due for the years 1936 and 1937, under ch. 1, Public Laws 1936 (Extra Session), as amended, known as the Unemployment Compensation Law.

The defendant is a member of the Federal Reserve Bank System and of the Federal Deposit Insurance Corporation. It admits that if it is liable under said act the amount due is as stated in the complaint, to wit: $6,287.33, with interest, for 1936, and $13,134.51, with interest, for 1937. However, it pleads immunity under the provisions of section 19 (7) (b), which provides that the term "employment" shall not include: "Services performed in the employ of . . . the United States Government or of an instrumentality . . . of the United States," and denies liability by reason thereof.

A jury trial having been waived, the court below found the facts, made its conclusions of law, and rendered judgment for the plaintiff. The defendant excepted and appealed.

Adrian J. Newton, Ralph Moody, and J. C. B. Ehringhaus, Jr., for plaintiff, appellee.

Manly, Hendren & Womble and W. P. Sandridge for defendant, appellant.

BARNHILL, J. It is conceded, and the court found as a fact, that the defendant is a private banking corporation, organized and doing business for profit under the laws of the State of North Carolina, and that it is a member of the Federal Reserve System and the Federal Deposit Insurance Corporation. Likewise, the defendant offered evidence tending to show, and the court found as a fact, that the United States Treasury Department, through the Bureau of Internal Revenue, promulgated a ruling now in force that State banks which are members of the Federal Reserve System, and their employees, are exempt from the taxes imposed pursuant to Titles VIII and IX of the Social Security Act.

The ruling of the United States Treasury Department relates to the taxes levied by the Federal Government under the Act of Congress known as the Social Security Act. We are not concerned therewith except to the extent that the same may be persuasive in the determination of the question presented to us, which is: Is the defendant a private banking institution organized under the law of North Carolina and operating for profit, an instrumentality of the Federal Government within the meaning of the provisions of the North Carolina Unemployment Compensation Law by reason of its membership in the Federal Reserve Bank system and the Federal Deposit Insurance Corporation?

In determining whether any given corporation, association or individual is an instrumentality of government a somewhat different rule applies as between instrumentalities of a State Government and instrumentalities of the Federal Government. The State Legislature may exercise any power of legislation which is not expressly or by necessary inference prohibited by the Constitution, unless such legislation invades the prerogatives of one of the other coördinate branches of government. It may, therefore, authorize the State or one of its subdivisions to engage in an enterprise which is not essentially governmental in nature. Therefore, in applying the constitutional immunity of instrumentalities of a State Government from Federal taxation the United States Supreme Court has consistently held that when the instrumentality of the State is engaged in performing functions which are not essentially governmental in nature the immunity does not apply. The right of the State to maintain instrumentalities of government free of inhibition by the national taxing power of "the high and responsible duties assigned to them in the Constitution. . . . And, more especially, those means and instrumentalities which are the creation of their sovereign and reserved rights," relates to functions thought to be essential to the maintenance of a State Government. Thus, where the attempt was to tax: Income received from the investments of a municipal subdivision of a state, *U. S. v. Baltimore & O. R. Co.*, 17 Wall., 322, 21 L. Ed., 597; income received by a private investor from state bonds, and thus to

threaten impairment of the borrowing power of the State, *Pollock v. Farmers' Loan & Trust Co.,* 157 U. S., 429, 39 L. Ed., 759; Railroad of U. S. held in name of corporation, *Clallam County v. U. S.,* 263 U. S., 341, 68 L. Ed., 328; or the manufacture and sale to a municipal corporation of equipment for its police force, *Indian Motorcycle Co. v. U. S.,* 283 U. S., 570, 75 L. Ed., 1277, it was held that the doctrine of constitutional immunity applied. On the other hand, a state conducted liquor business, *S. C. v. U. S.,* 199 U. S., 437, 50 L. Ed., 261, a street railway business taken over and operated by state officers as a means of effecting a local public policy; *Helvering v. Powers,* 293 U. S., 214, 79 L. Ed., 291; the privilege of exercising corporate franchises granted by a state to public service companies, *Flint v. Stone Tracy Co.,* 220 U. S., 107, 157, 55 L. Ed., 389, income or profits derived by independent engineering contractors from a contract with the state under which they performed certain state functions, *Metcalf v. Mitchell,* 269 U. S., 517, 70 L. Ed., 384; profits from the resale of state bonds, *Willcuts v. Bunn,* 282 U. S., 216, 75 L. Ed., 304; lessees of state property engaged in producing oil from state lands, the royalties from which, payable to the state, are devoted to public purposes; *Group No. 1 Oil Corp. v. Bass,* 283 U. S., 279, 75 L. Ed., 1032, are not exempt from taxation under the immunity doctrine. These are only a few of the cases in which the Supreme Court of the United States has refused to extend the doctrine. See also *Unemployment Compensation Commission v. Insurance Co., ante,* 479, for an able discussion of the subject. 1 Selected Essays on Constitutional Law, p. 641, "State Taxation and the New Federal Instrumentalities."

As to the Federal Government, it derives its authority wholly from the powers delegated to it by the Constitution. Since every action within its constitutional power is governmental action, and since Congress is made the sole judge of what powers within the constitutional grant are to be exercised, all activities of government constitutionally authorized by Congress are governmental in nature. And when the National Government lawfully acts through a corporation which it owns and controls, those activities are governmental functions entitled to whatever tax immunity attaches to those functions when carried on by the Government itself through its departments. *Graves v. New York ex rel. O'Keefe,* filed 27 March, 1939. The Federal Government is one of delegated powers, in the exercise of which Congress is supreme; so that every agency which Congress can constitutionally create is a governmental instrumentality. If, therefore, the defendant can be classed as such an agency engaged in the exercise of functions of the Federal Government it is immune from taxation by the State.

Perhaps it is impossible to formulate a satisfactory definition of the term "instrumentalities of government" which would be applicable in all cases. At least it is unwise to undertake to do so. Each case must be determined as it arises. Generally speaking, however, it may be said that any commission, bureau, corporation or other organization, public in nature, created and wholly owned by the Government for the convenient prosecution of its governmental functions, existing at the will of its creator, is an instrumentality of government; and that any state created corporation or association, privately owned, and organized and doing business primarily for profit, which is granted certain incidental duties or privileges by the Federal Government is not. The enjoyment of a privilege conferred by either a national or a state government upon an individual, association or corporation operating primarily for profit in a private enterprise, even though to promote some governmental policy, does not convert such individual, partnership or corporation into an instrumentality of government. *Unemployment Compensation Commission v. Insurance Co., ante,* 479. Speaking to this subject in *Thomson v. Union Pacific Railroad Co.,* 19 U. S. Law Ed., 792, the Supreme Court, in respect to a Kansas corporation which had received large grants of land and engaged large subsidies from the Federal Government on the security of a second mortgage on the condition of paying at maturity the bonds advanced by way of subsidy and of rendering certain services to the Government in the transmission of messages and in the transportation of mails, troops, munitions and other property at reasonable rates of compensation, said that: "The Corporation, however, remained a State Corporation, though entitled to certain benefits and subject to certain duties under the legislation of Congress. . . . We do not think ourselves warranted, therefore, in extending the exemption established by the case of *McCulloch v. Maryland,* beyond its terms. We cannot apply it to the case of a corporation deriving its existence from state law, exercising its franchise under state law, and holding its property within state jurisdiction and under state protection."

In the borderline cases in which it does not clearly appear that the agency is or is not an instrumentality of government important factors, among others, which must be considered in determining that such agency is an instrument of government are: (1) It was created by the Government; (2) it is wholly owned by the Government; (3) it is not operated for profit; (4) it is primarily engaged in the performance of some essential governmental function; (5) the proposed tax will impose an economic burden upon the Government, or it serves to materially impair the usefulness or efficiency of the agency or to materially restrict it in the performance of its duties. While, perhaps, no one of these factors is sufficient, and the presence of all is not required, to constitute any given

agency an instrumentality of government, the presence or absence of either requires serious consideration. If the tax in fact is to be paid out of Government money, thus placing an economic burden on the Government, or, if it constitutes an undue interference with the agency in the performance of its governmental functions, the agency may usually be classed as a governmental instrumentality.

Bearing these principles in mind, we must consider the relationship of the defendant to the Federal Reserve Banks and to the Federal Government to determine the justness of its claim to immunity as an instrumentality of government. In the first place, the Act of Congress creating Federal Reserve Banks expressly exempts them and their capital stock and surplus and the income derived therefrom from Federal, State and local taxation, except taxes upon real estate. Title XII, U. S. C. A., sec. 531. While the act authorizes the defendant and other State banks to become members of the Federal Reserve System no such tax exemption is extended to them. The silence of The Congress in this respect is significant.

The defendant is a corporation organized under the laws of the State of North Carolina, exercising only such powers as are granted in its charter, or by the general law of the State. In acquiring stock in and becoming a member of the Federal Reserve System it was exercising a power expressly conferred upon it by the State. Ch. 4, sec. 42, Public Laws 1921. While National Banks are required to become members of the Federal Reserve System or forfeit their charters, the defendant acquired membership therein by its own voluntary act. Title XII, U. S. C. A., sec. 321. It may at any time voluntarily surrender its membership. Title XII, U. S. C. A., sec. 328. It retains its full charter and statutory rights as a State Bank with authority to exercise all the corporate powers granted by the State. Title XII, U. S. C. A., sec. 330.

In becoming a member of the Federal Reserve System the defendant assumed certain duties and obligations. It was required to subscribe to capital stock in the Federal Reserve Bank of its district. It must permit examination by Federal Bank examiners. It must submit reports and financial statements, and it must otherwise comply with the rules and regulations included in the statute and adopted by the Board of Governors of the Federal Reserve System. In assuming these obligations it did so in the exercise of a power expressly conferred by State statute. Ch. 4, sec. 42, Public Laws 1921. Furthermore, it did so voluntarily for its own advantage to obtain the benefits accruing from membership in the system. The performance of these duties is merely incidental. The continuance—or cancellation—of its membership in the Federal Reserve System does not affect its corporate existence. It

remains a private banking institution operated for the benefit of its stockholders. The tax to be paid comes out of its earnings and is an expense of its operation. The payment thereof to no extent imposes any economic burden upon the Federal Government. The levy thereof in no wise tends to interfere with the defendant in the exercise of the privileges and in the performance of the obligations and duties which rest upon it as a member of the Federal Reserve System.

The provisions for the payment of unemployment compensation is a national plan and contemplates a coöperative legislative effort by State and National Governments for carrying out a public purpose common to both, which neither could fully achieve without the coöperation of the other. The Unemployment Compensation Acts adopted in the several states were substantially contemporaneous. They were adopted pursuant to and in accord with the Social Security Act of the Federal Government. Therefore, in interpreting our act serious consideration is to be given to the construction placed upon the Federal statute by the administrative agency charged with its execution. *U. S. v. Hernanos,* 209 U. S., 338, 52 L. Ed., 821; *Komada v. United States,* 213 U. S., 392; *Powell v. Maxwell,* 210 N. C., 211, 186 S. E., 326; *City of Winston-Salem v. Board of Education,* 163 N. C., 404, 79 S. E., 886. However, this State reserves its sovereign right, through its courts, to interpret and apply its own legislation. We cannot conceive that the ruling of the Commissioner of Internal Revenue, exempting the defendant from the payment of tax under the Social Security Act, is based on sound reason or logic. While we fully appreciate the high purposes of the national plan and concur in the desire of this State to coöperate therein, we are unable in this instance to follow or to adopt the ruling of the Commissioner of Internal Revenue in his interpretation of language in the Social Security Act which is similar to that contained in our act. Nor is the fact that the North Carolina Unemployment Compensation Commission for a time likewise interpreted the language in the North Carolina Act, while persuasive, conclusive upon us.

We are of the opinion that there are no facts appearing from the evidence or in the facts found by the court which would justify the conclusion that the defendant is an instrumentality of the Federal Government such as would exempt it from the payment of the tax the plaintiff seeks to collect. The immunity is granted because it serves the public, and not a private cause. It is not in aid of the individual, association, or corporation in whose favor the exemption is claimed.

The defendant likewise claimed immunity by reason of its membership in the Federal Deposit Insurance Corporation. In its brief it does not state this as one of the questions presented and it does not argue the proposition. This position is deemed to be abandoned. In any

event, under the Federal law the defendant by reason of its membership in the Federal Reserve System was automatically insured under the Federal Deposit Insurance Corporation Act, without application. 12 U. S. C. A., sec. 264 (a) (e). For a consideration paid, or to be paid, its depositors are insured under the act. There is nothing in the relationship of the defendant to this Federal Corporation which would cause us to alter our conclusion. In this connection the defendant frankly admits in its brief that Treasury Ruling S. S. T. 79 is to the effect that a bank is not entitled to exemption under the Social Security Act merely by reason of having its deposits insured by the Federal Deposit Insurance Corporation, and that it does not claim exemption by reason of this fact alone.

It is argued here that to deny the defendant immunity from taxation under the State statute would operate to discriminate in favor of National member banks and against State member banks for the reason that neither National member banks nor State member banks pay the Federal tax and that National member banks do not pay the State tax levied under the State act. Thus, the State member banks would be carrying the burden of a tax not imposed upon National banks. It is true that this is the result under the present ruling of the United States Commissioner of Internal Revenue. On the other hand, to grant the immunity sought by the defendant would work a discrimination in favor of the defendant as against nonmember State banks. If we were forced to base our decision upon the selection of the lesser of these two evils which result from the ruling of the Commissioner of Internal Revenue, with which we do not concur, we would choose that horn of the dilemma which would work equality as between all State banks.

Article I, sec. 32, of the North Carolina Constitution, provides in part, that: "No law taxing retrospectively sales, purchases or other acts previously done ought to be passed." The North Carolina Unemployment Compensation Law, ch. 1, Public Laws 1936 (Extra Session), was ratified 16 December, 1936. It undertakes to levy a tax for the year 1936 for the promotion of the purposes of the act by providing: "On and after January one, one thousand nine hundred and thirty-six, contributions shall accrue and become payable by each employer for each calendar year in which he is subject to this act, with respect to wages payable for employment (as defined in section nineteen [g]) occurring during such calendar year. Such contributions shall become due and be paid by each employer to the commission for the fund in accordance with such regulation as the commission may prescribe, and shall not be deducted, in whole or in part, from the remuneration of individuals in his employ." The act further provides that for the year 1936 the contributions shall equal nine-tenths of one per centum of wages pay-

able by the employer with respect to employment during said year. Is so much of the act as attempts to levy a tax or require contributions for the year 1936 retroactive in nature and violative of Article I, sec. 32, of the Constitution?

In part, the purpose of the act is declared to be to provide "for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own." The act repeatedly refers to "employment," "employed," and "unemployed." The "contributions" required begin to accrue on the first day of the year "for employment occurring during such calendar year." The contributions are "with respect to wages payable for employment." Benefits are payable to those who are "temporarily" unemployed. The employer is termed an "employing unit."

It is not required that the employing unit shall be an employer for the full current year in order to be liable for the tax assessed. It is an employing unit if it has had in its employ on or subsequent to 1 January, 1936, one or more individuals performing services for it within this State. "Any employing unit which in each of twenty different weeks within either the current or the preceding calendar year (whether or not such weeks are or were consecutive) has, or had, in employment eight or more individuals (not necessarily simultaneously and irrespective of whether the same individuals are or were employed in each such week)" is an employer subject to the tax. Sec. 19 (f) (1). Thus, it appears that to be classed as an employer for the year 1936, subject to the tax, it is not necessary that such employing unit should have had in its employ eight or more individuals in each of twenty different weeks of 1936. It is sufficient if it employed eight individuals in each of twenty different weeks *within the preceding calendar year,* if it continues to be the employer of one or more persons during 1936. To determine the status of an employing unit, in ascertaining whether it is liable for the tax, the commission is empowered to examine its status as an employer not only during 1936 but during 1935 as well.

One of the primary purposes of the act is to give relief against involuntary unemployment, to prevent its spread and to lighten its burden. The law was not ratified until 16 December, 1936. There could be no determination of the liability for the tax, the amount, or the due date thereof until after the commission provided for in the act was appointed and qualified. There was no remaining time in 1936, after the enactment of the statute and the appointment and qualification of the commission, within which any person could establish the status of an employer under the standards set out in the act. The commission was required to consider the operations of alleged employers during the period prior to the enactment of the law, extending back even into 1935.

Furthermore, such unemployment as occurred during the year 1936, for which the contributions were to be made, had already occurred. The unemployed could not, under the requirements of the statute, qualify to receive compensation for their involuntary unemployment during that year. In so far as 1936 is concerned, the contributions are required for a purpose impossible to be accomplished. The "burden which now so often falls with crushing force upon the unemployed worker and his family" had already been met by those involuntarily unemployed, and there was no possibility of relief under the act, even though contributions for that year are required.

It seems clear to us that the contributions in the nature of a tax required by the law under consideration are based upon the act of contracting for employment and the payment of wages for services rendered. This is the theme of the whole act in respect to the collection of contributions. We are of the opinion, therefore, that the requirement that employers make contributions "in respect to employment" is in effect a tax upon an act or acts. If it be considered a tax upon the maintenance of the status of an employer, even then it is essentially a tax upon an act. To maintain the status of an employer one must employ and pay wages. In so far as the act attempts to require the payment of contributions "in respect to employment" for the year 1936 it is retroactive and is in direct conflict with the provisions of Article I, sec. 32, of the Constitution and is void.

The judgment below is

Modified and affirmed.

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

J. CLARENCE LEARY AND R. W. LEARY, JR., TRADING AS LEARY BROS. STORAGE COMPANY, v. VIRGINIA-CAROLINA JOINT STOCK LAND BANK AND JUNIUS BESS.

(Filed 3 May, 1939.)

1. Pleadings § 20—

In determining the sufficiency of a pleading as against demurrer the facts alleged in the pleading will be taken and considered as true.

2. Pleadings § 17—

The sufficiency of the facts alleged in an answer to constitute a defense may be raised by demurrer *ore tenus*.

3. Judgments § 32—

Ordinarily, in order for a judgment to bar a subsequent action there must be identity of subject matter and of issues, and the parties to the subsequent action must be the same or in privity with those in the former action, and the estoppel must be mutual.

4. Same: Judgment in favor of employee held to bar subsequent action by third person against employer upon the doctrine of respondeat superior.

An action was instituted by an administrator to recover for the wrongful death of his intestate who was killed while riding in a car driven by a chauffeur when the car was struck by a truck. Judgment was entered for plaintiff upon the jury's finding that the driver of the truck was negligent, that intestate was guilty of contributory negligence but the driver of the truck had the last clear chance of avoiding the injury. This action was instituted by the owners of the truck against the employer of intestate and against the chauffeur to recover damages resulting from the same collision upon allegations that defendant employer was liable for the alleged negligence of intestate and chauffeur, solely upon the doctrine of *respondeat superior*. *Held:* The former judgment constitutes *res judicata* as to liability of the employer upon the doctrine of *respondeat superior*, since the employer's liability under this doctrine is founded upon negligent default of its employee, and the very issue of such negligence was adjudicated in the prior action, and *held further*, although upon the allegations the chauffeur and intestate were *joint tort-feasors* so that the judgment in favor of intestate would not be *res judicata* in an action against the chauffeur, since the chauffeur was also a servant of intestate's employer, the estoppel in favor of the employer will inure to the chauffeur's benefit and the answer of the employer and chauffeur setting up the defense of *res judicata* is good as against demurrer.

5. Same—

The operation of a judgment as a bar is not affected by the fact that the action in which it was rendered was instituted subsequent to the action in which the estoppel is pleaded, priority of adjudication being the basis of an estoppel by judgment.

APPEAL by plaintiff from *Thompson, J.*, at December Term, 1938, of CHOWAN.

Civil action for recovery of property damage resulting from alleged actionable negligence.

The undisputed facts are substantially these: On the night of 18 March, 1938, a motor truck, owned by plaintiffs and operated by their employee, Elton Holley, traveling on the State Highway in Bertie County, North Carolina, from Windsor to Edenton, and a passenger automobile owned by the defendant bank, in the possession, and under the control and direction of its traveling agent and servant, W. B. Newbern, and operated by the defendant, Junius Bess, as chauffeur for the said Newbern, also agent and servant of the bank, in the course of their employment and in the scope of their authority as such agents, proceed-

ing in the same direction, but at the moment in the act of backing, came into collision, resulting in the death of Newbern.

On 26 April, 1938, plaintiffs instituted this action in the Superior Court of Chowan County to recover for damage to their said truck, allegedly proximately resulting from the negligence of the defendant bank, through its agents and servants, Newbern and Bess. Defendants deny plaintiffs' allegations of negligence, plead contributory negligence and set up counterclaims to recover alleged damages to the automobile of the defendant bank, and for alleged damage resulting from injury to person of the defendant Bess, allegedly proximately resulting from the negligence of the plaintiffs.

When this action came on for hearing at the December Term, 1938, of Chowan County, the defendants herein by leave of the court filed the following amendments to their answer:

"A. That after the institution of this action one Dora G. Newbern, administratrix of W. B. Newbern, deceased, to wit, on the ..... day of ....., 1938, instituted an action against the said J. Clarence Leary and R. W. Leary, Jr., trading as Leary Brothers Storage Company, the plaintiffs herein, in the Superior Court of Pasquotank County, North Carolina, having for its purpose the recovery of damage for the wrongful death of the said W. B. Newbern, occasioned, as it was alleged in the complaint, by the negligence of the plaintiffs herein in the operation of their truck; that upon the trial of said action so instituted by the said Dora G. Newbern, administratrix of W. B. Newbern, deceased, it was caused to appear and admitted by all the parties that the car in which the said W. B. Newbern was riding was being operated by the defendant herein, Junius Bess, it being admitted that the said Junius Bess was the agent and employee of the Virginia-Carolina Joint Stock Land Bank, a defendant herein, and that the negligence of the said Junius Bess, if any, was by reason of the rule of *respondeat superior* the negligence of the said W. B. Newbern; that upon the trial of said action a judgment was entered against the plaintiffs herein, the defendants in that action, awarding unto the said Dora G. Newbern, administratrix of W. B. Newbern, the sum of $12,500 for the wrongful death of her intestate; that the said Superior Court of Pasquotank County, North Carolina, had jurisdiction of the parties to said action and of the subject matter thereof; that the issues determined by the court and jury in that action in favor of the plaintiff therein and against the plaintiff in this action as to the negligence of the plaintiffs herein, the defendants in that action, are determinative of the issues of negligence in this action, and that said judgment is still standing, subsisting and unreversed, and that the evidence in this case will be the same, as they are informed and believe. A certified copy of the judgment roll in said cause is hereto attached.

"B. That the said Virginia-Carolina Joint Stock Land Bank and the said Junius Bess were and are in privity with the said Dora G. Newbern, administratrix of W. B. Newbern, deceased, and the said judgment rendered by the Superior Court of Pasquotank County, North Carolina, is binding upon them and upon the plaintiffs herein and that the matters alleged in the complaint herein, by reason of said judgment, have become and now are *res judicata,* and said judgment is specially pleaded in bar of the plaintiffs' right to recover against these defendants and in support of their counterclaim heretofore set up herein."

From the judgment roll in the Newbern case attached to said amendment to answer here, it appears that the defendants there, plaintiffs here, in answer to allegations of complaint make these pertinent averments: That "plaintiff's intestate, W. B. Newbern, was riding in a Plymouth automobile then in his possession and under his control, which was then and there being driven for him by a chauffeur or driver who was subject to his control and direction"; that "the said W. B. Newbern, or his driver of said Plymouth automobile, or both of them, negligently, carelessly and unlawfully caused said automobile to be stopped and immediately backed rapidly . . ."; and "that the negligence of plaintiff's intestate and that of the driver of the Plymouth car in which he was riding were the sole proximate cause of the collision."

Then, in setting up plea of contributory negligence, defendants there averred that "the said plaintiff's intestate and his said chauffeur and driver, negligently, carelessly and unlawfully, without keeping a sufficient and proper lookout, and without giving any warning or signal whatsoever, and without any tail light on said Plymouth car, suddenly stopped said Plymouth car on said highway and backed it . . . into the truck of these defendants"; "that as a result of this collision and the aforesaid negligence of W. B. Newbern and Junius Bess, the plaintiff's intestate sustained the injuries of which plaintiff now complains, and both the Plymouth car and the defendants' truck were badly damaged," and "that if the death of plaintiff's intestate was due to any negligence whatever on the part of the defendant, . . . the plaintiff's said intestate by his own negligence contributed to and proximately caused such injury and death sustained by him by the negligent and careless acts, doings and omission on the part of said plaintiff's intestate or of his said chauffeur and driver, Junius Bess, or both of them, acting singly or in conjunction in the particulars set forth in this answer; and the negligence and contributory negligence on the part of plaintiff's intestate or of his said chauffeur and driver, Junius Bess, are hereby expressly pleaded in bar of any recovery of these defendants."

It further appears from said judgment roll in the Newbern case, that upon issues joined and submitted, the jury found that plaintiff's intestate

was injured and killed by the negligence of the defendants as alleged in the complaint; and that plaintiff's intestate, by his own negligence, contributed to his injury and death as alleged in the answer; but that, notwithstanding, plaintiff's own contributory negligence, the defendants could, through the exercise of due care, have avoided the injury and death of plaintiff's intestate as alleged in the reply; that damages were assessed; that judgment was thereupon rendered in favor of plaintiff; and that defendants appealed to the Supreme Court. (It is pertinent here to interpolate and state that on such appeal the judgment was affirmed. See opinion, *Newbern v. Leary, ante,* 134.)

Plaintiffs demurred *ore tenus* to the amendment to the answer of defendants for that the facts alleged do not constitute a defense.

Thereupon, the court, after reciting in part "that it appearing to the court that the demurrer ought to be overruled, and that upon the pleadings in this action and proper proof of the matters and things contained in said amendment to the answer that such plea is good and acts as a bar to all matters and things in the above entitled action, except the amount of damages due defendants on their counterclaim," adjudged "that plaintiffs' demurrer be and the same is hereby overruled, and that the matters and things asserted in the amendment to the answer be and the same hereby are in bar of all matters and things asserted in this action, other than defendants' right to submit issues to the jury for its determination upon their counterclaims."

From this judgment plaintiffs appeal to the Supreme Court, and assign error.

W. D. Pruden for plaintiffs, appellants.

R. M. Cann, McMullan & McMullan, M. B. Simpson, and R. Clarence Dozier for defendants, appellees.

WINBORNE, J. Admitting the truth of the facts alleged and contained in the amendment to the answer of defendants, as we must do in testing a demurrer, this question arises: Is the judgment in the Newbern case *res judicata* of the matters alleged in the complaint, in and a bar against the plaintiffs' prosecution of this action? We are of opinion and hold that the question is properly answered in the affirmative.

"As to matter set up as defense the usual ground of demurrer is its insufficiency, and this may be taken by a formal demurrer or demurrer *ore tenus.*" McIntosh, North Carolina Prac. & Proc., 507, sec. 475; *Toler v. French,* 213 N. C., 360, 196 S. E., 312; *Ins. Co. v. McCraw, ante,* 105, 1 S. E. (2d), 369.

Generally, to constitute a judgment an estoppel there must be identity of parties, of subject matter and of issues. *Hardison v. Everett,* 192

N. C., 371, 135 S. E., 288. It is a principle of elementary law that the estoppel of a judgment must be mutual, and "ordinarily the rule is that only parties and privies are bound by a judgment." *Rabil v. Farris,* 213 N. C., 414, 196 S. E., 321; 116 A. L. R., 1083. When used with respect to estoppel by judgment, "the term 'privity' denotes mutual or successive relationship to the same rights of property." Greenleaf on Evidence, Redfield Ed., Vol. 1, sec. 189, p. 216.

That the rule that only parties and privities are bound by a judgment is subject to certain exceptions is recognized in the decisions of this Court. *Bank v. McCaskill,* 174 N. C., 362, 93 S. E., 905.

In the case of *Whitehurst v. Elks and Dunbar,* 212 N. C., 97, 192 S. E., 850, this Court said: "Where the relation between two parties is analogous to that of principal and agent, or master and servant, or employer and employee, the rule is that a judgment in favor of either in an action brought by a third party, rendered upon a ground equally applicable to both, should be accepted as conclusive against the plaintiff's right of action against the other." 15 R. C. L., 1027.

In that case the liability of the defendant Elks depended solely on imputing to him the negligence of the defendant Dunbar on the principle of *respondeat superior.* From judgment as of nonsuit as to both defendants the plaintiff appealed only as to Elks. The judgment was affirmed.

See, also, the cases of *Smith v. R. R.,* 151 N. C., 479, 66 S. E., 435; *Morrow v. R. R.,* 213 N. C., 127, 195 S. E., 383; and *Hudson v. Oil Co., ante,* 422, 2 S. E. (2d), 26.

"The application of the principle of *res judicata* to persons standing in the relation of principal and agent or master and servant has, by some authorities, been supported on the ground that privity exists between persons standing in these relations. But other authorities deny the existence of such privity, and hold that in such cases the technical rule is, upon grounds of public policy, expanded so as to embrace within the estoppel of a judgment persons who are not, strictly speaking, either parties or privies," 24 A. & E. Enc. of Law (2 Ed.), 752, quoted in *Gadsden v. Crafts,* 175 N. C., 358, 95 S. E., 610.

But, be that as it may, the principle is applied and prevails in decisions of courts of the several states and of the United States, notably among which are these: *Doremus v. Root,* 23 Wash., 710, 63 Pac., 592, 54 L. R. A., 649; *Childress v. Lake Erie and W. R. Co.* (Ind. case), 101 N. E., 332; *McGinnis v. Chicago, etc., Ry. Co.,* 200 Mo., 347, 98 S. W., 590; *Williford v. Kansas,* 154 Fed. Rep., 514; *Wolf v. Kenyon,* 273 N. Y. S., 170, Sup. Ct., 242, App. Div., 116; *Portland Gold Mining Co. v. Strattons, Independence,* 16 L. R. A. (N. S.); *N. O. and N. R. Co. v. Jopes,* 142 U. S., 18, 35 L. Ed., 919; *Bigelow v. Old Dominion Copper and Smelting Co.,* 225 U. S., 111, 56 L. Ed., 1009; *Anderson*

v. West Chicago Street Ry. Co., 65 N. E., 717; *Antrim v. Legg*, 203 Ill., A. 483; *Bradley v. Rosenthal*, 154 Cal., 420.

In *Doremus v. Root, supra, Fullerton, J.*, delivering opinion of the Supreme Court of the State of Washington, said: "From the principle that there can be no liability on the part of the employer for the act of his employee in which he took no part, if the employer is free from liability, it follows that a judgment in favor of the employee in an action brought against him for an injury caused by such an act is a bar to a recovery against the employer in an action brought against him for the same cause of action."

In *Childress v. Lake Erie & W. R. Co., supra, Adams, J.*, for the appellate Court of Indiana, said: "Where it is not claimed that the master actually participated in or directed the commission of the wrong, and is only sought to be held under the doctrine of *respondeat superior*, a judgment rendered as in this case, in favor of the servant, would bar a judgment against the master."

In *McGinnis v. Chicago, etc., Ry. Co., supra, Graves, J.*, speaking for the Supreme Court of Missouri, said: "We are firmly of the opinion that in cases where the right to recover is dependent solely upon the doctrine of *respondeat superior*, and there is a finding that the servant, through whose negligence the master is attempted to be held liable, has not been negligent, as was true in the case in hand, there should be no judgment against the master."

In *Williford v. Kansas, supra, McColl, District J. of Circuit Court*, Western District of Tennessee, said: "My conclusion is that, the plaintiff having tested his right to recover against the servants or agents of the master or principal, and having had his day in court, he is precluded from testing it again on the same issue or issues against the master or principal."

In *Wolf v. Kenyon, supra*, a New York case, it is said: "Strictly speaking, master and servant are not in privity, but where the relationship is undisputed and the action is purely derivative and dependent entirely upon the doctrine of *respondeat superior*, it constitutes an exception to the general rule, nor does this lack of mutuality affect the exception," citing *Bigelow v. Old Dominion Copper Mining and Smelting Co., supra.*

In *Portland Gold Mining Co. v. Strattons, Independence, supra, Van Devanter, Circuit J.*, U. S. C. A., after reviewing pertinent authorities, concludes: "It is settled by repeated decisions that the general rule that one may not have the benefit of a judgment as an estoppel unless he would have been bound by it had it been the other way is subject to recognized exceptions, one of which is that, in actions of tort, such as trespass, if the defendant's responsibility is necessarily dependent upon

the culpability of another, who was the immediate actor, and who, in an action against him by the same plaintiff for the same act, has been adjudged not culpable, the defendant may have the benefit of that judgment as an estoppel, even though he would not have been bound by it had it been the other way. And we think it could not well be otherwise, for, when the plaintiff has litigated directly with the immediate actor the claim that he was culpable, and, upon the full opportunity thus afforded for its legal investigation, the claim has been adjudged against the plaintiff, there is manifest propriety, and no injustice, in holding that he is thereby concluded from making it the basis of a right of recovery from another who is not otherwise responsible."

In *Bigelow v. Old Dominion Copper & Smelting Co., supra,* the Supreme Court of the United States, speaking through *Justice Lurton,* on the subject of estoppel by judgment, said: "An apparent exception to this rule of mutuality has been held to exist where the liability of the defendant is altogether dependent upon the culpability of one exonerated in a prior suit upon the same facts when sued by the same principal. . . . The unilateral character of the estoppel of an adjudication in such cases is justified by the injustice which would result in allowing a recovery against a defendant for the conduct of another, when that other has been exonerated in a direct suit. The cases in which it has been enforced are cases where the relation between the defendants in the two suits has been that of principal and agent, master and servant, or indemnitor and indemnitee."

In applying these principles to the question involved in the present action, it is well to bear in mind the alleged facts with respect to the relationship of the parties to the accident, and to each other. Neither plaintiffs nor the defendant bank were present at the time of, or actively participated in the acts which caused the collision. Defendant bank's automobile was in the possession and under the control and direction of its servants and agents, W. B. Newbern and Junius Bess, in the line of duty and in the course of their employment. The plaintiffs' truck was in charge of their servant and employee, Elton Holley, in the line of duty and in the course of his employment. The relationship of master and servant or employer and employee existed between the defendant bank and the intestate Newbern and defendant Bess. The same relationship existed between plaintiffs and Elton Holley. The liability of the defendant bank to plaintiffs, if any, is grounded solely, and is dependent wholly, upon the negligence of its servants and employees, Newbern and Bess, individually or jointly, under the doctrine of *respondeat superior.*

In the case of *Newbern v. Leary, supra,* judgment in which is here pleaded by defendants as bar to plaintiffs' right to prosecute this action,

the question of liability for the injury and death of Newbern, resulting from the same collision, has been adjudicated between Leary Brothers, the plaintiffs here, who were defendants there, and Newbern, the agent and servant of the bank. The verdict of the jury is to the effect that the intestate Newbern was injured and killed by the negligence of the agent of Leary Brothers, who was operating their truck, and that although the said intestate by his own negligence contributed to his injury and death, the agent of Leary Brothers, by the exercise of due care, could have avoided the injury and death of the intestate. That being true, can the plaintiffs Leary Brothers now by this separate action charge the defendant bank, the master or employer of Newbern, with liability for acts of its servant or employee, Newbern, for the damage to their truck? The bank's liability, if any, is not as joint tort-feasor with Newbern or with defendant Bess. It rests solely upon the principle of *respondeat superior*. The jury having determined, and judgment having adjudicated that the negligence of agent of plaintiffs as alleged in the complaint was the proximate cause of the injury and death of Newbern, servant and agent of the bank, that judgment operates as an estoppel against the right of Leary Brothers to relitigate that question in an independent action against Newbern's master, the bank.

On the other hand, as between Newbern and Bess, while there is allegation that they both were servants of the bank and that Newbern was the superior of Bess and the *alter ego* of the bank, the verdict finds that Newbern by his own negligence contributed to his injury and death as alleged in the answer. In pleading contributory negligence it is averred in the answer that "the negligence and careless acts, doings and omission on the part of said plaintiff's intestate or of his said chauffeur and driver, Junius Bess, or both of them, acting singly or in conjunction in the particulars set forth in this answer" contributed to or proximately caused the injury and death of the intestate.

If, then, Newbern were actively negligent, and Bess were also negligent as charged in the answer, he and Newbern would be joint tort-feasors. "To make joint tort-feasors they must actively participate in the act which causes the injury," *Brown v. Louisburg,* 126 N. C., 701, 36 S. E., 166; *Smith v. R. R., supra.* As between them as joint tort-feasors, their relationship would not be within the exception to the general rule of estoppel, and the judgment in the *Newbern case, supra,* would not be *res judicata* of the matters and things here alleged in the complaint in so far as the defendant Bess is concerned. However, the relationship between the bank and Bess, being that of master and servant, and the plaintiff being estopped by the Newbern judgment to prosecute the action against the bank, that estoppel will inure to the benefit of Bess.

The fact that this action was instituted before the Newbern action does not change the legal situation. "A prior judgment upon the same cause of action sustains the plea of former recovery, although the judgment is in action commenced subsequently to the one in which it is pleaded. The date is of no consequence; it is the fact of an adjudication between the same parties upon the same subject matter, which gives effect to the former recovery." Herman on Estoppel and Res Adjudicata, Estoppel by Record, p. 126, sec. 120.

The cases of *Meacham v. Larus & Bros. Co.*, 212 N. C., 646, 194 S. E., 99; *Rabil v. Farris, supra,* and other cases relied upon by plaintiffs are distinguishable in factual situations from the present case. The decision here is not in conflict with the general principles there applied.

On this record the only question considered is whether the plea of *res judicata* is sufficient to meet the test of demurrer. For the reason hereinbefore stated, we hold that it is sufficient, and to that extent the judgment below is

Affirmed.

EARL GROOME v. J. V. DAVIS.

(Filed 3 May, 1939.)

1. Automobiles § 18a—Speed involves more than mere chance of being at a particular spot at a given instant.

Excessive speed is not negated as a proximate cause by the fact that the speeding automobile is traveling on the proper side of the highway and that if the speed had been greater or less the accident would not have occurred, since the rationale of the statutes is that speed should not exceed that which will give the driver control of the car under circumstances likely to arise.

2. Automobiles § 12e—Right of driver to assume that motorist approaching intersection from servient highway will observe stop signal is not absolute.

The driver of an automobile upon a through highway does not have the right to assume absolutely that a driver approaching the intersection along a servient highway will obey the stop sign before entering or crossing the through highway, ch. 148, Public Laws 1927, sec. 21; Michie's Code, 2621 (63), but is required to keep a proper lookout and to keep his car at a reasonable speed under the circumstances in order to avoid injury to life or limb, Michie's Code, 2621 (46) (c), and the driver of the car along the through highway forfeits his right to rely upon the assumption that the other driver will stop before entering or crossing the intersection when he approaches and attempts to traverse it himself at an unlawful or excessive speed, and even when his speed is lawful he remains under duty to exercise due care to ascertain if the driver of

the other car is going to violate the statutory requirement in order to avoid the consequences of such negligence, it being necessary to construe the pertinent statutes *in pari materia* and this result being consonant with such construction.

3. Automobiles § 21—

Where collision is caused by negligence of the drivers of both cars, a guest in one of the cars may recover against either of the drivers without regard to liability as between the drivers.

4. Automobiles § 12e—

The failure of a driver upon a servient highway to stop before entering or traversing a through highway intersection is not negligence *per se* nor *prima facie* negligence, but is merely evidence of negligence to be considered with the other evidence in the case.

5. Same—

The requirement to stop before entering or traversing an intersection of a through highway does not obtain until the proper sign has been erected by authority of the Highway Commission, and a motorist along a through highway may not assume that vehicles along a servient highway will stop unless he knows of the existence of the highway stop sign and makes such fact affirmatively appear in the evidence.

6. Automobiles § 22—Evidence held for jury in guest's action against driver of car on through highway to recover for injuries from collision at intersection.

Plaintiff was riding as a guest in a car driven by defendant on a through highway and was injured in a collision occurring at an intersection with a servient highway. The evidence tended to show that the driver of the car in which plaintiff was riding approached the intersection traveling at the rate of 65 to 70 miles an hour and entered the intersection at 55 or 60 miles an hour, and that the driver of the car along the servient highway approached the intersection at 60 miles an hour and entered the intersection without stopping as required by statute, the evidence further tended to show that the driver of the car in which plaintiff was riding could have seen the other car when 100 yards from the intersection. *Held:* Defendant's demurrer to the evidence should have been overruled, since defendant did not have the unqualified privilege of assuming that the driver of the other car would stop before entering the intersection, and since if defendant's speed was excessive and such speed rendered it impossible for defendant to avoid a collision, defendant's negligence in approaching the intersection at such speed constituted presumptive negligence continuing up to the moment of impact, and the failure of the driver of the other car to stop before entering the intersection being for the consideration of the jury, with other evidence in the case, in determining whether defendant was negligent, and whether such negligence was a proximate cause of plaintiff's injury.

7. Automobiles § 20a—Evidence held not to show contributory negligence on part of guest as a matter of law.

The failure of plaintiff guest to remonstrate with the driver of the car, traveling at a speed of 65 or 70 miles an hour on a through highway, and the failure of such guest to warn the driver of the approach of

another car along a servient highway to the intersection of the highways because she assumed that the driver saw such other car in the exercise of due care, *is held* not contributory negligence on the part of the guest as a matter of law.

APPEAL by plaintiff from *Stevens, J.*, at Second February Term, 1939, of WAKE. Reversed.

Plaintiff brought this action to recover damages for an injury sustained in an automobile collision through the alleged negligence of the defendant. The evidence tended to show that the plaintiff and his wife, a witness in this case, were guests of the defendant, riding in a car belonging to defendant and operated by him on the Smithfield-Clinton Highway, in the village of Newton Grove, Sampson County. At the point of the collision, State Highway No. 23, a main paved highway, is intersected by State Highway No. 55, referred to in the evidence as a dirt road. On this latter road there was a stop sign facing the intersection and approach to the main highway.

As the Davis car approached the intersection, the plaintiff Groome and Davis were riding on the front seat and Mrs. Groome was on the rear seat. There is evidence that, approaching the intersection in the direction in which the defendant was driving, one could see the intersection for a distance of about a quarter of a mile. The road was level and flat, with nothing to obstruct the view. When within 200 yards of the intersection the driver of the car could see down the intersecting highway about 100 yards. When within 100 yards of the approach he could see down the highway to the right approximately 150 yards. While there were weeds on Mr. Davis' right as he approached the intersection, they were 3½ or 4 feet high, and as defendant was seated in his automobile, he was 5½ or 6 feet from the ground, having about two feet clearance of vision over and above the weeds. Mrs. Groome testified that she actually saw the automobile, which, it turned out, belonged to a man named Lovie, approaching when defendant was within 100 yards of the intersection, at which time Davis was running 70 miles an hour. The approaching car was being driven about the same rate of speed—60 or 65 miles an hour. The defendant made no attempt to slow down until about 100 feet from the intersection, when he slowed down to about 55 miles an hour. When the defendant was within the intersection and near the southeast side of the intersecting road, the car driven by Lovie crashed into defendant's car, and as a result of the collision plaintiff was seriously injured.

Mrs. Groome testified: "When the two cars came together, we spun around the road, went to the other side of the highway, went into a ditch and lodged up against a tree 40 feet from the highway, on Mr. Davis' left side of the highway. There was nothing to obstruct Mr. Davis'

view of that automobile coming from the side road to his right. I saw it clearly. I saw it at a distance of 100 yards from the intersection."

This witness testified that Davis had been driving at a high rate of speed between Raleigh and the place of the collision, but had no trouble prior to the collision; that she made no protest against any of his driving; that she hesitated to do so because she was an invited guest of Mr. Davis; that she saw the car coming down the dirt road and assumed that Mr. Davis saw it also and naturally thought he was going to stop every second, so did not say anything.

H. B. Sanders, a witness for the plaintiff, testified that in the village of Newton Grove, where the collision occurred, he was standing in front of his store; that the buildings were on the left side of the road as Mr. Davis approached from Smithfield. Some forty-five families normally live in the village, but on this particular afternoon there were approximately fifty people standing in the space around the stores and houses on the left side of the intersection; that Mr. Davis could have seen the car coming over the intersecting highway seventy yards back by observing very much at all, although it would have been a little difficult. If he looked closely he could have seen it for more than seventy-five yards, but for seventy-five yards he had a clear view; that Mr. Davis was driving 65 to 70 miles an hour before applying the brake; he applied his brakes "the length of this courtroom from the intersection," and his car was traveling 55 to 60 miles an hour when the two cars crashed together. The other car was traveling 60 to 65 miles an hour and did not slow up at all. This was the Lovie car. The Chrysler car driven by defendant was struck on the right side, and the damage was from the right front wheel to the rear of the running board.

There was other testimony as to the rate at which the defendant was driving, as to the result of the collision, as to the effect upon the Chrysler car, and as to the nature and extent of the injury to the plaintiff.

At the conclusion of plaintiff's evidence the defendant moved for judgment as of nonsuit, which motion was allowed, and plaintiff appealed.

Thomas W. Ruffin and Douglass & Douglass for plaintiff, appellant.
Smith, Leach & Anderson for defendant, appellee.

SEAWELL, J. In this case we find two automobilists approaching a common intersection on different highways simultaneously, each traveling at a speed *prima facie* negligent and colliding within the intersection. The issue is not between them, but between the defendant Davis and the plaintiff Groome, a guest in his car. Lovie, the other driver, is not sued. Questions of right of way, however, are raised as affecting the

exercise of due care on the part of the defendant, and as bearing on the question of proximate cause of plaintiff's injury, sustained in the collision.

Defendant was traveling a through highway at a speed of about 65 miles an hour, which he reduced to about 55 miles an hour before going into the intersection. The Lovie car approached from the right over a road on which had been posted a stop sign which, under the law, required him to stop before entering the main highway. He approached the intersection at a speed of about 65 miles per hour, which he did not diminish up to the time of the collision.

There are two arguments made by defendant's counsel in support of the judgment sustaining the demurrer to the evidence:

They contend that the speed of defendant's automobile had no causal connection with the collision, since his car was stricken on the side, and if the speed had been slightly greater or slightly less the collision would not have occurred. But there is more involved in speed than the mere chance of being at a particular spot at a given instant. The event may not be left in the lap of the gods, when it should have been kept in the hands of the driver.

It is also contended that the defendant, having the right of way, had the right to assume that Lovie would observe the stop sign, since the law required him to stop before entering the intersection of the through highway; and that the negligence producing the injury, if any, was, as a matter of law, solely that of Lovie, since, as contended, his was the intervening act of an intelligent agent, unforeseeable by defendant, which, as efficient cause of the injury, insulated his negligence, if any, from such result. As to this, involving, as we think it does, the defendant's manner of approach to the intersection, we think counsel have overestimated the degree of reliance defendant was legally authorized to place on the observance of the stop sign, and have overlooked the conditions under which the assumption may be made.

Presumably the stop sign was erected under authority of chapter 148, Public Laws of 1927, section 21—see Michie's North Carolina Code of 1935, section 2621 (63)—which reads as follows: "Vehicles must stop at certain through highways. The State Highway Commission with reference to State Highways and local authorities with reference to highways under their jurisdictions are hereby authorized to designate main traveled or through highways by erecting at the entrances thereto from intersecting highways signs notifying drivers of vehicles to come to a full stop before entering or crossing such designated highway, and whenever any such signs have been so erected it shall be unlawful for the driver of any vehicle to fail to stop in obedience thereto. That no failure so to stop, however, shall be considered contributory negligence

per se in any action at law for injury to persons or property; but the facts relating to such failure to stop may be considered with the other facts in the case in determining whether the plaintiff in such action was guilty of contributory negligence."

Under the same chapter of the Public Laws of 1927, and chapter 311, Public Laws of 1935—see Michie's North Carolina Code, 1935, section 2621 (46)—we find the following speed regulations: "(a) No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions then existing. (b) Where no special hazard exists the following speeds shall be lawful, but any speed in excess of said limits shall be *prima facie* evidence that the speed is not reasonable or prudent and that it is unlawful: (1) Twenty miles per hour in any business district. (2) Twenty-five miles per hour in any residence district. (3) Thirty-five miles per hour for motor vehicle designed, equipped for, or engaged in transporting property; and thirty miles per hour for such motor vehicle to which a trailer is attached. (4) Forty-five miles per hour under other conditions." No suggestion was made in the court below that paragraphs 1, 2, or 3 might apply in this case.

The law further provides—Michie's North Carolina Code of 1935, section 2621 (46) (c): "The fact that the speed of a vehicle is lower than the foregoing *prima facie* limits shall not relieve the driver from duty to decrease speed when approaching and crossing an intersection . . . and speed shall be decreased as may be necessary to avoid colliding with any person, vehicle, or other conveyance on or entering the highway in compliance with legal requirements and the duty of all persons to use due care."

Laws and regulations of this character are intended to facilitate travel upon arterial roads, but not at the expense of life and limb. They are, rather, intended to afford an additional protection, both to those traveling on arterial highways and those entering them from intersecting roads, from dangers arising because of the frequency of travel along the through highway. To keep the emphasis where it belongs, they must be taken *in pari materia,* as a whole, and the constituent parts given only that influence in the resulting complex which is consistent with this purpose. We cannot, therefore, approve of a rule which, disregarding the duty of all persons to observe due care when using the intersection, would justify blind reliance on the assumption that another automobilist approaching it will observe a stop sign, or which would encourage a stubborn adherence to a supposed right of way under all conditions—a rule which would be more likely to produce disaster than to promote safety.

The holder of the right of way, even on an arterial highway, does not possess an unqualified privilege in its exercise. The duty still rests on him to use due care in approaching an intersection, notwithstanding he may know that it is protected by a stop sign on the less favored highway; and without the exercise of such care his right of way will not avail him. His right to rely on the assumption that a driver approaching the intersection on the servient road will observe the stop sign is forfeited when he approaches the intersection and attempts to traverse it at an unlawful or excessive speed. And even when he is within the law, it may be necessary for him to surrender his right of way, in the exercise of due care, to avoid the consequences of another's negligence. The principles, thus summarized, are clearly stated in leading texts: Huddy on Automobiles, 9th Ed. 3-4, pp. 228, 263, 264, 277; Berry on Automobiles, 3.2; Babbitt on Motor Vehicles, 4th Ed., 439, 461; and they find expression in numerous well considered opinions of the courts, from which we cite the following as containing a more detailed exposition of the rules under consideration than we find convenient to make here: *Sebastian v. Motor Lines,* 213 N. C., 770, 197 S. E., 539; *Anthony v. Knight,* 211 N. C., 637, 191 S. E., 323; *McCulley v. Anderson* (Neb.), 227 N. W., 321; *Richard v. Neault,* 126 Maine, 17, 135 Atl., 524, 525; *Brown v. Saunders,* 44 Ga. App., 114, 160 S. E., 542; *Rosenau v. Peterson,* 147 Minn., 95, 179 N. W., 647; *Carter v. Vadeboncoeur,* 32 Manitobia L. R., 102, 11 B. R. C., 1113; *Carlson v. Meusenberger,* 200 Iowa, 65, 204 N. W., 432; *Ray v. Brannon,* 196 Ala., 113, 72 So., 16.

The right of a driver on the more favored road to assume that another approaching on the servient road will observe a stop sign, or laws respecting the right of way, is conditioned on his own behavior, and the assumption can be made only when it will not be inconsistent with the paramount duty to exercise due care, incumbent on the person who would assert the right. Simply stated, the right to make the assumption is available only to one who himself is free from negligence. Some states, by express wording of the statute, have rendered such a defense unavailable to negligent drivers; *Morris v. Bloomgren,* 127 Ohio State, 147, 187 N. E., 2, 89 A. L. R., 831; *Wolfe v. Fay Bros. Auto and Taxicab Co.,* 18 La. App., 321, 138 So., 453; *Jordan v. Western Motor Ways,* 213 Cal., 606, 2 P. (2nd), 786; and in others the courts have reached the same result by judicial reasoning. Here the rule is fairly deducible from a consideration of the statute itself, its purpose, and its incidence on the safe use of the highways under regulatory authority.

It will be found that most of the cases in which questions of right of way are featured are between parties who have reciprocal duties with regard to the intersection and mutual rights which are at issue in the action, where the rule is of value in fixing liability between the two,

and they do not concern third persons who had no duties in the premises and to whom both may be liable. As to the latter, to whom negligence is not attributable, comparative rights to the highway between two drivers, both of whom are negligent, will not defeat recovery. *Anthony v. Knight, supra; Chiles v. Rolf et al.* (So. Dak.), 201 N. W., 154, 155.

It is argued that the view here taken deprives the defendant of the benefit of the common law rule that one is not required to anticipate the negligence of another. It is pointed out that while under that rule it is still a duty to use due care in avoiding the negligence of another after it has been discovered, or could have been discovered by the exercise of proper care, this does not require anticipation of such negligence. But the common law rule remains unimpeached when we recall that we are mainly considering statutory duties and that it may be said to be the law itself, which, in providing against recognized dangers, makes the anticipation. Many of the duties of automobilists in the use of highways, and especially in approaching and using intersections, are regulated by statutes, which impose duties unknown to the common law. When duties are imposed by statutes which are likely to create standards of care higher than those commonly found in ordinary men, and where perfect compliance cannot, therefore, be reasonably expected, a hazard is created against which provision may be expected in the law.

The stop sign statute under consideration bears evidence of a recognition of the human equation—the imperfection of the human machine which, since we cannot completely remove, we cannot wholly ignore. Failure to observe the stop sign is not negligence *per se,* not even *prima facie* negligence, just evidence of negligence. Some countervailing provision might be expected in related statutes. We think this is found in the requirement that speed be effectively reduced before entering intersections, so that the car shall be under reasonable control and the driver left with some degree of opportunity to cope with hazards which might be reasonably expected to arise, not under ideal conditions, but under conditions that are commonly known to exist. *Sebastian v. Motor Lines, supra; Hinnant v. R. R.,* 202 N. C., 489, 494, 163 S. E., 555; *Harton v. Telephone Co.,* 141 N. C., 455, 54 S. E., 299. Without reference to the fact that the duty may arise under the statute, Huddy on Automobiles, 9th Ed., 3-4, p. 346, states broadly: "Although a traveler on the highway has a right to rely to some extent on the expectancy that other travelers will obey the law and will use reasonable care not to injure him, yet he still has the duty to use ordinary care and prudence to avoid an injury that might otherwise result from the negligence of another." *Ray v. Brannon, supra.*

It was the duty of the defendant to use ordinary care in approaching the intersection. In this instance ordinary care means that degree of

care which an ordinarily prudent man would exercise to avoid such dangers as reasonably might be anticipated. If the intersection was obscured, it was his duty to reduce his speed effectively, in lieu of visual assurance; if unobstructed it was his duty to use his eyes, and his judgment as well, with regard to cars approaching on the intersecting road. If he discovered, or by the exercise of reasonable care could have discovered, that Lovie apparently did not intend to observe the stop sign, or that because of his excessive speed he could not do so, it was defendant's duty to use the means in his power to avoid the collision. It does not seem to be a logical defense if, when the discovery was made, or should have been made, he was powerless to act because of previous negligence on his part.

In deciding this question we cannot confine our attention narrowly to the area of the intersection and the moment of the collision. From the time defendant came into the zone of obligation, and the duty of care with regard to this intersection arose, his acts must be considered as a continuing sequence. The negligence of the defendant, if the jury should find such negligence, might have begun some distance up the road when he surrendered control for speed, finding later he could not retrieve it. We need not be reminded that the speed relation is dominant in the control of a car—in the ability to stop it within a given time and distance, and to turn to the right or left with safety in order to avoid a collision. The defendant brought with him into the intersection this potentiality of disaster and was presumptively negligent down to the time of the collision. The presence of a stop sign and the fact that it was overrun by Lovie will not necessarily, and as a matter of law, absolve him from negligence, or insulate any negligence of which he might have been guilty from its natural and probable consequences as a proximate or contributing cause. The jury is at liberty to infer that they were concurrently negligent. *Wooten v. Smith, ante,* 48; *Cunningham v. Haynes,* 214 N. C., 456, and cited cases; *Anthony v. Knight, supra; Hinnant v. R. R., supra; Sebastian v. Motor Lines, supra; Brown v. R. R.,* 208 N. C., 57, 179 S. E., 25; *Caddell v. Powell,* 70 Fed. (2d), page 123.

We do not wish to be understood as saying that the erection and presence of a stop sign might not be considered by the jury as bearing upon the negligence of a driver on the arterial highway or upon the question of proximate cause. The contrary is true. When properly presented, it must be considered as other evidence in the case upon these questions. "If he knows of the stop sign, it is a factor on which, with others, he may base his judgment as to the safety of the crossing." *Adams v. Gardner,* 306 Pa., 576, 160 Atl., 589.

Since other questions of right of way are involved, we have, for convenience of discussion, assumed that defendant had a knowledge of the existence of the stop sign upon which he seeks to rely. The evidence is negative in this respect. He could not rely on it unless he knew of its presence, and such knowledge must affirmatively appear in the evidence. While, generally speaking, persons using the highway are presumed to know the law of the road, the stop law did not become applicable to this intersection until the sign was erected by authority of the Highway Commission.

We cannot find, as a matter of law, evidence of contributory negligence on the part of the plaintiff such as would bar his recovery.

Taking the evidence in the light most favorable to the plaintiff, the issue is one for the jury. Factual adjustments and appraisals are required, the making of which belong exclusively to them. *Cole v. Koonce,* 214 N. C., 188.

The judgment of nonsuit is

Reversed.

RUTH MILLWOOD (EMPLOYEE), v. FIRESTONE COTTON MILLS (EMPLOYER), AND LIBERTY MUTUAL INSURANCE COMPANY (CARRIER).

(Filed 3 May, 1939.)

1. Master and Servant § 42b—Evidence held not to sustain finding that additional hospitalization would tend to lessen the period of employee's disability.

All the expert opinion evidence in this case tended to show that after hospitalization and treatment of the employee for an injury resulting from an accident arising out of and in the course of her employment, the employee developed dementia praecox, that said mental condition was incurable and that although additional hospitalization and treatment might tend to lessen her disability, the employee was permanently disabled and would have to remain for her life in an institution for constant care and attention. *Held:* There is no sufficient evidence to sustain the finding of the Industrial Commission that such additional hospitalization and treatment would tend to lessen the period of the employee's disability.

2. Same—

Whether additional hospitalization and treatment will tend to lessen the period of an injured employee's disability so as to sustain an award of additional medical attention is a question for the Industrial Commission upon competent evidence.

3. Master and Servant § 55d—

A finding of fact by the Industrial Commission which is not supported by any competent evidence is not conclusive.

4. Master and Servant § 41b—The Industrial Commission may award additional hospitalization only upon proper finding that it would tend to lessen the period of employee's disability.

The provision of the Workmen's Compensation Act that the employer should be liable for additional medical treatment to effect a cure or give relief, Public Laws 1929, ch. 120 (25), as amended by Public Laws 1931, ch. 274 (4), is limited by the provision of the section to cases in which such additional medical treatment would tend to lessen the period of the employee's disability, and the discretionary power to award such additional medical treatment is also subject to this limitation; nor may liability for medical attention be extended upon the ground that public policy demands that the care of a permanently disabled employee should not be cast upon the State, the extent of liability under the act being definitely prescribed by its provisions.

5. Constitutional Law § 6a—

It is the duty of the courts to declare the law as written and not to make it.

6. Appeal and Error § 20a—

An index of exhibits solely by the alphabetical designation of such exhibits does not comply with the requirements of Rule of Practice in the Supreme Court No. 19.

7. Appeal and Error § 28—

A reference in the brief to exhibits should designate the page of the record on which they are printed.

APPEAL by defendants from *Gwyn, J.*, at March Term, 1939, of GASTON.

Proceeding under the North Carolina Workmen's Compensation Act in which defendants petition for termination of their liability for expense of further medical and hospital treatment. Public Laws 1929, ch. 120, sec. 25, as amended by Public Laws 1931, ch. 274, sec. 4.

The claimant, Ruth Millwood, sustained an injury by accident arising out of and in the course of her employment by defendant Firestone Cotton Mills Company when on 21 February, 1936, she was stricken on the head by a flying broken belt.

On 3 March, 1936, she entered into an agreement with the defendants for compensation at the rate of $7.20 per week, beginning 28 February, 1936, for the number of weeks required for partial or total disability as the case might be (sections 29 and 30 of the act). The agreement was duly approved by the North Carolina Industrial Commission as required by the act.

After being treated by physicians in Gastonia, she was taken to and entered in the Charlotte Sanatorium in the city of Charlotte, N. C., where she was treated by and under the supervision of Dr. R. F. Leinbach. While there she developed serious mental disorder. Having there "nothing further to offer her in way of treatment," she was re-

moved to Broadoaks Sanatorium, in Morganton, N. C., a private institution for the treatment of mental diseases, of which Dr. James W. Vernon is superintendent. She remained there until 1 July, 1938, when by order of the North Carolina Industrial Commission she was transferred to the State Hospital at Morganton, N. C.

On 14 February, 1938, defendants petitioned the North Carolina Industrial Commission for relief from liability for the expense of further medical and hospital treatment on the ground that they had furnished such treatment for the length of time required by the Workmen's Compensation Act, and for that unless further treatment would "tend to lessen the period of disability" they are not liable for the expense thereof.

The petition came on regularly for hearing at Gastonia, N. C., on 23 March, 1938, before Commissioner J. Dewey Dorsett. By agreement, written reports of Dr. Crispell, neurologist and psychiatrist of Duke Hospital, who had examined her both while she was in Charlotte Sanatorium and while in Broadoaks, and Drs. Leinbach and Vernon were admitted as a part of the record. In addition, Drs. Leinbach and Vernon testified in person.

Thereupon Commissioner Dorsett, after stating contention of defendants, and referring to the reports of the three distinguished doctors, states: "From the evidence the Commission finds as a fact that the plaintiff is unable to earn any wages. She is totally disabled. And we further find as a fact that the plaintiff is unable to look after herself. She is in need of custodial care."

Thereupon on 30 March, 1938, the North Carolina Industrial Commission made an award as follows: "Upon the finding that plaintiff sustained an injury by accident arising out of and in the course of her employment, resulting in permanent total disability; that plaintiff for some time has been in an institution for the treatment of mental diseases in Morganton; that plaintiff is unable to look after herself and is in need of custodial care: Defendants will continue to furnish plaintiff the proper hospital, custodial and medical treatment needed."

Upon appeal by defendants thereto, the Full Commission made these, among other, findings of fact and conclusions: "The plaintiff is now suffering from dementia praecox. . . . The facts are fully set forth in the able opinion of Commissioner Dorsett. . . . The evidence in this case tends to show, according to medical experts, that the plaintiff is now suffering from an incurable mental condition. At the same time the medical evidence tends to establish the necessity of some kind of care at all times. Therefore, the Commission feels that it is contrary to public policy to require that the State bear the expense of maintaining the plaintiff who suffered an injury in industry."

The Commission also finds as a fact that it is for the best interests of all parties concerned, including the plaintiff herself, that she be transferred from the private sanatorium to the public hospital at Morganton, and approved previous informal order to that effect.

Then the Full Commission affirmed the findings of fact, conclusions of law and the award of the hearing Commissioner, except with respect to treatment at private sanatorium, and ordered that defendants be responsible for such cost as is charged by the public hospital for private patients from and after 1 July, 1938. An award, denying petition of defendants issued from which defendants appeal to the Superior Court, and assigned error.

At the January Term, 1939, it appearing that no specific finding of fact had been made that additional hospitalization and treatment would tend to lessen the period of disability, the presiding judge remanded the cause to the North Carolina Industrial Commission to the end and with direction that specific finding of fact be made on that question.

Pursuant thereto, the North Carolina Industrial Commission, without hearing further evidence, entered a decree in which these recitals appear: "The Commission finds as a fact that additional hospitalization and treatment would tend to lessen the period of disability of the plaintiff, Ruth Millwood. . . . In all other respects the findings of fact, conclusions of law and the award of the individual Commissioner, and the original findings of fact, conclusions of law and the award of the Full Commission are herein affirmed." Supplemental award issued thereupon. Defendants excepting to the finding "that additional hospitalization and treatment would tend to lessen the period of disability of plaintiff," appealed from the award to the Superior Court. Judgment was there entered sustaining the findings, order and award of the Commission.

Defendants appeal to Supreme Court and assign error.

C. B. McRorie for plaintiff, appellee.

J. Laurence Jones and J. L. DeLaney for defendants, appellants.

WINBORNE, J. On this record, is there sufficient competent evidence to support the finding that "additional hospitalization and treatment will tend to lessen the period of disability of the claimant"? If not, when the North Carolina Industrial Commission finds that the claimant is permanently totally disabled as result of injury by accident arising out of and in the course of her employment may it in its discretion award medical, surgical, hospital or other treatment for an additional period of time?

Consideration of pertinent sections of the North Carolina Workmen's Compensation Act under proper construction points to negative answers to these determinative questions.

Section 25 of the act as amended provides: "Medical, surgical, hospital, or other treatment, including medical and surgical supplies as may reasonably be required, for a period not exceeding ten weeks from date of injury to effect a cure or give relief, and for such additional time as in the judgment of the Commission will tend to lessen the period of disability, . . . shall be provided by the employer. In case of a controversy arising between employer and employee relative to the continuance of medical, surgical, hospital or other treatment, the Industrial Commission may order such further treatments as may in the discretion of the Commission be necessary . . ." Public Laws 1929, ch. 120, sec. 25, as amended by Public Laws 1931, ch. 274, sec. 4.

As we read and construe the wording of the act it is plain that in order to effect a cure or give relief, medical, surgical, hospital or other treatment shall be provided by the employer for a period of ten weeks. But such treatment may not be required for additional time unless it "will tend to lessen the period of disability." Disability, as used in the act, means "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." Public Laws 1929, ch. 120, sec. 2, subsec. (i). Whether additional hospital treatment will tend to lessen the period of disability is a question of fact to be ascertained by the Industrial Commission upon competent evidence. Until and unless such finding be made, the Commission is without jurisdiction to make an award for treatment for an additional period.

1. Reverting to the first question, it is appropriate to refer to the evidence before the Commission. Drs. Crispell, Leinbach and Vernon each, after reviewing the history of the case, and treatment administered, expresses his opinion of the present condition of claimant and a prognosis as to her future condition.

Dr. Crispell said in part: "For all intents and purposes, I think that the course and prognosis are those of schizophrenia or dementia praecox. . . . While there may be a little tendency towards remission at times, I do not think the patient will ever be mentally normal or able to live outside of an institution, and the likelihood is that the condition will be progressive. Furthermore, there is no specific treatment and there remains nothing but custodial care. . . . In spite of the fact that everything possible has been done, she has a malignant psychotic condition which will incapacitate her, probably permanently, and this is beyond any treatment, and in which she will need permanent institutional and psychiatric care."

In his report, Dr. Leinbach stated in part: "It is implied only that the course of her psychosis is, in my opinion, beyond human control and can be influenced only in minor features by treatment of any kind. It appears to me also that her treatment in the future will be largely custodial. . . ." On examination before the hearing Commissioner, Dr. Leinbach testified: "I have an opinion satisfactory to myself that further medical treatment will not tend to lessen the period of her disability. . . . I saw this patient January 30th. Her condition at that time was just as bad as it could be. She became worse, progressively worse, during her treatment in the Charlotte Sanatorium, and at the time I saw her eighteen months later, January 30, her condition was just as bad as it was the day she was dismissed from the Sanatorium. . . . I don't think hospitalization would tend to give relief. I don't think her trend is to recover or improve by being in the hospital at all."

Dr. Vernon reported in part: "A mental disorder and disability of three years standing following an accident is probably permanent and not likely to be influenced by any treatment. . . . The mental reactions of Mrs. Millwood present a picture with close marks of the mental disease known as dementia praecox. It is my opinion that we can so call it at this time. What has caused it I do not know. . . . As to treatment, no specific treatment that has been tried and tested is known to materially influence the course of dementia praecox. Custodial care may improve habits and prolong life; and in the course of time the patient may come to a more or less comfortable adjustment with surroundings; but the disease known as dementia praecox is beyond control and gradual deterioration is the usual course. Such a case as Mrs. Millwood will probably spend her life in a mental hospital."

On examination before the hearing Commissioner, Dr. Vernon testified, in part: "I think custodial care of the patient is necessary . . ." Then in response to a direct question as to whether anything medically, surgically, or of any nature while in his institution would effect a cure or give relief or tend to lessen the period of disability, the doctor said in part: "My reply would have to be that the best efforts of hospitalization and care would certainly tend to give her the best chance. By that I wouldn't mean that I had full assurance or any reason to think that she would necessarily recover. . . . Right along she might regress, deteriorate while doing all these things. Nothing that is any assurance or certainly medically that I know of could be given Mrs. Millwood which could cure her present mental condition. I am inclined to think I can treat her, which treatment would tend to lessen her disability . . ." And, finally, in response to the question: "Most of us subscribe to the theory that as long as there is life there is hope?" he replied: "Yes, sir, and it is obvious that the person needs training or

skillful nursing or care. It is not in the sense of medical or surgical care. Everything has to be done for her, every sanitary thing."

From this evidence taken in the most favorable light to plaintiff as "everything has to be done for her, every sanitary thing," treatment would tend to lessen her disability. But there is no evidence that treatment will tend to lessen *the period* of her disability which the Commission finds. To the contrary, on 30 March, 1938, the Commission awarded continuance of hospitalization upon finding that plaintiff "sustained an injury by accident arising out of and in the course of her employment, resulting in permanent total disability." Upon that finding, the treatment terminates and the act provides the compensation.

2. That part of section 29 of the act providing that "in case of a controversy arising between the employer and employee relative to continuance of medical, surgical, hospital or *other treatment,* the Commission may order further treatment as may *in the discretion* of the Commission be necessary" must be read in connection with the sentence just preceding, providing for such treatment. When so considered, the exercise of discretion for treatment beyond the ten weeks period comes into play only upon proper finding by the Commission that such additional treatment "will tend to lessen *the period* of disability."

The record in the present case reveals that "in spite of the fact that everything possible has been done" for claimant since her injury on 21 February, 1936, she is now suffering from an incurable mental disease, a permanent total disability. What care and treatment is now required to be provided for her under the provisions of the Workmen's Compensation Act is not a matter of public policy except as therein declared. In that act the Legislature has prescribed and limited the benefits to and the burdens upon those subject to its provisions. It is the duty of the courts to declare the law as written, and not to make it. *S. v. Whitehurst,* 212 N. C., 300, 193 S. E., 657; *Borders v. Cline,* 212 N. C., 472; 193 S. E., 826, and cases there cited.

Attention is called to Rule 19 of the Rules of Practice in the Supreme Court, 213 N. C., 816, with respect to the arrangement of the contents of the record and of the index. The index to record on this appeal is made up almost entirely of alphabetical designation of exhibits. This is not in compliance with the requirements of the rule, and is virtually no index. Hence, it has been necessary in the main to search through the ninety pages to find any particular document. See *Kearnes v. Gray,* 173 N. C., 717, 92 S. E., 149.

Likewise, attention is called to the fact that in brief of appellant reference is made to exhibits in the record without page designation.

The judgment below is

Reversed.

VIRGINIA TRUST COMPANY, A CORPORATION, v. LAMBETH REALTY CORPORATION, C. A. CANNON, TRUSTEE; AND MRS. LAURA CANNON MATTES.

(Filed 3 May, 1939.)

1. Usury § 5—Forfeiture of interest for usury may be set up without tender of debt with legal interest.

A claim of forfeiture of all interest for usury may be properly set up as a defense in the creditor's action on the debt without a tender of the debt with legal interest, C. S., 2306, tender being required only when the debtor seeks affirmative equitable relief such as enjoining the collection of the debt or the foreclosure of the security therefor.

2. Same: Fraudulent Conveyances § 1—Debtor may plead forfeiture of interest for usury in creditor's action to set aside conveyance.

The complaint in this action by a creditor alleged the amount of the debt and sought to have a subsequent conveyance in trust by the debtor set aside as fraudulent on the ground that the debtor was insolvent and the conveyance covered virtually all the property of the debtor. *Held:* The creditor was entitled to establish its claim in the suit, the remedy sought being incidental and supplemental thereto, and upon proper procedure, might be entitled to an equitable levy, and therefore the suit is one to enforce the alleged usurious notes, and the debtor is entitled to set up the defense of usury, and demand the forfeiture of all interest, without tender of the principal with legal interest.

3. Same—When defendant does not seek equitable relief based on usury he is not required to tender principal with legal interest.

Plaintiff instituted this suit to set aside a conveyance in trust executed by defendant debtor as being fraudulent as to creditors. Plaintiff's debt was evidenced by notes secured by a first deed of trust on certain of defendant's property, and the conveyance sought to be set aside constituted a second lien against all the lands of defendant and certain of its personal property. Defendant sought to have plaintiff's notes and deed of trust canceled on the ground of fraud in procuring their execution. *Held:* Since defendant does not seek to restrain the collection of the notes or the foreclosure of the security therefor in the event it is not successful in obtaining cancellation of the instruments for fraud, defendant debtor is not required to tender the principal with legal interest in order to demand the forfeiture of all interest for usury.

4. Usury § 4—Junior lienor is not entitled to invoke forfeiture of interest for usury as against senior lienor.

The trustee and *cestui que trust* in a second deed of trust are not entitled to invoke the forfeiture of interest for usury as against the first lienor, since they are not parties to the alleged usurious contract between the first lienor and the debtor, but may only require that the debt be stripped of usury.

5. Same: Fraudulent Conveyances § 6—Transferee may not plead forfeiture of interest for usury to establish solvency of transferor.

This action was instituted by a creditor under a senior lien to have a junior lien on all the property of the trustor canceled as being fraudulent as to creditors. The trustee and *cestui que trust* in the second deed of trust claimed the right to invoke the forfeiture of interest on the prior debt for usury in order to establish the solvency of the trustor at the time of the execution of the second deed of trust. *Held:* The right to invoke the forfeiture of interest for usury is personal to the debtor, C. S., 2306, and the trustee and *cestui que trust* have no relation to the contract between the debtor and the first lienor entitling them to enter the plea.

6. Fraudulent Conveyances § 1: Equity § 1b—Usury entitles debtor to declare forfeiture of interest, but does not bar action by creditor to set aside conveyance.

In a creditor's action to establish its debt and to have a subsequent conveyance by the debtor set aside as fraudulent as to creditors, the fact that plaintiff's debt is tainted with usury entitles defendant debtor to invoke the forfeiture of interest, C. S., 2306, but does not defeat plaintiff's action, or estop plaintiff from asserting the equitable remedy of setting aside the fraudulent conveyance under the doctrine that he who seeks equity must come into court with clean hands.

APPEAL by plaintiff from *Hamilton, J.,* at October Term, 1938, of MECKLENBURG. Affirmed in part; reversed in part.

This action was instituted 28 October, 1935, for the purpose of setting aside conveyances in trust of the property of the corporate defendant alleged to be fraudulent as to the plaintiff, a creditor, as attempting to dispose of all its property while defendant was insolvent, in defeat of plaintiff's debt.

On 2 February, 1931, it is alleged the defendant Lambeth Realty Corporation obtained from or through the plaintiff $47,500, for which it executed 30 first lien notes of $1,000 each, due and payable 1 February, 1935, and four second lien notes, three for $2,500 each, payable respectively on the first day of February of the years 1933, 1934, and 1935, and one note for $10,000 to become due on the first day of February, 1936.

In security for the thirty first lien notes, and for the security of the subordinate second lien notes aggregating $17,500, the Lambeth Company made a deed of trust to plaintiff on certain real estate described in the complaint.

Two of the notes, in the sum of $2,500 each, were taken up by the defendant Laura Cannon Mattes, and it is alleged they became subordinated in lien to the balance of the indebtedness. The plaintiff claims in its own right the remaining $2,500 note and the $10,000 note referred to as second lien notes, and as trustee, with authority to represent the owners, the 30 first lien notes.

It is alleged that there have been placed on the records of Mecklenburg County two deeds of trust from the corporate defendant to defendant C. A. Cannon, Trustee, both dated 15 February, 1934, and filed 19 February, 1934. The first conveys the real estate on which plaintiff's debt is secured by deed of trust, together with various other lands, alleged to be all the real estate owned by the corporate defendant; the other, it is alleged, conveys substantially all of its personal property. They purport to secure $218,095.34, alleged to be due Mrs. Mattes, and advancements which may be made, not in excess of $350,000. The complaint sets up particulars as to insolvency and circumstances as to the alleged fraud.

It is further alleged that the deeds of trust executed to Cannon, Trustee, were intended to be, and were in fact and law, assignments for the benefit of creditors of the corporate defendant, and that because of noncompliance with C. S., 1610, requiring the filing of an inventory within ten days, they are void.

The complaint alleges that subsequently to the execution of the trust deeds to the defendant Cannon, Mrs. Mattes, codefendant, undertook to take an assignment of certain stocks conveyed in one of them through an exchange of stocks and credit on indebtedness without payment in cash, and not in accordance with the deed of trust, and asks that the stocks be returned, surrendered, or paid for.

Plaintiff further alleges that defendants Cannon, Trustee, and Mrs. Mattes, have advertised the real estate conveyed in one of the deeds of trust for sale, alleges irreparable damage if the sale is permitted to take place, and asks that the sale be restrained until the matters in controversy have been determined. It is alleged that the value of the property conveyed in the trust deed to plaintiff is less than the total amount due on the bonds secured, and has so depreciated as to afford no security for the $12,500 notes held by plaintiff in its own right.

The prayer for relief asks that Mrs. Mattes make an accounting for the stocks taken by her; that C. A. Cannon, Trustee, be perpetually enjoined from exercising any of the powers contained in the deeds of trust made to him; and that plaintiff have such other relief as it may be entitled to.

After intermediate pleadings unessential to an understanding of this appeal, all of the defendants answered. Summarizing, the answers admit the execution of the various conveyances in the chronological order stated, and the face amounts of the notes as alleged. It is denied that any fraudulent invasion of plaintiff's rights was involved in the various transactions between Lambeth Corporation and Mrs. Mattes and Cannon, Trustee. It is averred that these transactions were *bona fide,* and that the conveyances representing them were for value, legal and legitimate.

The answer of Lambeth Company, in a further defense, charges that the indebtedness to the plaintiff was brought about by a fraudulent scheme of the plaintiff to avoid loss upon other loans, and should not, in equity, be collected, and pleads that its officers acted *ultra vires* in executing the notes and deed of trust securing them.

The answer of Mrs. Mattes, in addition to the summarized statement above, alleges in a further defense that plaintiff has received moneys from her through advancements made to Lambeth Corporation, under the foregoing conditions, of which plaintiff had the benefit, and under circumstances which estop plaintiff from attacking the validity of the deeds of trust to Cannon; and similar allegations appear in the answer of Lambeth Corporation.

The defendants, Mrs. Mattes, Cannon, Trustee, and Lambeth Corporation, were permitted to file amendments to their answers and set up a charge of usury against the plaintiff with respect to the entire loan secured by its deed of trust, and the several notes evidencing the same, reciting the particulars thereof. Both answers demand a forfeiture of all interest on plaintiff's notes and the denial to it of equitable relief, upon the ground that the notes upon which its right of action is based are tainted with usury.

Upon these affirmative pleas plaintiff filed a written demurrer to the answer of Lambeth Corporation and demurred *ore tenus* to the answer of Mrs. Mattes and C. A. Cannon, Trustee, upon the ground that these defendants had made no tender to the plaintiff of the amount due, with lawful interest, as required by law.

The demurrer was overruled, and plaintiff excepted and appealed.

Taliaferro & Clarkson for plaintiff, appellant.

E. T. Bost, Jr., for defendant Lambeth Realty Corporation, appellee.

Robinson & Jones for defendants C. A. Cannon, Trustee, and Laura Cannon Mattes, appellees.

SEAWELL, J. The plaintiff's demurrer to the answers of the defendants, setting up usury, apparently is based on the assumption that these defendants in pleading the usury were pursuing an equitable remedy and had taken the offensive. "He who seeks equity must do equity." The statute itself, however, gives to the debtor, defendant in a suit upon notes tainted with usury, the right to plead forfeiture of all interest—C. S., 2306—and makes no condition of previous tender upon such defense. The forfeiture of all interest is one of the law; and only when the debtor must resort to equity to restrain collection of the usurious debt or prevent foreclosure of the mortgage security, thereby becoming, both in the real and technical sense, actor, is it required that he tender the amount of the debt with legal interest. When attacked, he may

defend according to the terms of the statute. *Noland v. Osborne,* 177 N. C., 14, 97 S. E., 714; *Gore v. Lewis,* 109 N. C., 539, 13 S. E., 909, and cited cases; *Arrington v. Goodrich,* 95 N. C., 462. As to the usurious lender, there may be a *locus poenitentiae,* and for that reason the statute is content to place the forfeiture of interest on a defensive basis. It follows in the train of the attempt to enforce the usurious interest agreement and is what the law says it is, a forfeiture incident upon the "taking, receiving, reserving, or charging a greater rate of interest than six per centum per annum"; a forfeiture, however, which the statute makes available as a defense. On payment of the usurious demand, a cause of action arises for the recovery of twice the amount of the interest paid.

As to the defendant Lambeth Corporation, it has asked no equitable relief against plaintiff except cancellation of the debt on account of an alleged fraud; it has not asked that plaintiff be restrained from foreclosing its deed of trust or the enforcement of its notes, if it cannot maintain itself on the issue of fraud.

The defense presented to the usury charge is a legal defense. The mere fact that plaintiff has brought an action involving incidental equitable features, thus choosing, as it had the right to do, the atmosphere of the proceeding, does not necessarily invest defendant's assertion of a legal statutory right with the character of an equitable claim, independently pursued.

With respect to this defendant, it remains to be considered whether plaintiff's action may be construed in law as one for the enforcement of the alleged usurious notes in which the plea of usury is appropriate. Of this there can be little doubt. The allegations are sufficient to legally justify a judgment against the Lambeth Corporation for whatever sum may be found due the plaintiff; *Knight v. Houghtalling,* 85 N. C., 17; *McNeill v. Hodges,* 105 N. C., 52, 11 S. E., 265; *Hendon v. R. R.,* 127 N. C., 110, 37 S. E., 155; *Staton v. Webb,* 137 N. C., 35, 36, 47 S. E., 55; and defendant, unless it has made timely assertion of its supposed right, under such conditions, might find itself at the mercy of the plaintiff at the end of the trial. The law will not compel it to take that chance. Indeed, the plaintiff has brought a typical suit for the enforcement of its claim against the defendant with respect to property conveyed in fraud of creditors, in which the enforcement is the gravamen of the suit and the remedy sought is incidental and supplemental. It is competent for it to establish its claim in such a suit, and, with proper procedural protection of its rights, the plaintiff in such a suit might have the advantage of an equitable levy. *Dillard v. Walker,* 204 N. C., 67, 167 S. E., 632; *Hancock v. Wooten,* 107 N. C., 9, 12 S. E., 199; *Bank v. Harris,* 84 N. C., 206; 14 Am. Jur., p. 696, section 37.

We conclude that the corporate defendant was not required to make the suggested tender.

As to the defendants—C. A. Cannon and Mrs. Laura Cannon Mattes—respectively trustee and *cestui que trust* under a junior deed of trust, we do not see that the plea of usury is directly available to them at all, considering the admitted relations of all the parties to the subject matter of the suit and the objectives declared by them in the litigation. These defendants were not parties to the contract between plaintiff and the Lambeth Corporation, and are not brought into privity with the parties to that contract by the fact that, in part, the senior trust deed of the plaintiff and the junior deed of these defendants cover a common security. *Pinnix v. Casualty Co.*, 214 N. C., 760. The fact, of course, gives certain rights to the junior mortgagee, but no rights under C. S., 2306, which statute is for the benefit of the debtor, who may be also debtor mortgagor. The plea is personal to him. *Pinnix v. Casualty Co., supra; Ghormley v. Hyatt,* 208 N. C., 478, 181 S. E., 242; *Ector v. Osborne,* 179 N. C., 667, 670, 103 S. E., 388.

Upon tender of the amount due, with legal interest, the junior mortgagee is let in to plead usury, to the extent that he may purge the debt secured by the senior mortgage of usury, when it becomes necessary to ascertain the amount of the debt secured by the senior mortgage to the end that he may pay it and obtain subrogation. *Pinnix v. Casualty Co., supra; Ector v. Osborne, supra.* The defendants have indicated no such purpose, have not asked that foreclosure of the senior mortgage be delayed or restrained for their equitable relief, and have alleged no grounds upon which, under these precedents, they may be permitted to interfere between the parties to the senior contract on the score of usury. Had they laid such a basis for it and sought equitable relief of the character mentioned in aid thereof, tender of the amount due, with legal interest, would, no doubt, be necessary.

These defendants—Cannon and Mattes—contend that the right to plead usury ought to be accorded to them because the usury is a factor in determining the total indebtedness of the Lambeth Corporation and, therefore, has a bearing on the issue of insolvency. But the forfeiture of the statute, and the right to purge a debt of its usury, are not objective devices to be applied in accountancy anywhere usury may be discovered and in behalf of impersonal justice. Their availability depends on the relation of the parties to each other and to the subject matter. What these defendants cannot do directly, they cannot achieve by indirection. Moreover, since the plea is one personal to the debtor, it might waive it. *Ghormley v. Hyatt, supra.* The fact that the debtor has not done so in this instance, while it inures to the benefit of the defendants Cannon and Mattes, it adds nothing to their right to assert it.

In sustaining the judgment overruling plaintiff's demurrer as to the defendant Lambeth Corporation, we must not be understood as accepting the defendant's apparent view of the legal effect of the usury, if found. This would not, of course, defeat plaintiff's action. Formerly, under the old usury laws, the taint of usury outlawed the debt in express terms. But, C. S., 2306, substituted for the more drastic law, as a remedy available on defense, forfeiture of interest and the recovery of double the interest when paid. Relief goes no further than that provided in the statute. As against the debt itself, the principles applying to actions brought on contracts made contrary to public policy no longer control, however they may apply to the interest agreement. *Moore v. Woodward,* 83 N. C., 531, 533; *Hughes v. Boone,* 102 N. C., 137, 9 S. E., 286; *Smith v. Building and Loan Assn.,* 119 N. C., 249, 255, 26 S. E., 41. The plaintiff will not be debarred of its legal rights because a part of the relief demanded lies in equity, upon the ground that it "does not come into court with clean hands." Pomeroy Equity Jurisprudence, 4th Ed., section 937; *Bank v. Lutterloh,* 81 N. C., 144; *Pinnix v. Casualty Co., supra.*

As to defendant Lambeth Realty Corporation, the judgment overruling the demurrer is

Affirmed.

As to the other defendants it is

Reversed.

C. O. KENNERLY, ADMINISTRATOR OF THE ESTATE OF AARON A. WILLIS, DECEASED, v. TOWN OF DALLAS.

(Filed 3 May, 1939.)

1. Municipal Corporations § 13b—

It must clearly appear upon the face of the complaint that the alleged negligence of the officers and employees of a municipality was committed by them in doing an act or conducting a business wholly *ultra vires* the municipality in order to sustain the municipality's demurrer on the plea of *ultra vires.*

2. Pleadings § 18—

A defect complained of must appear upon the face of the complaint in order to be demurrable.

3. Municipal Corporations § 5—

A municipal corporation has the powers expressly granted in its charter, special and general statutes, and the organic law, and those powers necessarily and fairly implied in or incident thereto, and those essential and indispensable to the accomplishment of the declared objects of the corporation.

4. Same: Municipal Corporations § 13b—Maintenance of electric power lines outside its limits is not necessarily ultra vires the municipality.

A municipality has the power to purchase, generate, or distribute electricity for its own use and the use of its inhabitants, and is given legislative authority to extend its lines beyond its corporate limits for the purpose of selling electricity to nonresidents, C. S., 2807, 2808, and therefore a complaint in an action against a municipality alleging injury from negligent maintenance of power lines outside the corporate limits is not demurrable on the ground that the alleged negligence of its officers and employees was *ultra vires* the city. *Williamson v. High Point*, 213 N. C., 96, cited and distinguished in that the municipality in that case was proceeding under the Revenue Bond Act of 1935, which contains restrictions not incorporated in the general law.

5. Municipal Corporations § 5—

Chapter 136, Public Laws of 1917, as amended by chapter 285, Public Laws of 1929, conferring power upon municipalities to own and maintain electric power systems for the benefit of its inhabitants and those outside its limits desiring same where the service is available, is valid.

6. Constitutional Law § 6a—

The wisdom of permitting municipalities to engage in private and competitive business is for legislative determination, and the courts must construe the statutes embodying the legislative policy as they are written.

7. Municipal Corporations § 17b: Electricity § 7—

Complaint *held* sufficient to allege negligence in maintenance of power line in this action to recover for the wrongful death of intestate, who was killed when he came in contact with an uninsulated, heavily charged electric light wire.

APPEAL by defendant from *Gwyn, J.*, at January Civil Term, 1939, of GASTON. Affirmed.

This is a civil action to recover damages for the wrongful death of plaintiff's intestate, who was killed when he came in contact with an uninsulated electric light wire heavily charged with electricity. The wire with which the plaintiff's intestate came in contact was a part of a system of lines operated by the defendant outside of its corporate limits.

The defendant demurred to the amended complaint for that it fails to state facts sufficient to constitute a cause of action, in that: (1) The alleged conduct of the defendant in operating electric lines outside the corporate limits of the town and engaging in a private enterprise outside of the corporate limits as alleged in the complaint is *ultra vires*, and the defendant is not liable for any resulting damages; (2) the conduct of the defendant in engaging in the distribution of electricity for lighting and power purposes for the use and benefit of said town, its citizens and customers is *ultra vires* and fails to show that the purchase of such lines outside its corporate limits was necessary to the promotion

of the welfare of its citizens, or for the use and benefit of the citizens; (3) there is no legal liability upon the defendant nor any legal duty which it owed to the plaintiff's intestate growing out of and arising from the things and matters set forth in the amended complaint; and (4) that if the defendant owed any legal duty to the plaintiff's intestate under the facts set forth in the amended complaint, then the same fails to contain sufficient allegations of negligence or wrongful acts on the part of the defendant that would be sufficient to constitute a cause of action.

The court below entered an order overruling the demurrer, and the defendant excepted and appealed.

Claudius D. Holland and Emery B. Denny for plaintiff, appellee.
Paul E. Monroe and Cherry & Hollowell for defendant, appellant.

BARNHILL, J. This appeal presents two questions for determination: (1) Is the maintenance and operation by the defendant of electric light lines wholly outside of its corporate limits, for distribution of electric current to nonresident customers *ultra vires;* and, (2) does the complaint sufficiently allege acts of negligence on the part of the defendant proximately causing the death of plaintiff's intestate?

Notwithstanding the fact that no legal liability is imposed upon the defendant by reason of the negligent conduct of its officers and employees in committing an act or conducting a business that is wholly *ultra vires,* the complaint is not demurrable unless the *ultra vires* nature of the acts and conduct complained of clearly appear upon the face of the complaint. *Madry v. Scotland Neck,* 214 N. C., 461. A demurrer challenges the sufficiency of the complaint and the defect therein complained of must appear upon the face of the complaint.

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. *Madry v. Scotland Neck, supra; Asheville v. Herbert,* 190 N. C., 732, 130 S. E., 861; *S. v. Gulledge,* 208 N. C., 204, 179 S. E., 883. 1 Dillon (5 Ed.), sec. 237. The sources of its powers are its charter, special acts, general statutes, and the organic law. 1 McQuillin (2 Ed.), 363. *Holmes v. Fayetteville,* 197 N. C., 740, 150 S. E., 624.

The plaintiff alleges: "3. That at the time of the grievances hereinafter complained of, the defendant was engaged in the distribution of electricity for lighting and power purposes for 'the use and benefit

of said town, its citizens and customers,' and that on or about May 1, 1938, said defendant purchased additional light lines, poles, transformers, meters, and other electrical apparatus, fixtures, and equipment from Bessie A. Craig and her husband, Robert O. Craig, which electric lines extended from the town of Dallas towards the town of Stanley; from the town of Dallas toward the village of High Shoals; from the town of Dallas toward the village of Hardin; and from the town of Dallas toward the town of Cherryville, North Carolina; and at the time and times hereinafter mentioned, the governing authorities of the town of Dallas caused to be operated on behalf and for the benefit of the town of Dallas, its electric light and power system, including the lines, equipment, and apparatus purchased from the said Bessie A. Craig and her husband, Robert O. Craig, hereinbefore referred to."

If the defendant in no event is authorized to maintain and operate electric lines located outside of its corporate limits for the distribution of electric current to customers residing outside of its corporate limits, the alleged acts of the defendant in so doing is *ultra vires* and no liability attaches to the town for injuries received as a proximate result of the negligent maintenance and operation of such lines. If the defendant has the authority to maintain and operate an electric light system for "the use and benefit of said town, its citizens and customers," then it does not appear upon the face of the complaint, and the plaintiff's allegations do not disclose, that the defendant was exceeding its authority. The question, then, to be determined on the plea of *ultra vires* is: May a municipality maintain and operate an electric light system for the distribution of electricity for lighting and power purposes for "the use and benefit of said town, its citizens and customers," and, in so doing, acquire, maintain and operate additional light lines, poles, transformers and other necessary equipment located entirely outside of its corporate limits for the purpose of serving customers who are not residents of the defendant town?

The Legislature by chapter 136, Public Laws 1917, C. S., 2807, conferred upon the municipalities of the State the power to own and maintain light and waterworks systems, to furnish water for fire and other purposes and light to the city and its citizens. This act was amended in 1929 and the further power was conferred upon municipalities to furnish light "to any person, firm or corporation desiring the same outside the corporate limits, where the service is available." Ch. 285, sec. 1, Public Laws 1929. The amendatory act of 1929, by sec. 2 thereof, as an amendment to C. S., 2808, further provided "that for service supplied outside the corporate limits of the city, the governing body, board or body having such waterworks or lighting system in charge, may fix a different rate from that charged within the corporate limits."

There can be no question as to the defendant's right to purchase, or to generate and distribute, electricity for its own use and for the use of its inhabitants. It is equally clear that without legislative authority the defendant would not be permitted to extend its lines beyond the corporate limits for the purpose of selling electricity to nonresidents of the city. It is likewise clear that the cited statutes authorize a municipality to furnish light, not only to its citizens, but "to any person, firm or corporation desiring the same outside the corporate limits where the service is available."

The act of 1917, as amended by the act of 1929, is a valid exercise of legislative authority. *Holmes v. Fayetteville, supra.* The wisdom of a policy which permits municipalities to engage in enterprises which are private and competitive in nature is for the determination of the legislative branch of the Government. We only interpret the law as it is written.

It does not appear upon the face of the complaint from the allegations therein contained that the defendant is exceeding the authority thus conferred upon it. The demurrer cannot be sustained for the reason that the acts and conduct of the defendant, as set out in the complaint in paragraph 3, are *ultra vires.*

This conclusion is not in conflict with the opinion in *Williamson v. High Point,* 213 N. C., 96, 195 S. E., 90, relied on by the defendant. The facts in that case disclosed that the city of High Point was proposing to issue and sell bonds under the provisions of ch. 473, Public Laws 1935, known as "The Revenue Bond Act of One Thousand Nine Hundred and Thirty-Five," for the purpose of constructing a municipal power plant to be located outside of its corporate limits, with transmission lines running through three counties, that would generate more than three times the amount of electricity then used by the entire city, and that the purpose of the project was to engage in the power business generally and to sell electricity to municipalities, industries and individuals generally. The act under which High Point was attempting to proceed expressly provides in section 3 thereof, that: "No municipality shall operate such undertaking primarily for profit, but shall operate such undertaking for the use and benefit of the consumers served by such undertaking and for the promotion of the welfare and for the improvement of the health and safety of the inhabitants of the municipality." Thus, it appears that a municipality proceeding under the Revenue Bond Act of 1935 was subject to restrictions not contained in the general law. It further appears that the 1935 act did not repeal or modify the general law theretofore in force, for it is expressly provided in section 13 thereof that "the powers conferred by this act shall be in addition and supplemental to the powers conferred by any other general,

special or local law." There, High Point was proceeding under a statute which contained restrictions not incorporated in the general law under which the defendant is acting.

We have carefully examined the allegations of negligence contained in plaintiff's complaint. We are convinced that negligence is sufficiently alleged. The defects the defendant seeks to point out therein are evidentiary matters to be developed by the testimony. As the case goes back for trial before a jury we refrain from any detailed discussion thereof.

The judgment below is

Affirmed.

STATE v. FRANK BRIGHT.

(Filed 3 May, 1939.)

1. Homicide § 18a—

Testimony of a dying declaration is competent when the declarant, at the time he makes the statement, is in actual danger of impending death, has full apprehension of such danger, and death ensues.

2. Same—

The fact that declarant entertains a hope of recovery subsequent to the time of making the declarations does not render the declarations incompetent.

3. Same—

When proper predicate is laid for the admission of testimony of dying declarations, the statements are not rendered incompetent by the fact that immediately thereafter declarant made a statement to another disclosing that declarant did not feel certain that death impended.

4. Homicide § 18b—

The remoteness of a threat goes to its weight and not to its competency.

5. Same—

Evidence in this case *held* sufficient to show continuing threats from the time of the threat made by defendant two years prior to the homicide, and defendant's objection to testimony of the prior threat is not sustained.

6. Criminal Law § 81c—

Objection to the admission of testimony cannot be sustained when the witness gives the same testimony on cross-examination without objection.

7. Homicide § 5—

Murder in the second degree is the unlawful killing of a human being with malice, but without premeditation and deliberation.

8. Homicide § 7—

Manslaughter is the unlawful killing of a human being without malice and without premeditation and deliberation.

9. Homicide § 16—

When the intentional killing of a human being with a deadly weapon is admitted or established, the law implies malice, constituting the offense murder in the second degree, nothing else appearing, and places the burden upon the defendant to establish matters in mitigation or excuse.

10. Homicide § 27b—

An instruction that upon the admission or proof of the intentional killing of a human being with a deadly weapon, the burden is on defendant to prove from "all the evidence" matters in mitigation or excuse to the satisfaction of the jury, *is held* not error, the court having fully and correctly charged the jury on the law relating to defendant's plea of self-defense.

APPEAL by defendant from *Carr, J.*, at January Term, 1939, of BEAUFORT.

Criminal action upon indictment charging defendant with the murder in the first degree of one Osborne Cayton.

Upon the case being called for trial, the solicitor for the State announced that he would not ask for a verdict of murder in the first degree, but would ask for a verdict of murder in the second degree, or manslaughter, as the jury might find the facts to be.

The evidence tends to show that Osborne Cayton was shot between 11:10 and 11:30 o'clock on the night of 22 November, 1938; that he was taken to the hospital by Harold Bateman, arriving there shortly after midnight; and that he died at half-past three on the morning of 23 November.

The State offered no witnesses as to the shooting, but introduced testimony as to statements of Osborne Cayton with respect to the circumstances under which he was shot by defendant; that he went to home of defendant and called him; that after answering the call defendant, without warning, shot him through the door. Exception by defendant. The State also introduced evidence tending to show threats made by defendant against the deceased. Exception by defendant.

Defendant, while he did not testify, admitted the killing with a deadly weapon, to wit, a pistol, but pleaded justification upon the ground of self-defense, contending that the deceased was making a felonious assault upon him or members of his family, late at night at defendant's home. Defendant offered members of his family as witnesses in an effort to show that deceased attacked him and, after being expelled from the house, went to his truck, turned back and was again trying to get into the house when defendant shot him through the door.

Verdict: Guilty of manslaughter.

Judgment: Confinement in State Prison for not less than seven nor more than ten years.

Defendant appealed therefrom to the Supreme Court, and assigns error.

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

Gholson & Gholson and Carter & Carter for defendant, appellant.

WINBORNE, J. Defendant assigns error in the trial below upon three grounds:

1. The admission of evidence as to dying declarations of deceased.

2. The admission of evidence of a threat two years prior to the homicide.

3. Portions of the charge with respect to burden on defendant when an intentional killing is admitted or established.

Careful consideration of the record on this appeal fails to disclose prejudicial error in any of these respects.

1. State's witness, Harold Bateman, testified that the deceased, Osborne Cayton, after he was shot and while on the way to the hospital and again while on the operating table in the hospital, told him that he was going to die and he "couldn't over it." The witness was then permitted to testify with respect to statements of the deceased as to the circumstances of the shooting. The witness further stated that, after the deceased made the statement while on the operating table, he left the room, and that as he went out he met deputy sheriff Bryan Marslender going into the room. Later the deputy sheriff testified that he spoke to Osborne Cayton in the operating room, and, upon asking "how he was," Cayton said to him—"I'm in mighty bad shape; I don't know whether I will over this or not."

Defendant contends that admitting for the sake of argument that Bateman's testimony standing alone would be competent, it must be taken in connection with the testimony of the deputy sheriff which he contends shows that at the time, and prior thereto, deceased did not know he was going to die, but had strong hope of recovery, and that a declaration made without fear of immediate death is not competent against defendant upon the trial.

The rule for the admission of dying declarations is well settled. The declarant at the time he made the statement should have been in actual danger of impending death and in full apprehension of such danger, and death should have ensued. *S. v. Tilghman,* 33 N. C., 513; *S. v. Mills,* 91 N. C., 581; *S. v. Caldwell,* 115 N. C., 794, 20 S. E., 523; *S. v. Williams,* 185 N. C., 643, 116 S. E., 570; *S. v. Casey,* 212 N. C., 352, 193 S. E., 411.

In *S. v. Casey, supra,* quoting from Ruling Case Law, it is said: " 'An undoubting belief existing in the mind of the declarant at the time

the declarations are made, that the finger of death is upon him, is indispensable to that sanction which the law exacts, and, therefore, if it shall appear, in any mode, that there was a hope of recovery, however faint it may have been, still lingering in his breast, that sanction is not afforded, and his statements cannot be received.' 1 R. C. L., 82, p. 539."

But, if at the time the statements are made the declarant is in, and is fully apprehensive of actual danger of death, a hope of recovery at a subsequent time will not render incompetent statements which were competent when made. *S. v. Tilghman, supra; S. v. Mills, supra; S. v. Caldwell, supra.*

In the present case the statements of deceased as disclosed by the testimony of the witness Bateman unequivocally showed that he was fully apprehensive of the actual danger of death at the time the statements were made. The evidence shows that he was in such danger, and death ensued.

2. Defendant contends that evidence of a threat made by defendant against deceased two years prior to the homicide, being unconnected with it by intermediate threats, is incompetent.

The fact that the threat, to evidence of which exception is taken, was made two years before 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,* 213 N. C., 719, 197 S. E., 573; *S. v. Hawkins,* 214 N. C., 326, 199 S. E., 284.

If it should be conceded that evidence of continuing threats is essential to the competency of a threat made two years prior to the homicide, we think there is sufficient evidence on this record to meet such test. The witness Charlie Lewis testified that a month before the shooting, in conversation about reporting on a still in which deceased was interested, and speaking of deceased, defendant said "he would have settled with him if he had got caught." Again, the witness Tom Whitfield testified that "a week and one day" before Cayton was shot defendant said: "'You hear what I said,' . . . if Cayton messed with him he would kill him."

If the evidence of the threat made two years previously, admitted over objection, were incompetent, defendant cannot now avail himself of the objection, as the record discloses that the same witness gave the same testimony on cross-examination without objection. *Smith v. R. R.,* 163 N. C., 143, 79 S. E., 433; *Shelton v. R. R.,* 193 N. C., 670, 139 S. E., 232; *Owens v. Lumber Co.,* 212 N. C., 133, 193 S. E., 219, and numerous other cases.

3. Defendant directs exception to this part of the charge of the court: "(When it is admitted or when it is proved to the satisfaction of the

jury beyond a reasonable doubt that the defendant shot and killed the deceased with a deadly weapon, to wit, a pistol, malice is presumed in law, and, nothing else appearing, the defendant, that having been either admitted or proved [beyond a reasonable doubt to the satisfaction of the jury], would be guilty of murder in the second degree, unless the defendant satisfies you from the evidence, not beyond a reasonable doubt, nor by the greater weight of the evidence, but simply satisfies you from all the evidence that the killing was done without malice, and if you are satisfied from all the evidence, not beyond a reasonable doubt, nor by the greater weight of the evidence, but simply satisfied that the killing was done without malice, then that would rob the charge of malice and reduce it from murder in the second degree to manslaughter, and if you find beyond a reasonable doubt that the defendant killed the deceased with a deadly weapon, to wit, a pistol, and I charge you gentlemen that a pistol is a deadly weapon, or if it has been admitted by the defendant, and you are satisfied from his admission beyond a reasonable doubt that he did kill the deceased with a deadly weapon, to wit, a pistol, and you are satisfied from the evidence that there was no malice in the killing of the deceased, then nothing else appearing, the defendant under that situation would be guilty of the crime of manslaughter, unless you are satisfied [the burden being upon him to satisfy you from all the evidence that the killing was justifiable or excusable for some legal reason].)"

Here defendant bases assignment upon this question: "When defendant admits the killing with a deadly weapon, is the burden upon him to satisfy the jury *from all the evidence* that the killing was justifiable or excusable for some legal reason?"

Murder in the second degree is the unlawful killing of a human being with malice, but without premeditation or deliberation. Manslaughter is the unlawful killing of a human being without malice and without premeditation and deliberation.

The intentional killing of a human being with a deadly weapon implies malice and, if nothing else appears, constitutes murder in the second degree. When this implication is raised by an admission or proof of the fact of killing, the burden is on the defendant to show to the satisfaction of the jury facts and circumstances sufficient to reduce the homicide to manslaughter, or to excuse it. *S. v. Capps,* 134 N. C., 622, 46 S. E., 730; *S. v. Quick,* 150 N. C., 820, 64 S. E., 168; *S. v. Gregory,* 203 N. C., 528, 166 S. E., 387; *S. v. Terrell,* 212 N. C., 145, 193 S. E., 161; *S. v. Robinson,* 213 N. C., 273, 195 S. E., 824; *S. v. Moseley,* 213 N. C., 304, 195 S. E., 830.

With respect to the burden which, under such circumstances, is upon the defendant to show to the satisfaction of the jury facts and circumstances sufficient to reduce the homicide to manslaughter or to excuse it,

this Court has expressed the rule in different phraseology. In *S. v. Miller,* 112 N. C., 878, 17 S. E., 167, *Avery, J.,* uses this language: "He must satisfy the jury, if he can do so, from the *whole of the testimony as well that offered for the State as for the defense,* that matter relied on to show mitigation or excuse is true," citing authorities. (Italics ours.)

In *S. v. Quick, supra, Brown, J.,* expresses it in this way: "The burden is on the defendant to establish such facts to the satisfaction of the jury, *unless they arise out of the evidence against him.*" This language is quoted in *S. v. Gregory,* 203 N. C., 528, 166 S. E., 387.

The court properly and fully charged the jury on the law relating to defendant's plea of self-defense. The use of the clause "the burden being upon him to satisfy you that upon all the evidence the killing was justifiable or excusable for some legal reason" cannot be held for error. In considering the conduct of the defendant in the light of the facts and circumstances as they appeared to him at the time he committed the act, as to whether he had reasonable apprehension that he was about to lose his life or to receive enormous bodily harm, the defendant is entitled to have the jury consider all of the evidence. Certainly, if the court had charged the jury that only evidence introduced by the defendant should be considered, error would be manifest.

No error.

THE STATE OF NORTH CAROLINA EX REL. LYNN WILDER, JR., ADMINISTRATOR OF PEARL MEDLIN RAINES, AND LYNN WILDER, JR., ADMINISTRATOR OF PEARL MEDLIN, ADMINISTRATRIX OF O. R. MEDLIN, v. MINNIE MEDLIN, ADMINISTRATRIX OF O. R. MEDLIN; L. T. ROSS, ADMINISTRATOR DE BONIS NON OF GASTON H. MEDLIN; THE INDEMNITY INSURANCE COMPANY OF NORTH AMERICA AND THE NATIONAL SURETY CORPORATION.

(Filed 3 May, 1939.)

1. Evidence § 32—Testimony of agreement between administrator and distributee in regard to settlement of estate held incompetent in action by distributee's administrator to recover assets.

This action was instituted by the administrator of a distributee against the administrator *d. b. n.* of the estate in which the distributee was interested, and against the executrix of the prior administrator of that estate and the surety on his bond, alleging the failure of the prior administrator to account for moneys of that estate and the refusal of the administrator *d. b. n.* to institute action. The administrator *d. b. n.* was permitted to testify as to an agreement made between him and the distributee, in the presence of the executrix and others, in which the dis-

tributee agreed to make no objection as to the administration of that estate. *Held:* The testimony related to more than a transaction between the distributee and executrix, since the witness, as administrator *d. b. n.*, was a necessary party to the conference and entire transaction and the agreement directly affected the manner of his handling of the estate, and the testimony was incompetent under the provision of C. S., 1795, and its unrestricted admission in evidence constituted prejudicial error as to plaintiff administrator, since it tended to show that his intestate, as distributee, had agreed to forego the prosecution of the very suit instituted by plaintiff administrator.

2. Same—Witness may testify in regard to independent facts and circumstances not involving personal transaction or communication between the witness and deceased.

Testimony of an interested witness as to independent facts and circumstances, within his own knowledge, or as to what he saw or heard take place between deceased and a third party, are not rendered incompetent by C. S., 1795, since in such instances the testimony does not relate to a personal transaction or communication between the witness and deceased, and appellant's exceptions to the admission of such testimony are not sustained.

APPEAL by plaintiff from *Harris, J.*, at November Term, 1938, of WAKE. New trial.

Plaintiff instituted this action as administrator of the estate of Pearl Medlin Raines against the administratrix of the estate of O. R. Medlin, deceased, to recover money for which it was alleged O. R. Medlin had failed to account while he was acting as administrator of the estate of Gaston H. Medlin. L. T. Ross, administrator *de bonis non* of Gaston H. Medlin, was made party defendant, as was also the surety on the administration bond of O. R. Medlin. Pearl Medlin Raines and O. R. Medlin were the children of Gaston H. Medlin and the only distributees of his estate.

The cause was referred to Oscar Leach, Esq., as referee, the defendants preserving right to trial by jury. The referee reported findings of fact and conclusions of law in favor of the plaintiff, and defendants filed exceptions thereto, and demanded jury trial on the following issues:

"At the time of the death of G. H. Medlin was O. R. Medlin indebted to him on account of money paid by G. H. Medlin for O. R. Medlin to the clerk of the Superior Court of Wake County, and, if so, in what amount?"

"Did O. R. Medlin, on or about 12 March, 1933, find and appropriate to his own use any sum of money belonging to the estate of G. H. Medlin, deceased, and, if so, how much?"

When the case was tried in the Superior Court, the jury answered both these issues "No," and from judgment in accord with the verdict, plaintiff appealed.

J. G. Mills and Paul F. Smith for plaintiff.

Gulley & Gulley for defendant Minnie Medlin, Administratrix, Estate of O. R. Medlin.

T. Lacy Williams for defendants L. T. Ross, Administrator d. b. n., Estate of G. H. Medlin, and Indemnity Insurance Company of North America.

DEVIN, J. The only questions presented by this appeal relate to the rulings of the court below in the admission of testimony which it is contended was rendered incompetent by C. S., 1795.

For a proper understanding of the relevancy of the testimony objected to and in order to determine its competency, it is necessary to consider the pertinent facts and circumstances as disclosed by the record. These may be briefly stated in chronological order as follows: Gaston H. Medlin died in March, 1933, intestate, leaving him surviving his two children, O. R. Medlin and Pearl Medlin Raines. In September, 1933, O. R. Medlin qualified as administrator of his father's estate with defendant Indemnity Insurance Company as surety on his bond. Without having rendered any account of his administration, O. R. Medlin died in November, 1934, and defendant Minnie Medlin, his widow, qualified as his administratrix. At the same time defendant L. T. Ross qualified as administrator *de bonis non* of the estate of Gaston H. Medlin. In May, 1935, Pearl Medlin Raines died, and plaintiff Lynn Wilder, Jr., qualified as administrator of her estate. Plaintiff as such administrator made demand upon defendant Ross as administrator *de bonis non* of Gaston H. Medlin that he institute action against the estate of O. R. Medlin, prior administrator of Gaston H. Medlin, and the surety on his bond, for the recovery of money alleged to be due by O. R. Medlin to his father's estate. Defendant Ross declined so to do, and thereupon the plaintiff instituted this action, alleging that O. R. Medlin was indebted to the estate of Gaston H. Medlin in the sum of $2,533.53 for money paid for him by Gaston H. Medlin to the clerk of the Superior Court of Wake County, and that O. R. Medlin was also indebted to said estate in the further sum of $9,000, money found by him in the home of Gaston H. Medlin after his death, and appropriated to his own use. Plaintiff alleged his intestate was entitled as distributee of Gaston H. Medlin's estate to one-half of these amounts.

Evidence was offered in support of plaintiff's allegations. It appeared that in 1932, about a year before his death, Gaston H. Medlin had withdrawn $11,500 from a bank in Oxford, and that this was at a time when there were many bank failures in this and other sections of the country. Plaintiff offered evidence tending to show that shortly after Gaston H. Medlin's death, O. R. Medlin found and appropriated

$9,000 in currency belonging to his deceased father's estate, upon which estate he subsequently qualified as administrator. Defendant's evidence tended to explain the matter of the $2,533.53, and to impeach the testimony of plaintiff's witnesses as to the finding of $9,000 in the Medlin home.

During the trial, over the objection of plaintiff as administrator of Pearl Medlin Raines, the following testimony of defendant L. T. Ross was permitted to go to the jury:

"I had a conference with Pearl Raines and Mrs. Minnie Medlin in your office (office of T. Lacy Williams, attorney for defendant Ross). The four of us were present, myself, Mrs. Medlin, Mrs. Raines and Mr. Williams. The conference took place after the investigation I had made with respect to the assets of the estate of G. H. Medlin. An agreement was reached at that time between Mrs. Medlin and Mrs. Raines with respect to the estate. After going over the thing and seeing just how it was they agreed that they were each willing to go fifty-fifty in what was on hand and not bring no other objection in no way toward each other in the settling of it."

In apt time plaintiff requested the court to instruct the jury that this evidence could only be considered by them as tending to explain why Ross declined to bring the action and in no other aspect, and that the jury should not consider it in connection with the issues submitted. The court refused to give this instruction and the jury was permitted to consider this evidence as competent for all purposes.

Examining this evidence in its relation to the determinative issues in the suit, we think it was both incompetent under C. S., 1795, and prejudicial to the plaintiff. The testimony was given by a party to the action, who was testifying in his own behalf, and in behalf of another party to the action, against the administrator of the deceased, Pearl Medlin Raines. It involved a personal transaction and communication between the witness and the deceased.

The defendant Ross testified, in effect, that, following an investigation which he had made as to the G. H. Medlin estate, of which he was administrator and in which the deceased was interested as distributee, he had a conference with her in the presence of the defendant, Mrs. Minnie Medlin, in the office of witness' attorney, and that after going over the matter an agreement was entered into by the deceased with respect to the settlement of the estate which the witness had in charge. This was something more than the mere relation of a transaction between other parties. The witness was a party to the conference and to the entire transaction, as was also the deceased. It materially concerned his administration of the estate, and the agreement which he says Mrs. Raines entered into there constituted the basis upon which he acted in

dealing with the estate and its distributees. The conference was doubtless arranged by the witness, as it was held at his attorney's office, and was designed for the consideration of matters to which both he and the deceased were necessary parties.

The restriction upon the introduction of testimony in the trial of an action contained in C. S., 1795, refers by its express terms to a person who is a party to the action (*Benedict v. Jones,* 129 N. C., 475, 40 S. E., 223; *Grier v. Cagle,* 87 N. C., 377), or interested in the event, and prohibits his examination as a witness in his own behalf, against the administrator of a deceased person, concerning a personal transaction or communication between him and the deceased. *Bunn v. Todd,* 107 N. C., 266, 11 S. E., 1043; *Bank v. Wysong,* 177 N. C., 284, 98 S. E., 769. This statute has been often considered by this Court and its provisions analyzed for the purpose of determining its applicability to varying situations and circumstances. Among the many cases on the subject there are decisions to the effect that, notwithstanding the witness is a party or interested, if he merely testifies to independent facts and circumstances, within his own observation and knowledge, or to what he saw or heard take place between the deceased and a third party, his testimony would not be rendered incompetent under the statute. *Burton v. Styers,* 210 N. C., 230, 186 S. E., 248; *Vannoy v. Green,* 206 N. C., 80, 173 S. E., 275; *Barton v. Barton,* 192 N. C., 453, 135 S. E., 296; *In re Mann,* 192 N. C., 248, 134 S. E., 649; *Abernathy v. Skidmore,* 190 N. C., 66, 128 S. E., 475; *In re Harrison,* 183 N. C., 457, 111 S. E., 867; *Zollicoffer v. Zollicoffer,* 168 N. C., 326, 84 S. E., 349; *Lehew v. Hewett,* 138 N. C., 6, 50 S. E., 459; *Johnson v. Cameron,* 136 N. C., 243, 48 S. E., 640; *Johnson v. Townsend,* 117 N. C., 338, 23 S. E., 271; *Watts v. Warren,* 108 N. C., 514, 13 S. E., 232; *McCall v. Wilson,* 101 N. C., 598, 8 S. E., 225; *March v. Verble,* 79 N. C., 19; *Gray v. Cooper,* 65 N. C., 183.

This construction of the statute, however, has not been extended to include those cases where the facts, in connection with which the testimony is offered, indicate a personal transaction or communication between the interested witness and the deceased. There the prohibition of the statute has been applied according to the terms in which it is expressed. *In re Plott,* 211 N. C., 451, 190 S. E., 717; *Boyd v. Williams,* 207 N. C., 30, 175 S. E., 832; *Price v. Pyatt,* 203 N. C., 799, 167 S. E., 69; *White v. Evans,* 188 N. C., 212, 124 S. E., 194; *Brown v. Adams,* 174 N. C., 490, 93 S. E., 989; *Witty v. Barham,* 147 N. C., 479, 61 S. E., 372; *Davidson v. Bardin,* 139 N. C., 1, 51 S. E., 779; *Fertilizer Co. v. Rippy,* 123 N. C., 656, 31 S. E., 879; *Wilson v. Featherston,* 122 N. C., 747, 30 S. E., 325; *Bright v. Marcom,* 121 N. C., 86, 28 S. E., 60; *Blake v. Blake,* 120 N. C., 177, 26 S. E., 816; *Lane v.*

Rogers, 113 N. C., 171, 18 S. E., 117; *Carey v. Carey,* 104 N. C., 171, 10 S. E., 156; *Ballard v. Ballard,* 75 N. C., 190; *Peoples v. Maxwell,* 64 N. C., 313.

An analysis of these and other cases on the subject, in the light of the facts upon which the decisions were made to turn, makes clear the substantial uniformity of the authorities to the effect that if the testimony offered may fairly be construed to refer to and rest upon a communication by the deceased to the interested witness, or to relate to a transaction by the deceased to which the interested witness was a party, though others be present and therein concerned, it comes within the exclusion prescribed by the statute.

The evidence objected to here was rendered incompetent by the statute and the trial court should have restricted its consideration by the jury as prayed by plaintiff. The evidence was material and its admission for all purposes was harmful to the plaintiff, as it tended to show an agreement on the part of plaintiff's intestate to forego the prosecution of the cause of action now in suit.

There were other exceptions noted by the plaintiff to certain testimony of defendant Minnie Medlin and brought forward in his assignments of error, but upon examination we find these without substantial merit. The evidence of this witness to which objections were entered may be regarded as consisting of statements of independent facts and circumstances, and not as necessarily involving personal transactions or communications between the witness and the deceased.

The findings of fact reported by the referee, to which no exception was filed, were approved by the trial judge, and are set out in his judgment.

For the reasons hereinbefore stated there must be a new trial of the issues presented by the defendants' exceptions to the referee's report, and it is so ordered.

New trial.

JOHN M. WILSON v. WILLIAM R. DOWTIN, TRADING AS DOWTIN'S FOOD STORE, AND F. O. SHERRILL.

(Filed 3 May, 1939.)

1. **Landlord and tenant § 11—Liability of lessor for injury to third person.**
Ordinarily, the lessor is not liable for injuries to a third person resulting from any defective condition in the leased premises unless he contracts to repair, knowingly demises the premises in a ruinous condition or in a state of nuisance, or unless he authorizes a wrong.

2. Negligence § 4b—Customer entering part of store reserved for lessee and his employees is licensee therein.

A customer who enters a part of the premises reserved for the operator of a store and his employees, is a mere licensee therein, even though he is an invitee to other parts of the premises, and evidence that an invitee, in attempting to go to the office of the store in the rear of the building, entered a large, dimly lit room in the rear thereof with merchandise and boxes on the floor which he could dimly see, and fell through an open stair well while attempting to traverse such room to the office, discloses that at the time of injury he was a licensee, the darkness of the room and the merchandise on the floor being sufficient to give clear warning that he was not in the part of the store open to customers and other visitors, and there being a direct entrance from the front part of the store to the office.

3. Landlord and Tenant § 11: Negligence § 4a—Rule that lessor may be liable to customer if he knowingly demises premises in ruinous condition or state of nuisance relates to the use for which the premises were let.

The premises in question were leased as a store, and thereafter, upon application of lessee, lessor built a store room in the rear in which a stairway, which had entered the basement from the outside, was included, and an open, unprotected well for the stairway was left in the room. *Held:* Lessor could not have reasonably anticipated that a customer of the store would be injured by falling into the open stair well in the part of the premises reserved for the lessee and its employees so as to be liable to the customer under the exception to the general rule that the lessor is liable when he knowingly demises the premises in a ruinous condition or in a state of nuisance, and, there being no evidence that lessor contracted to repair or that he authorized a wrong, his motion to nonsuit was properly granted.

APPEAL by plaintiff from *Olive, Special Judge,* at November Extra Term, 1938, of MECKLENBURG. Affirmed.

This is a civil action to recover damages for personal injuries sustained when the plaintiff fell into an open, unprotected stair well in the storage room of a building owned by the defendant Sherrill and in possession of the defendant Dowtin, as lessee.

The defendant Dowtin leased the property from H. C. Sherrill & Co. Thereafter, in July, 1936, the defendant Sherrill purchased the property subject to the lease. In the spring of 1937 the lessee, desiring enlarged premises, requested Sherrill to construct an addition at the back of the building, to be used as a storage room for merchandise. Sherrill engaged a contractor to build the addition as the tenant wished it. At the time the addition was constructed there was a stairway from the outside of the rear of the building leading into the basement. When the addition was constructed the stairway to the basement was retained, with an entrance from the floor of the addition, a part of the stair well being

covered over so that the open entrance was about 32 inches by 3½ feet. No railing or other protective device around the opening was constructed.

The office was in the rear of the original building and the storage room addition extended from the rear wall of the original building and could be entered through a door in the rear wall.

On 26 October, 1937, plaintiff, an employee of Armour & Co., at the request of defendant Dowtin, went to the store to adjust a dispute relative to an invoice for merchandise purchased by Dowtin from plaintiff's employer. After talking to the manager of the market, who did the purchasing from Armour & Co., in the rear of the original building, he was told to go back to the office and see the bookkeeper about the invoice. The plaintiff entered the door to the storage room. Due to the atmospheric conditions and the small windows the storage room was at the time dark. After he entered the storage room, not seeing the office, he started to call back to the meat cutter for directions. He then saw the lights of the office through the lattice work in the petition between the office and the storage room. He proceeded toward the light and as he undertook to step around some white bags lying on the floor he fell down the basement stair well, receiving certain personal injuries.

During the progress of the trial nonsuit was entered as to the defendant Dowtin pursuant to an agreement or covenant not to sue executed by the plaintiff. At the conclusion of the evidence, on motion of the defendant Sherrill, the court dismissed the action as of nonsuit and entered judgment accordingly. The plaintiff excepted and appealed.

McDougle & Ervin for plaintiff, appellant.

Guthrie, Pierce & Blakeney and Frank H. Kennedy for defendant Sherrill, appellee.

BARNHILL, J. The plaintiff alleges that the addition to the original building was constructed as a storage room and that it was actually in use as such at the time of his injury. All of the evidence tends to show that from the time of its construction this portion of the building was used for the storage of surplus merchandise carried in stock by Dowtin in connection with the operation of his business. All of the evidence likewise tends to show that there is a direct method of reaching the office from the front of the store without going through the storage room and that the office is easily observable when one enters the store. There is no evidence that the addition was used other than as a storage room or that customers and other persons visiting the store for business purposes, were either expressly or impliedly invited to enter the storage room, or customarily went therein. Under these circumstances is the landlord

liable in damages for injuries sustained by the plaintiff by reason of the fact that he constructed a stairway in the storage room leading to the basement and left the stair well opening unprotected by any railing or other protective device?

The general and basic rule is that when third parties are injured as the result of any defective condition in leased premises he may have recourse against the lessee, but not against the lessor. *Williams v. Strauss,* 210 N. C., 200, 158 S. E., 252; *Combs v. Paul,* 200 N. C., 382, 157 S. E., 12. The liability may, however, be extended to the landlord or owner—(a) When he contracts to repair; (b) where he knowingly demises the premises in a ruinous condition or in a state of nuisance; (c) where he authorizes a wrong. 1 Jaggard Torts, 223; 5 Dillon Mun. Corp. (5th Ed.); 3028; 36 C. J., 208; *Knight v. Foster,* 163 N. C., 329.

There is no evidence that the appealing defendant contracted to keep the premises in repair or that he authorized a wrong. On the contrary, the uncontradicted evidence shows that upon the completion of the building Dowtin, the tenant, agreed to protect the stair opening with shelving and by stacking merchandise around it. Did the defendant Sherrill lease the premises to Dowtin in a ruinous condition or in a state of nuisance so as to impose liability upon him for any resulting injury? If not, the judgment below must be sustained.

This exception to the general rule relates to the condition of the premises open to the ordinary uses for which the premises were let. *Meloy v. Santa Monica,* 124 Cal. App., 622, 12 P. (2nd), 1072; *Brown v. Powell,* 92 Ind. App., 467, 176 N. E., 241; 20 R. C. L., 67.

The storage room was not constructed, leased or maintained for the use of customers and other invitees to the store. It was provided with artificial lights which were not switched on at the time plaintiff was injured. He voluntarily entered the room, assuming that it was the proper way to the office. Immediately upon entering he discovered that it was dark and that he could not see how to move about in the room. Without turning back and ascertaining the correct method of entry to the office, or taking any other precaution, he continued on in a room under conditions which would have made it apparent to any person of ordinary prudence that he was in a part of the building not ordinarily used by invitees. He was put on notice by the condition of darkness that it was dangerous for him to proceed further. Notwithstanding this he continued to move around in the room until he finally fell into the open stair well. There is nothing in the record which tends to indicate that any part of the building leased by the defendant to Dowtin into which he could reasonably anticipate that customers and others would be invited to enter was in any ruinous condition or condition of nuisance, or to cause him to foresee that injury was likely to result to third parties from the existing conditions.

Where one enters a part of premises reserved for the use of the occupant and his employees and to which there was no express or implied invitation to go, there can be no recovery for resulting injury, even though he is an invitee to other parts of the premises. *Money v. Hotel Co.*, 174 N. C., 508; 20 R. C. L., 67. In entering or leaving premises, the visitor is bound to use the ordinary and customary place of ingress and egress, and if he adopts some other way he becomes a mere licensee, and cannot recover for defects outside and not substantially adjacent to the regular way. Shearman and Redfield on Law of Negligence, Vol. 3, sec. 704; *Money v. Hotel Co., supra; Quantz v. R. R.*, 137 N. C., 136—in which the plaintiff had left a passway which he had the right to use and had gone twelve feet to reach the door. In so doing he fell through an unprotected doorway. *Clark v. Drug Co.*, 204 N. C., 628, 169 S. E., 217.

The evidence considered in the light most favorable to the plaintiff likewise fails to disclose any circumstances which would tend to show that the defendant could have foreseen that the condition of the stair well in the storage room was likely to cause injury to a customer or other invitee of his tenant. *Clark v. Drug Co., supra; Money v. Hotel Co., supra; Ellis v. Refining Co.*, 214 N. C., 388.

The plaintiff cannot successfully maintain his contention that he had no reason to suppose that the course he took might prove dangerous. The very darkness which he says prevented him from seeing the stair well and caused his injury was sufficient notice to a reasonably prudent person going for the first time into a storage room in the rear of a store building. It constituted a positive signal to retreat. The merchandise and boxes he states he could dimly see on the floor were likewise a warning that it was a storage room and not a part of the store open to customers and other visitors. One may not thus heedlessly disregard the commonest precautions for his own safety. *Scott v. Telegraph Co.*, 198 N. C., 795; *Clark v. Drug Co., supra; Kaminsky v. Waddell*, 208 N. C., 173, 179 S. E., 463; which is similar to the instant case, except that plaintiff walked off of an unprotected and unlighted loading platform at the rear of a store rather than into an open stair well. *King v. Thackers, Inc.*, 207 N. C., 869, 178 S. E., 95.

Plaintiff's evidence fails to establish any negligent conduct on the part of the defendant Sherrill which, under any circumstances, could be considered the proximate cause of his injuries.

The judgment below is

Affirmed.

STATE v. ARTHUR MORRIS.

(Filed 3 May, 1939.)

1. **Burglary §§ 1, 2—Definition of burglary in the first and second degrees.**

The common law offense of burglary has been divided by statute into burglary in the first degree, which is the breaking and entering of a dwelling house or room used as a sleeping apartment, at nighttime, while the same is actually occupied by any person, with intent to commit a felony; while burglary in the second degree is the commission of the offense when the dwelling house or sleeping apartment is not actually occupied at the time, C. S., 4332.

2. **Burglary § 11: Criminal Law § 54b—Verdict, interpreted with reference to indictment, evidence and charge, held sufficiently definite.**

Defendant was tried upon an indictment charging burglary in the first degree, breaking and entering with intent to commit the crime of larceny, and larceny. The evidence tended to show that defendant burglariously entered a dwelling house at nighttime while same was occupied by its owner and stole therefrom certain goods and chattels. The court charged the jury that it could return one of two verdicts, guilty of burglary in the first degree or not guilty. *Held:* The jury's verdict of "Guilty as charged" when interpreted with reference to the indictment, the facts in evidence, and the charge of the court, is sufficiently determinative and supports the sentence for the capital crime, though in matters of such supreme importance the jury should definitely and expressly say of what degree of the crime they convict the defendant.

3. **Burglary § 10: Criminal Law § 53d—Where all the evidence shows that dwelling house was occupied at the time, the court need not submit question of second degree burglary.**

Where the uncontradicted evidence for the State tends to show the breaking and entering of a dwelling was at nighttime while the same was actually occupied by the owner thereof, and that goods and chattels were stolen therefrom, the refusal of the court to submit instructions requested that the jury might find defendant guilty of burglary in the second degree will not be held for error, even though such a verdict would be allowed to stand as being favorable to defendant, if returned by the jury. C. S., 4641.

APPEAL by defendant from *Harris, J.*, at September Term, 1938, of WAKE.

Criminal prosecution tried upon indictment in which it is charged that the prisoner, and another, did on 29 December, 1937, about the hour of twelve in the night of the same day, with force and arms at and in the county of Wake, feloniously and burglariously break and enter the dwelling house of one Dr. W. B. Dewar, then and there actually occupied by the said Dr. W. B. Dewar, "with intent the goods and chattels of the said Dr. W. B. Dewar in the said dwelling house then

and there being, then and there feloniously and burglariously to steal, take and carry away, against the peace and dignity of the State."

There is a second count in the bill charging the breaking and entering, with intent to commit the crime of larceny, and also charging the actual commission of larceny of goods of the value of $82.00.

The State's evidence, taken in connection with that offered by the defendant, clearly establishes a case against the defendant of burglary in the first degree as charged in the bill of indictment. The facts are short and simple: On the night in question, the dwelling house of Dr. W. B. Dewar, located at No. 930 Vance Street in the city of Raleigh, was in the actual occupation of the owner and his family. The defendant and his accomplice, David Fisher, came from Durham that night, went to the flower garden back of the Dewar home, the defendant remarking, "this is a hold up," and he "went up the steps to the back window," in the nighttime, "broke into the house," took a wallet or bill folder containing a Liggett & Myers dividend check for $80.00, and was frightened away by the sound of a thermostat. The occupants of the house, though greatly frightened, remained quiet to avoid the risks of a physical encounter. The check, made payable to W. B. Dewar, was presented by the defendant to the Fidelity Bank in Durham on the morning of 29 December, 1937. This led to his arrest, later confession and conviction.

The court instructed the jury that, under the evidence, only one of two verdicts might be rendered: "That is, you can find this defendant guilty of burglary in the first degree or not guilty." Exception. All other portions of the charge are admitted to be correct.

In apt time, the defendant requested the following special instruction:

"Our law provides (C. S., 4641) that when the crime charged in the bill of indictment is burglary in the first degree, the jury may render a verdict of guilty of burglary in the second degree if they deem it proper to do so and I instruct you that you have the right to return a verdict of guilty of burglary in the second degree." Instruction refused; exception.

Verdict: "Guilty as charged."

Judgment: Death by asphyxiation.

The defendant appeals, assigning errors.

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

J. C. Little and W. Brantley Womble for defendant, appellant.

STACY, C. J. To seek to injure another or to take advantage of him while he is disarmed by sleep is to evince a heart devoid of social duties

and a mind fatally bent on mischief. Such is the stuff of which house-thieves are made. Hence, burglary was regarded at the common law as one of the worst of crimes. 9 Am. Jur., 239. In its highest degree, it is still a capital offense in North Carolina. The purpose of the law was and is to protect the habitation of men, where they repose and sleep, from meditated harm. "A burglar (or the person that committeth burglary)," says Lord Coke, 3 Inst., 63, "is by the common law a felon, that in the nighttime breaketh and entereth into a mansion house of another, of intent to kill some reasonable creature, or to commit some other felony within the same, whether his felonious intent be executed or not." To a conviction, under the common law, it was necessary to allege and prove: *first,* the breaking; *second,* the entering; *third,* that the house, broken and entered, was at the time a mansion-house; *fourth,* that the breaking and entering was in the nighttime; *fifth,* that the breaking and entering was with intent to commit a felony therein. *S. v. Whit,* 49 N. C., 349; 9 Am. Jur., 240. And such was the law of burglary in this State prior to the enactment of ch. 434, Public Laws 1889, now codified as C. S., 4232, 4233 and 4641, which avowedly was enacted "to amend the law in relation to the crime of burglary" by dividing the offense into two degrees, first and second, with certain designated differences between the two, and with different punishments prescribed therefor. *S. v. Foster,* 129 N. C., 704, 40 S. E., 209.

The first degree is where the crime is committed "in a dwelling house, or in a room used as a sleeping apartment in any building, and any person is in the actual occupation of any part of said dwelling house or sleeping apartment at the time," while the second degree is where the crime is committed "in a dwelling house or sleeping apartment not actually occupied by any one at the time . . . or . . . in any house within the curtilage of a dwelling house or in any building not a dwelling house, but in which there is a room used as a sleeping apartment and not actually occupied as such at the time." C. S., 4232.

The first degree is punishable with death and the second degree with imprisonment in the State's Prison for life, or for a term of years, in the discretion of the court. C. S., 4233.

Coming then to the record before us and interpreting it with reference to the indictment, the facts in evidence, and the charge of the court —a permissible method of interpretation—we think it is manifest that the verdict, "guilty as charged," means "guilty of burglary in the first degree" as charged in the bill of indictment. *S. v. Whitley,* 208 N. C., 661, 182 S. E., 338; *S. v. Bryant,* 180 N. C., 690, 104 S. E., 369; *S. v. Wiggins,* 171 N. C., 813, 89 S. E., 58; *S. v. Millican,* 158 N. C., 617, 74 S. E., 107. So clearly is this so that no challenge has been made to the sufficiency of the verdict. The record as a whole reveals the clear

intent of the jury. *S. v. Kinsauls,* 126 N. C., 1095, 36 S. E., 31. Indeed, the facts essential to the establishment of the capital offense are not in dispute. *S. v. Foster, supra; S. v. Whit, supra.* They appear in part from the defendant's own evidence.

Under the principle stated, and owing to the clearness of the evidence and the very definite and precise instruction of the court as to the terms of the verdict, we find no difficulty in giving the instant verdict significance and upholding it as sufficiently determinative by reference to the indictment, the facts in evidence, and the charge of the court. *S. v. Wiggins, supra.*

We deem it proper to say, however, that this method of interpreting a record is not a desirable one in a capital case where the pitfalls attendant upon such procedure are wholly disproportionate to the ease with which they may be avoided. *S. v. Murphy,* 157 N. C., 614, 72 S. E., 1075. In a matter of supreme importance, the jury should definitely and expressly say of what degree of crime they convict the prisoner, and the verdict should be recorded as rendered. There should be no room for doubt or mistake. *S. v. Matthews,* 191 N. C., 378, 131 S. E., 743.

The only question debated on argument and in brief is whether the court committed error in refusing to submit the case to the jury on the charge of burglary in the second degree as requested by the prisoner in his prayer for special instruction. The authorities answer in the negative. *S. v. Spain,* 201 N. C., 571, 160 S. E., 825; *S. v. Ratcliff,* 199 N. C., 9, 153 S. E., 605.

It is provided by C. S., 4641, that upon an indictment for burglary in the first degree, the jury may render a verdict of burglary in the second degree "if they deem it proper so to do." But this, according to our previous decisions, does not, as a matter of law, authorize the trial court to instruct the jury that such a verdict may be rendered independently of all the evidence. *S. v. Johnston,* 119 N. C., 883, 26 S. E., 163; *S. v. Alston,* 113 N. C., 666, 18 S. E., 692; *S. v. Fleming,* 107 N. C., 905, 12 S. E., 131. It has been said, however, that in such a case, a verdict of burglary in the second degree, if returned by the jury, would be permitted to stand, notwithstanding evidence of occupancy of the dwelling house at the time of the alleged offense. *S. v. Smith,* 201 N. C., 494, 160 S. E., 577. And this upon the principle that the verdict, being favorable to the prisoner, may not, for this reason, be successfully challenged by him. *S. v. Alston, supra.* Here, all the evidence establishes the actual occupation of the dwelling house at the time of the offense. *S. v. McKnight,* 111 N. C., 690, 16 S. E., 319. This precluded the court from submitting the case to the jury on the charge of burglary in the second degree as defined by C. S., 4232. *S. v. Spain, supra,* and cases there cited.

Speaking to the question in *S. v. Ratcliff, supra,* it was said: "There is no evidence on the present record of burglary in the second degree as defined by C. S., 4232, unless the jury disbelieve the evidence relating to occupancy. *S. v. Alston,* 113 N. C., 666, 18 S. E., 692. All the evidence tends to show that the dwelling house was actually occupied at the time of the alleged offense. Hence, under these conditions, according to our previous decisions, an instruction that the jury may render a verdict of burglary in the second degree, 'if they deem it proper to do so' (C. S., 4641), would be erroneous, though a verdict of burglary in the second degree, if returned by the jury, would be permitted to stand, such a verdict, under the circumstances, being regarded as favorable to the prisoner. *S. v. Fleming, supra; S. v. Alston, supra.* This may seem somewhat illogical, in view of C. S., 4640 and 4641, nevertheless it is firmly established by a number of decisions."

Our conclusion is, that the record contains no exceptive assignment of error which can be sustained. The verdict and judgment will be upheld.

No error.

STATE HIGHWAY AND PUBLIC WORKS COMMISSION v. EDDIE COBB (ORIGINAL PARTY DEFENDANT), AND IRENE COBB (ADDITIONAL PARTY DEFENDANT).

(Filed 3 May, 1939.)

1. State § 2b—

The State Highway and Public Works Commission, as successor to the State Prison Department, chapter 172, sec. 32, Public Laws of 1933, C. S., 7698, has implied power to maintain an action in its corporate name on behalf of the State.

2. Same—

While the State may maintain an action in tort for injury to its property, it has no right of action in tort arising out of the commission of a crime against its sovereignty.

3. Same: Escape § 6—

The State may not recover of a prisoner moneys expended by it to recapture him after his escape from custody, since the escape does not invade any property right of the State, but the expenditure of the sums is voluntary and made by it for the protection of the people of the State in preserving the integrity of the penal system.

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

APPEAL by plaintiff and defendant Eddie Cobb from *Ervin, Jr., J.,* at November Term, 1938, of WAKE. Reversed.

The State Highway and Public Works Commission brought this action to recover the expenses of the recapture and return to the State Prison of one Eddie Cobb, who had escaped from custody during the year 1937. The amount sued for was $1,134.21. On motion of plaintiff a receiver was appointed, who took charge of defendant's property—a Chrysler automobile—and sold it under order of the court *pendente lite,* receiving therefor the sum of $671.55, which sale was confirmed. Out of the proceeds a $10.00 advertisement charge was paid and the remaining proceeds held subject to order of the court.

Defendant's wife was permitted to interplead and set up title to the car. Protesting the validity of the State's claim, and the authority to make the sale, the defendant, nevertheless, claimed his exemption of $500.00 as a resident of this State, and it was agreed that the proceeds received at the sale should stand in lieu of the car.

The case was heard without a jury by Judge S. J. Ervin, Jr., on admitted facts, and, thereupon, Judge Ervin made his findings of fact and conclusions of law and entered judgment that defendant's intervening wife had no valid claim to the moneys in the hands of receivers. It was further adjudged that plaintiff was entitled to recover on its demands, but that the defendant was entitled to his personal property exemption as a resident of the State.

The judgment provided for delay in the distribution of the funds, after paying costs, until after an appeal might be heard in the Supreme Court. Both plaintiff and defendant Eddie Cobb appealed.

Charles Ross for plaintiff.
Wm. B. Oliver for defendant.

APPEAL OF DEFENDANT EDDIE COBB.

SEAWELL, J. This interesting case is admittedly novel in the history of jurisprudence in so far as the attorneys concerned, and the court as well, are aware. Without precedent to guide us, we do not find in the argument of the able counsel for the plaintiff sufficient legal ground to sustain the judgment of the trial court.

Under the law creating the State Highway and Public Works Commission, that body succeeded to all the rights and powers and duties of the State Prison Department—ch. 172, sec. 32, Public Laws of 1933. Although the act incorporating the State Prison Department—see Consolidated Statutes, ch. 130, sec. 7698—does not expressly confer on it the power to sue, and does expressly provide that suits against it shall be construed as brought against the State, we assume that it has that implied power, and it has been recognized by the courts. *State's Prison v. Hoffman,* 159 N. C., 564, 76 S. E., 3. The infirmity of plaintiff's case

does not consist in an inability to sue, generally speaking, but its inability to maintain this particular suit; and in considering this question we are forced to consider the suit as brought on behalf of the State to recover funds expended for defendant's recapture and return to prison.

The plaintiff bases its action on tort. It is difficult to see how an actionable tort could arise out of defendant's criminal offense in effecting his escape from custody, or his status as a fugitive from justice. The step from one to the other is a bit too long for the judicial stride. "The distinction between a tort and a crime with respect to the character of the rights affected and the nature of the wrong is this: A tort is simply a private wrong in that it is an infringement of the civil rights of individuals, considered merely as individuals, while a crime is a public wrong in that it affects public rights and is an injury to the whole community, considered as a community, in its social aggregate capacity." 16 C. J., p. 54; Black's Law Dictionary, 2nd, p. 299.

"Crime is an offense against the public pursued by the sovereign, while tort is a private injury which is pursued by the injured party." 14 Am. Jur., p. 755.

If a tort is pursued by the sovereign, it must be with respect to the same sort of right and in the same way as may be allowed a private citizen. This is a part of the definition. A sovereign, who is also a natural person, may, of course, bring an action for tort in his individual capacity and with respect to his individual and proprietary rights. Authorities are somewhat divided as to where sovereignty lies in a Republican State; Story on the Constitution, paragraph 270; *Filbin Corporation v. U. S.*, 266 Fed., 911, 915; but the term is still useful in providing categories affecting rights and liabilities. *Warrenton v. Warren County, ante,* 342.

The State constitutes a sort of intangible sovereignty. Legally speaking, it cannot be assaulted, slandered, or injured as an individual with respect to a personality that it does not possess. But it does own property and has property rights which might be the subject of invasion. If a wrong is committed against it in the nature of a tort, it must be with respect to such a right.

It does not appear that the defendant has invaded any property right of plaintiff except that which may be involved in the expenditure of the State's public funds for his apprehension after his escape. Since his recapture was a public duty required by law under a general system which the State has established, the position of the sovereign towards such a public expenditure can scarcely be that of a private individual who has been compelled to spend money because of the tortious conduct of another. Indeed, in point of legal logic, defendant's yen for the open spaces and his answer to the call of the wild was rather the

occasion than the cause of the expenditure, or, at least, it did not afford the compulsion. While his flight was contrary to the will of the sovereign, as expressed in its law, the expenditure for his recapture was voluntary.

No crime against the sovereignty of the State violates any of its property right, and no governmental expenditure paid out for apprehension of a criminal or the maintenance or recovery of his custody incident to the punishment or correction of such a crime can be construed as the subject of such invasions, since it is voluntarily made by the State—although a mandatory duty on the custodial agency—C. S., 7442—for the protection of the people of the State at large in preserving the integrity of the penal system. The offense was against the sovereignty of the State, the penalty fixed by law—C. S., 4404—and the exactions because of it do not go to the sovereign in any proprietary capacity justifying an application of the law of torts.

The most that can be said in behalf of the plaintiff is that it is endeavoring to protect public funds given into its custody. These funds were legitimately spent for a public purpose, and there is no statute law, and certainly no common law principle, authorizing their recovery from this defendant.

In view of this disposition of the case it is not necessary to consider plaintiff's appeal or questions concerning the residence of the defendant.

The judgment of the court below is reversed. The defendant will be placed, as far as possible, *in statu quo* at the beginning of this suit, respecting, however, the agreements of counsel with regard to the sale and its proceeds.

Reversed.

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

IN THE MATTER OF E. LLOYD TILLEY, FORMER CLERK OF THE SUPERIOR COURT OF WAKE COUNTY, NORTH CAROLINA.

(Filed 3 May, 1939.)

Counties § 13—Receiver of trust funds of the clerk held entitled to proceeds of loans made from trust fund.

The findings of fact were to the effect that the clerk of the Superior Court was in charge of trust funds which he was authorized to invest, and was also delinquent tax collector without authority to invest delinquent tax funds, and that the clerk invested trust funds in mortgage

securities but, upon being pressed by the auditor for settlement of the delinquent tax account, exhibited said securities as belonging to his delinquent tax account and placed same in the compartment in the vault reserved for securities belonging to the delinquent tax account. After the death of the clerk the mortgage was paid and the proceeds thereof were claimed by the County Treasurer as belonging to the delinquent tax account and by the receiver of the trust account as belonging to that fund. *Held:* The mere placing of the mortgage security in the compartment of the vault reserved for the securities belonging to the delinquent tax account and the statement by the clerk to the auditor that they belonged to such account could not have the effect of transferring the funds from the trust funds account, and therefore the same should be paid to the receiver of the trust fund.

APPEAL by petitioner from *Stevens, J.*, at February Term, 1939, of WAKE. Reversed.

R. L. McMillan for petitioner, appellant.
Jones & Brassfield for respondents, appellees.

SCHENCK, J. This proceeding was instituted by the filing of a petition by J. W. Bunn, receiver of E. Lloyd Tilley, deceased, former clerk of the Superior Court of Wake County, wherein it is alleged that two certain sums of money, namely, $107.56 and $11,167.87, are being held by the treasurer of Wake County to which said receiver is entitled, and asking that said sums be paid over to said receiver to be paid out by him under direction of the court. The hearing was had by and with the consent of the receiver, the board of county commissioners of Wake County, and J. Milton Mangum and H. G. Holding, treasurer and auditor, respectively, of said county.

There is no evidence as to the first sum of $107.56 and no further mention thereof in the judgment or in the record. It is therefore presumed that there is no further controversy relative to it.

The respondents contend that the $11,167.87 should be allocated by the treasurer to the delinquent tax fund of Wake County, and credited on the delinquent tax account of Tilley, as delinquent tax collector.

The $11,167.87 was paid after the death of Tilley to take up a note and deed of trust given to him by Margaret Hunter Yancey and her husband, Robert G. Yancey, and was turned over to J. Milton Mangum, treasurer, for disbursement as he may be directed.

Tilley was clerk of the Superior Court, and as such held trust funds, which came into his hands as such clerk, and was also delinquent tax collector, and as such had delinquent tax funds, which he had collected. He was authorized by law to loan out the trust funds, but had no such authorization to loan out the delinquent tax funds.

The question presented for decision is whether the funds collected from the loan by Tilley to Margaret Hunter Yancey and her husband, Robert G. Yancey, are a part of the trust funds and are therefore due to be paid Bunn, receiver of said trust funds, or whether the funds so collected are a part of the delinquent taxes collected by Tilley, and therefore should be allocated to the delinquent tax account of the county.

His Honor found the facts and concluded as a matter of law that the funds in question should be retained by the treasurer and allocated as back tax collections, and used and disbursed accordingly, and entered judgment consonant with such conclusion.

To this conclusion of law, and to the judgment entered, the petitioner, Bunn, receiver, excepted and appealed, assigning errors.

The conclusion of law, to which exception was duly preserved, reads: "From the foregoing facts, the court is of the opinion, and finds as a matter of law that the proceeds derived and collected from the loan made by E. Lloyd Tilley, former clerk of the Superior Court, to Mrs. Margaret Hunter Yancey and husband, Robert G. Yancey, belong to the delinquent tax fund of Wake County, the said collection amounting to $11,167.87." We think the exception is well taken.

The facts found by the court are substantially as follows:

(1) E. Lloyd Tilley was clerk of the Superior Court prior to and at the time of his death on 30 June, 1937; (2) in addition to his duties as clerk, Tilley was delinquent tax collector; (3) J. W. Bunn was duly appointed receiver for Tilley, deceased clerk; (4) at the time of his death Tilley held notes of Margaret Hunter Yancey and her husband, Robert G. Yancey, in the sum of $10,000, secured by deed of trust on real estate, and said notes and interest, aggregating $11,167.87, was subsequently paid, and credited to the account of the former receiver of E. Lloyd Tilley, clerk, and thereafter the former receiver, without order of court, transferred said amount collected from the Yancey note and deed of trust to the auditor of Wake County, and the auditor turned said amount over to the treasurer of said county, who allocated same to the delinquent tax account; (5) Margaret Hunter Yancey and her husband, Robert G. Yancey, were granted a loan of $10,000 by E. Lloyd Tilley, clerk, the funds to make up said loan being derived from the collection of $1,900 by said clerk from a former loan to Lucy Hartsfield, and the collection of $5,016.99 from a former loan to J. K. Barrow, and two checks for $1,500 each drawn on trust fund account of said clerk, payable to said Yancey and wife or their attorney; (6) in the vault of his office the said Tilley maintained separate compartments in which he purported to keep moneys and securities belonging respectively to his trust account and to his delinquent tax account; (7) a few days before his death, said Tilley, upon being pressed by the auditor for a settle-

ment of his delinquent tax account, exhibited to said auditor his bank book showing his bank account as delinquent tax collector, and also certain securities which he stated belonged to his delinquent tax account, the note and deed of trust from Margaret Hunter Yancey and her husband being among said securities, and being in the compartment in the vault reserved for securities belonging to the delinquent tax account.

We are of the opinion that the mere placing of the note and deed of trust in the compartment in the vault reserved for securities belonging to the delinquent tax account, and the statement by Tilley to the auditor that they belonged to such account, could not have the effect of transferring funds derived from a loan made from the trust funds to the delinquent tax account from the trust funds account, and we therefore hold, from the facts found by the court, that the proceeds derived and collected from the loan made by E. Lloyd Tilley, former clerk of the Superior Court of Wake County, to Margaret Hunter Yancey and her husband, Robert G. Yancey, amounting to $11,167.87, belong to the trust funds of the former clerk, and should be paid by Mangum, treasurer, to Bunn, receiver of said trust funds, to be disbursed by said receiver under direction of the court.

The cause is remanded for judgment in accord with this opinion.

Reversed.

J. P. ROBERTSON, EXECUTOR OF J. H. ROBERTSON, DECEASED; AND J. P. ROBERTSON, AS AN INDIVIDUAL, v. B. F. ROBERTSON AND WIFE, BERTIE ROBERTSON; BESSIE COLEMAN AND HUSBAND, E. D. COLEMAN; INA WILLIFORD AND HUSBAND, R. D. WILLIFORD; RUBY WILLIFORD (WIDOW); ETTA ROBERTSON (WIDOW); WALTER T. ROBERTSON; MARY ROBERTSON PHILLIPS AND HUSBAND, WILLIAM PHILLIPS; JAMES PROCTOR ROBERTSON AND MARGIE MAY ROBERTSON, A MINOR 18 YEARS OF AGE.

(Filed 3 May, 1939.)

1. Pleadings § 16: Wills § 46—Held: All parties interested in the estate were properly joined in order to effect a complete determination of all matters involved in settlement of the estate.

The will in question provided for the distribution of the personal and real assets among testator's children, with provision that the share of each should be charged with any indebtedness owed by such beneficiary to any of the other beneficiaries. *Held:* All the beneficiaries of the estate were properly joined as defendants in the action brought in the name of the executor and the beneficiary to whom it was alleged the other beneficiaries were indebted, in order that there might be a complete determination of all matters involved in the settlement of the estate,

except that the demurrers of the husbands of two of defendant beneficiaries, against whom personal judgment was asked, were properly allowed.

2. Husband and Wife § 18b—Joinder of husband as party defendant may be treated as surplusage unless personal judgment against husband is demanded.

This action was instituted to determine the rights and liabilities of the beneficiaries under the provision of the will of their common ancestor that the share of each should be charged with any indebtedness owed to the other beneficiaries. *Held:* Under the provision of C. S., 2507, 2513, the married beneficiaries might be sued alone as to their independent debts and the joinder of their husbands might be treated as surplusage but for the allegations of the complaint demanding a personal judgment against them, but since personal judgment is sought against the husbands, their demurrers for misjoinder of parties and causes were properly allowed.

APPEAL by plaintiff from *Harris, J.*, at March Term, 1939, of WAKE.

Affirmed as to defendants E. D. Coleman and R. D. Williford.

Reversed as to other defendants.

Demurrers to the complaint, on the ground of misjoinder of parties and causes of action, were filed by all defendants except Bessie Coleman who answered. From judgment sustaining the demurrers the plaintiff appealed.

J. C. Little and P. H. Wilson for plaintiff, appellant.

Jones & Brassfield for defendants B. F. Robertson and wife, Bertie Robertson.

Thomas W. Ruffin for defendants Ina Williford and husband, R. D. Williford.

J. Harold Griffin for Etta Robertson, Walter T. Robertson, Mary Robertson Phillips, William Phillips, James Proctor Robertson, and Etta Robertson, guardian ad litem for Margie May Robertson, minor.

W. H. Rhodes for defendant E. D. Coleman.

DEVIN, J. The complaint, to which demurrers were interposed, sets out a cause of action for the determination of questions raised in the settlement of the estate of J. H. Robertson, the ancestor of plaintiff and defendants, in accord with the provisions of his will. C. S., 135. The plaintiff is the executor and a son of the testator. The defendants are children of the testator and the children of a deceased son. The husbands of two of testator's daughters are made parties defendant.

The portions of the will pertinent to the controversy are as follows:

"ITEM 11. If at my death any one of my children shall be indebted to any other one of said children, then the portion of the lands hereinbefore described devised to such debtor, shall be charged with the amount

of such indebtedness and until such indebtedness is settled and paid, the one in whose favor such indebtedness exists shall have the right to have such land sold as in case of a mortgage for the payment of such indebtedness. However, this provision shall not apply to the land devised to my daughters, or either of them, but they are to take the lands as hereinbefore set out.

"ITEM 12. If any one of my children at the time of my death should be indebted to any other one of said children, then the portion of the personal estate to be paid to such child as may be so indebted shall be used to pay off the indebtedness of such child or as much thereof as same will pay, and my executor hereinafter named shall carry out this provision of my will."

The action to determine the amounts of the indebtedness of the testator's children to each other and to the estate was properly brought in the name of the executor and J. P. Robertson to whom it is alleged the debts were due, and it was proper that all the children of the testator and the representatives of those deceased should be made parties, so that all matters in controversy among them might be settled in one action. *Leach v. Page,* 211 N. C., 622, 191 S. E., 349; C. S., 456; C. S., 507. The allegations in the complaint as to the indebtedness of the several defendants relate to the same subject matter and involve the rights of the parties under the quoted provisions of the will of a common ancestor.

The only ground upon which the demurrers for improper joinder of causes is based is that the husbands of two of testator's daughters, E. D. Coleman and R. D. Williford, who are not devisees or distributees under the will, are joined as parties defendant, and that as to each of them a several judgment is prayed by the plaintiff. The allegation of the complaint is that "defendant Bessie Coleman and her husband E. D. Coleman" are and were indebted to plaintiff at the time of the death of the testator. The same allegation is made as to "Ina Williford and her husband R. D. Williford." By the acts of 1911 and 1913 (C. S., 2507 and 2513) a married woman is authorized to contract and deal as if unmarried, and to sue alone for her services and for torts. *Taft v. Covington,* 199 N. C., 51, 153 S. E., 597. Hence, in a suit against a married woman to recover upon her individual debt, where no personal judgment is sought against her husband, the joinder of the husband as party defendant may be treated as surplusage. *Shore v. Holt,* 185 N. C., 312, 117 S. E., 165.

But here it is alleged that defendants Bessie Coleman and her husband, and Ina Williford and her husband are indebted to the plaintiff and judgment against them is asked in that form. This would have the effect of rebutting the possible inference that the husbands of the two daughters were made parties merely because of their conjugal relation-

ship (C. S., 454, and C. S., 2520). We think, therefore, the demurrers were properly sustained as to the defendants E. D. Coleman and R. D. Williford.

As to all other defendants the demurrers should have been overruled. All who have or claim any interest in the estate were properly joined as parties defendant and included in the same action, in order that there might be a complete determination of all matters involved in the settlement of the estate of J. H. Robertson under the terms of his will.

As to defendants E. D. Coleman and R. D. Williford, judgment
Affirmed.

As to other defendants, judgment
Reversed.

VIRGINIA TRUST COMPANY v. A. T. WHITE, ADMINISTRATOR, ET AL.

(Filed 3 May, 1939.)

Dower § 5—

In determining the present value of inchoate dower or dower consummate, the full value of the dowerable lands, encumbered as well as unencumbered, and without deducting the mortgage debt, constitutes the proper basis of computation.

APPEAL by defendant A. T. White, administrator, from *Harris, J.*, at November Term, 1938, of WAKE.

Civil action for allotment of dower and to enforce assignment thereof. *Parton v. Allison,* 109 N. C., 674, 14 S. E., 107.

At the time of the death of Berry O'Kelly, 14 March, 1931, he and his wife, Marguerite O'Kelly (now Marguerite O'Kelly White), were indebted to the Virginia Trust Company, Trustee, in a large sum of money evidenced by their joint promissory notes and secured by deed of trust on certain lands situate in Wake County. Upon foreclosure a deficiency was found to exist, and in consideration of petitioner's forbearance not to secure deficiency judgment on said notes against the widow, she assigned and transferred to the Virginia Trust Company, Trustee, "all her right, title and interest to dower in and to the lands of the estate of Berry O'Kelly, deceased." Berry O'Kelly died seized of several tracts of lands situate in Wake County, some encumbered and others unencumbered. It was ordered that the dower interest of his widow be appraised upon the value of all said lands of which the said Berry O'Kelly died seized, "regardless of whether said lands were encumbered or unencumbered."

From this ruling the defendant administrator appeals, assigning error.

N. G. Fonville and Shepherd & Shepherd for plaintiff, appellee.
R. B. Templeton and J. M. Templeton for defendants, appellants.

STACY, C. J. The question for decision is whether a widow's dower is to be computed on the basis of the encumbered real estate of which her husband died seized, as well as of the unencumbered. The authorities answer in the affirmative. *Chemical Co. v. Walston,* 187 N. C., 817, 123 S. E., 196, and cases there cited. The judgment below accords with the substantive law on the subject.

It is well established that in determining the present value of dower, inchoate (*Blower Co. v. MacKenzie,* 197 N. C., 152, 147 S. E., 829) or consummate (*Caroon v. Cooper,* 63 N. C., 386), the full value of the dowable lands, encumbered as well as unencumbered, and without deducting the mortgage debt, constitutes the basis of computation. *Creecy v. Pearce,* 69 N. C., 67; *Gwathmey v. Pearce,* 74 N. C., 398; *Askew v. Askew,* 103 N. C., 285, 9 S. E., 646. The basis of computation of dower is unaffected by the rights of creditors, secured or unsecured. *Gore v. Townsend,* 105 N. C., 228, 11 S. E., 160; *Overton v. Hinton,* 123 N. C., 1, 31 S. E., 285. We are not now concerned with how the rights of creditors, devisees and legatees are to be worked out. *Chemical Co. v. Walston, supra.*

While not presently germane, as "any objection to the manner of the trial by the court below" has been specifically withdrawn, it may not be amiss to observe generally that in dealing with procedural questions in matters of this kind, what was said in the case of *Griffin v. Griffin,* 191 N. C., 227, 131 S. E., 585, should not be overlooked.

The record, as amended by stipulation, presents no exceptive assignment of error which can be sustained. The judgment will be upheld.

Affirmed.

STATE v. TOY DAY.

(Filed 3 May, 1939.)

1. Homicide § 29—

Upon conviction of defendant of murder in the first degree, the jury's voluntary recommendation for mercy is properly treated as surplusage, and sentence of death must be rendered as the law commands.

2. Criminal Law § 80—

Where defendant convicted of a capital crime fails to prosecute his appeal, the motion of the Attorney-General to docket and dismiss, made after expiration of time of serving case on appeal, must be allowed when an inspection of the record proper fails to disclose error. Rule of Practice in the Supreme Court, No. 17.

STATE *v.* DAY.

MOTION by State to docket and dismiss appeal.

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

STACY, C. J. At the first regular January Term, 1939, Mecklenburg Superior Court, the defendant herein, Toy Day, was tried upon indictment charging him with the murder of one E. H. McQuay, which resulted in a conviction of murder in the first degree (with recommendation of mercy) and sentence of death as the law commands. From the judgment thus entered, the defendant gave notice of appeal to the Supreme Court and was allowed 30 days from 14 January, 1939, to make up and serve his statement of case on appeal, and the solicitor was given 15 days thereafter to prepare and file exceptions or countercase. The clerk certifies that "according to the records of my office no case on appeal was agreed upon and therefore was not perfected within the time allowed by the court nor within the 14 days before the call of the Fourteenth Judicial District." Accompanying the clerk's certificate is a letter addressed to him by counsel for defendant in which they say: "Since the trial of the case we have secured recommendations from eleven of the jurors, from the trial judge and from the solicitor of this district that the Governor of the State commute the sentence of death imposed upon the said defendant to life imprisonment. In view of these recommendations, which have been forwarded to Hon. Edwin Gill, Commissioner of Paroles, we have not prosecuted the appeal of the case to the Supreme Court, as we felt that the ends of justice would be properly met if commutation of this defendant's sentence was effected."

The time for serving statement of case has expired. *S. v. Watson,* 208 N. C., 70, 179 S. E., 455. No bond was required as the defendant was allowed to appeal *in forma pauperis. S. v. Stafford,* 203 N. C., 601, 166 S. E., 734.

The jury's voluntary recommendation of mercy was properly treated as surplusage. *S. v. Stewart,* 189 N. C., 340, 127 S. E., 260, and cases there cited. See *S. v. Matthews,* 191 N. C., 378, 131 S. E., 743.

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. Stovall,* 214 N. C., 695.

Judgment affirmed; appeal dismissed.

MRS. JOSEPHINE MILLER HOOD v. MRS. MARY MILLER McELVAIN AND HUSBAND, C. C. McELVAIN, MRS. ROBERTA MILLER DEHNE AND HUSBAND, THEODORE DEHNE, PAUL E. MILLER, SAMUEL G. MILLER, FRANCES I. MILLER, ROBERTA MILLER, JULIAN S. MILLER, JR., AND ROBERT MILLER.

(Filed 3 May, 1939.)

1. Wills § 33a—

A bequest of personal property with provision for defeasance if the legatee should die childless, with limitation over of the defeasible fee, vests the absolute title in the legatee, the limitation over being void.

2. Wills §§ 33c, 33f—

A devise of realty with provision that if the devisee dies childless the land should revert to testator's grandchildren "except so much as she may wish to will to Christian benevolence" conveys a defeasible fee to the devisee, the power of disposition being restricted.

APPEAL from *Sinclair, Emergency Judge,* at April Term, 1939, of MECKLENBURG. Modified and affirmed.

Action under the Declaratory Judgment Statute to construe the will of R. G. Miller. From judgment for the plaintiff defendants appealed.

Fred C. Hunter for plaintiff.
J. H. McLain for defendants.

DEVIN, J. By this appeal the Court is called upon to determine the rights of the parties under the following clause of the will of R. G. Miller:

"In case Josephine G. Miller should die childless, I will that her share of my estate named above shall revert to my eight grandchildren except so much as she may wish to will to christian benevolence."

Previously in his will the testator had given to his daughter Josephine (now the plaintiff Josephine Miller Hood) certain real and personal property. The later disposition of this property, in the event she should die childless, does not affect the validity of the bequest of personal property previously given her, and as to that she takes it freed of any condition. *Nixon v. Nixon, ante,* 377. The court below properly so held.

As to the real property devised, however, it is apparent that only a defeasible fee is conveyed (*Whitfield v. Garris,* 134 N. C., 24, 45 S. E., 904; *Daly v. Pate,* 210 N. C., 222, 186 S. E., 348; *Merritt v. Inscoe,* 212 N. C., 526, 193 S. E., 714), and that plaintiff's title thereto is subject to be defeated, with limitation over, in the event she should die childless. The power of disposition given in the quoted clause of the

will is not unlimited but is restricted to conveyance by will to Christian benevolence. *Hampton v. West,* 212 N. C., 315, 193 S. E., 290. In this respect the judgment of the court below must be modified to conform to this opinion.

Modified and affirmed.

ARTHUR D. COVINGTON v. MARGARET J. COVINGTON.

(Filed 3 May, 1939.)

Divorce § 11—Findings held sufficient to sustain award of alimony pendente lite.

Where, in the husband's action for divorce on the ground of adultery, the wife files answer denying the charges and sets up a cross action for divorce from bed and board, C. S., 1660, the finding by the court that the wife denied the charge of adultery under oath, that the court did not find that she was guilty of adultery, and that the husband had abandoned her and that she was financially unable to defray the necessary and proper expenses of the action, was without means of support and that the husband was financially able to make the payments ordered, *is held* sufficient to support the court's order of alimony *pendente lite,* C. S., 1666.

APPEAL by plaintiff from *Olive, Special Judge,* at 8 December, 1938, Special Term of MECKLENBURG. Affirmed.

This is an action brought by plaintiff against the defendant for an absolute divorce on the grounds of adultery. The defendant in her answer denied the charge and for a further answer and defense, and as a cross complaint against the plaintiff, alleged, among other things: "That about July, 1936, in their home, plaintiff falsely and without any truth or justification, accused the defendant of committing adultery with a certain man, and, when defendant denied the same, he struck the defendant in the face with his fist; that the plaintiff's entire course of conduct towards the defendant, with rare intervals, has been for a long period so uniformly cruel and abusive as to have undermined the defendant's health and rendered her condition intolerable. . . . That the defendant has always conducted herself towards the plaintiff as a faithful and obedient wife; that the life and conduct of the defendant has been free from blame, and she has been an obedient, faithful and dutiful wife to the plaintiff. . . . The plaintiff pointed a pistol at the defendant and tried to force the defendant to say that she had had improper relations with some person, and had kicked the defendant in the back when plaintiff had the pistol pointed at her. . . . That the defendant had not at any time or in any respect given the plaintiff

any reason for separating himself from her or justify plaintiff in failure to support her; that the plaintiff has cruelly humiliated and insulted the defendant by falsely charging her with adultery and has willfully and deliberately and without cause or justification deserted and abandoned the defendant with intent not to return to defendant, and the defendant, by such false and malicious charges and cruel and humiliating conduct on the part of plaintiff, cannot live with the plaintiff and is entitled to a divorce from bed and board from the plaintiff."

Upon the pleading and evidence, the court below, "On motion for alimony *pendente lite* and counsel fees, both plaintiff and defendant being present and each being represented by counsel. From the complaint, cross complaint of defendant and answers and the affidavits filed and read in evidence, the court finds as a fact that the plaintiff and defendant were married on January 29, 1922; that the plaintiff Arthur D. Covington has charged the defendant Margaret J. Covington with adultery; that the defendant Margaret J. Covington denies under oath the adultery charged against her. The court further finds as a fact that it does not find that the defendant Mrs. Margaret J. Covington committed adultery. The court finds as a fact that the plaintiff Arthur D. Covington has willfully deserted and abandoned the defendant Margaret J. Covington without providing her with adequate support; the court finds as a fact that the plaintiff Arthur D. Covington left the home of the defendant on or about February 16, 1938, without the intention of returning; that he contributed the sum of $50.00 a month to the defendant from February 16, 1938, to August 19, 1938, but since August 19, 1938, has contributed nothing to the defendant's support and has wholly and willfully abandoned the defendant. The court further finds as a fact that the defendant has not sufficient means whereon to subsist during the prosecution of her action for divorce from bed and board and her defense to the action for the plaintiff; the court further finds as a fact that the defendant is unable financially to defray the necessary and proper expenses of her action and defense and to employ counsel; the court further finds as a fact that the plaintiff, her husband, is amply able to pay to the defendant the sum of $50.00 a month for alimony during the pendency of the actions of the plaintiff and defendant and the sum of $100.00 for counsel fees at this time.

"It is therefore ordered, adjudged and decreed: (1) That Arthur D. Covington, plaintiff, be and he is hereby ordered to pay to Margaret J. Covington, defendant, $50.00 a month for her support commencing with the month of December, 1938, the first payment to be made on or before December 15, 1938; thereafter monthly payments to be made on or before the first day of each month. (2) That Arthur D. Covington,

plaintiff, be and he is hereby ordered to pay to J. Edward Stukes, attorney for the defendant, the sum of $100.00, to be credited on such counsel fees as the court may allow at the final determination of the actions of the plaintiff and defendant; the payment of said sum shall be on or before December 15, 1938. (3) All of said payments shall be made into the office of the clerk of Superior Court of Mecklenburg County, North Carolina. This the 15th day of December, 1938. Hubert E. Olive, Judge Presiding."

John H. Small, Jr., for plaintiff.
J. Edward Stukes for defendant.

PER CURIAM. The plaintiff objected and excepted to the above ruling of the court below allowing the defendant alimony and counsel fees and appealed to this Court. We do not think the objection and exception can be sustained.

The defendant's cross action for divorce from bed and board is bottomed on N. C. Code, 1935 (Michie), section 1660, which, in part, is as follows: "The Superior Court may grant divorces from bed and board on application of the party injured, made as by law provided, in the following cases: (1) If either party abandons his or her family. (3) By cruel or barbarous treatment endangers the life of the other. (4) Offers such indignities to the person of the other as to render his or her condition intolerable and life burdensome."

We think the facts found by the court below sufficient in law to sustain the order. *Vaughan v. Vaughan,* 211 N. C., 354; *S. c.,* 213 N. C., 189.

In *Holloway v. Holloway,* 214 N. C., 662 (663), it is said: "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."

The judgment of the court below is

Affirmed.

WILLIAM RABB v. A. M. COVINGTON AND ARTHUR D. COVINGTON, TRADING AS COVINGTON BROTHERS, AND THE WHITE PROVISION COMPANY, A CORPORATION.

(Filed 10 May, 1939.)

1. **Food § 8—Implied warranty that food is fit for human consumption obtains in sale by retailer to consumer, even though food is in sealed container.**

Plaintiff bit into a sausage in a casing sold by defendant retailer and was injured when his teeth were broken by a piece of metal in the sausage. It was conceded that the sausage was thus in a sealed container. *Held:* Defendant retailer may be held liable upon the doctrine of implied warranty that the food sold by him was merchantable and fit for human consumption, this being the common law rule in force in this State, C. S., 970, which is supported by the fact that the retailer, although not having any better opportunity of inspection of the food itself than the consumer, does have experience in buying, acquaintance with the manufacturer, knowledge of the brands and the responsibility of the concerns with which he deals; and by the fact that as between facilitating commerce and the preservation of the public health the latter must prevail; and since drastic changes in the common law are ordinarily for the Legislature.

2. **Same—**

The contention that the enforcement of the common law rule of implied warranty in the sale of food by a retailer to a consumer would result in spurious litigation cannot be entertained, since the processes of the courts cannot be denied to those having meritorious causes of action because others might abuse such processes.

3. **Same—**

The common law rule of implied warranty in the sale of food by a retailer to a consumer, even though the food may be sold in a sealed container, has not been rendered obsolete by the changes in the manner and method of the manufacture, preparation and distribution of food.

APPEAL by plaintiff from *Olive, Special Judge,* at February Term, 1939, of MECKLENBURG. Reversed.

This is an action to recover damages for an injury which the plaintiff alleges he sustained by reason of a foreign substance contained in food sold by the defendants for his consumption. The complaint is based both upon negligence and warranty; but upon the trial of the case it appeared that the plaintiff thought himself unable to successfully proceed against the White Provision Company, the manufacturers, upon the ground of negligence, and nonsuit as to that defendant was not resisted.

The evidence discloses that the plaintiff bought from the defendants, through his mother, some "wieners," or sausages, for his lunch. The

mother made the wieners into sandwiches and on the next day plaintiff carried them with him in a lunch box to his work and at lunch time undertook to eat them. He bit into one of the sandwiches, felt his teeth break, and felt pain. He put the food out in his hand, examined it, and found a piece of metal sticking in the meat. The metal had broken the teeth and plaintiff spit out little parts of them. Plaintiff carried the sandwiches home and showed them and the metal which he had found to his mother. He then went to a dentist, Dr. Watkins, who told him that two of his teeth were broken. He later took the sandwiches to Mr. Burwell's office and there found another piece of metal a little larger than the first piece. The pieces of metal were exhibited to the jury.

Dr. Watkins testified that the plaintiff came to him and, upon examination, he found two of his teeth badly broken.

A fellow workman corroborated the statement of the plaintiff that he had seen him when he bit into the sandwich and saw the metal.

It is conceded by the plaintiff that the sausage in question was in a casing and that this constituted a sealed container.

On the conclusion of the evidence the defendants moved for judgment as of nonsuit, which motion was allowed, and plaintiff excepted and appealed.

C. L. Burwell, E. Riggs McConnell, and John James, Jr., for plaintiff, appellant.

John H. Small, Jr., and Jake F. Newell for defendants, appellees.

SEAWELL, J. The question presented for our decision is whether a sale of food by a retail dealer to a customer for his immediate consumption carries with it a warranty that the food is merchantable and fit for human consumption when the article of food is contained in a sealed package, affording no opportunity for inspection of its contents, and was bought in that condition by the retailer from a manufacturer. The plaintiff contends that there is such a warranty and that it is not abated or disturbed by the fact that the food was at the time of its purchase by defendants and its sale to plaintiff in a sealed container. The defendants contend that inasmuch as the food was sold in such sealed container and neither the seller nor buyer had an opportunity to inspect it, or that at least their opportunities were equal, the doctrine of *caveat emptor* applies and no warranty is implied.

To accept the view urged by the defendants would be to make an exception to the prevailing rule, in favor of canned goods or food sold in sealed packages, in deference to what is termed modern commercial developments in food distribution, which, it is contended, would make the application of the warranty rule inconvenient and unfair to dealers.

No case demanding a decision of this point seems to have been presented to the Court and it has not, therefore, at least not consciously, made such a distinction.

Authorities are divided on the subject, seeming to fall on one side or the other of the line accordingly as they appraise the relative importance of the policies involved, or the consequences which might follow the adoption of one or the other.

Modern conditions of living, the conveniences and necessities of civilization, which have caused infinite division of labor in the production, processing and distribution of food products, whereby in its preparation for final consumption it passes through many hands and assumes many forms, may have rendered many of the old simple rules of law relating to the subject difficult of application and productive of hardship. Conceding that the development and interpretation of law must, as far as possible, be kept in accord with these changing conditions of society to which they apply, we may observe that drastic changes for the purpose of readjustment are usually matters for the lawmaking body and not for the Court. Here we have no sales law applicable to the situation, although the inadequacy of common law rules to do justice in the matter, if such exists, should have been long apparent to the lawmaking bodies. In this case, too, we are confronted with the argument that if we were free to make a choice of policies that choice must be made between facilitation of commerce and the preservation of the public health. In such a choice it seems to us there is no question that the latter should prevail.

The genesis of an implied warranty, it is true, rests in a recognition of the difference in attitude between the seller and purchaser regarding the subject of sale, but this does not necessarily mean that their opportunities are limited to what may be seen or investigated at the time of the sale. One who purchases an article of food for consumption is usually not equal in opportunity with the person who sells it, since the latter has the first opportunity of being assured that the goods he sells are merchantable and fit for human consumption, because of his experience in buying, his acquaintance with the manufacturer, and his knowledge of the brands, and of the responsibility of the concerns with which he deals. If occasionally the reliance which he places on these proves to be unjustified by the result, or if occasionally, through the negligence of the manufacturer, deleterious substances may be introduced into sealed packages, this seems to us rather to be a misfortune, the consequences of which are better absorbed in the course of commerce than passed on to a purchaser, in detriment to the public health.

It cannot be conceded that the present methods of preparation and distribution of food products are so greatly different from that which

has obtained for a long period of time as to destroy the reasons upon which the common law rule has been based. To some extent, they have existed from a remote period sufficiently, at least, to have had any influence to which they are entitled in the establishment and maintenance of the principles upon which the rule is founded, and the magnitude which the system has now reached does not, we think, afford a sufficient reason for its abolition.

The importance of the opportunity for immediate inspection is more apparent than real, since certain kinds of goods sold in bulk may not be inspected conveniently or sufficiently to disclose their unwholesomeness or content of deleterious or foreign matter.

In coming to this decision we not only recognize the superior opportunity of the retailer over that of the consumer to be assured of the quality of the products sold by him through his opportunity of selection of brands and purchase from reliable manufacturers, but also recognize the fact that the internal pressure of commerce in this field, as well as in others, will, through the necessity of meeting competition, of improving methods, and of rigid attention to matters relating to the quality and fitness of the product, strongly tend to minimize untoward happenings of the kind complained of in this suit, unless that pressure is removed by a rule which would compel the consuming public to absorb, without redress, consequences for which trade should be left responsible.

Under *Thomason v. Ballard and Ballard Co.,* 208 N. C., 1, 179 S. E., 30, there is no redress to be had by the consumer against the manufacturer under the doctrine of implied warranty, but only because of negligence. Since, as we have stated, the effect of modern methods of distribution has been to place the manufacturer at a remote distance from the consumer, and as he is ordinarily unable to prove the negligence of a manufacturer, since the doctrine of *res ipsa loquitur* is denied to him, the effect of the adoption of the views urged by the defendants would practically destroy any remedy which a consumer might have for the sale to him of food dangerous and unfit for human consumption, and prove a serious menace to the public health. *Griffin v. James Butler Grocery Co.* (1931), 108 N. J. Law, 92, 156 A., 636, 638; *Los Angeles Olive Growers' Assn. v. Pacific Grocery Co.* (1922), 119 Wash., 293, 205 P., 375; *Chapman v. Roggenkamp* (1913), 182 Ill. App., 117.

The fact, if it is a fact, so insistently urged by defendants' counsel that a ruling of this sort would open the gate to a fertile field of spurious litigation does not appeal to us. That some might abuse the processes of the court affords no reason for denying them to others who have meritorious causes of action.

We think the course we have pursued in this case has abundant support in reasoned authority.

In *Swift & Co. v. Aydlett,* 192 N. C., 330, at pages 334, 335, the principle is tersely stated: "The harshness of the common law rule of *caveat emptor,* when strictly applied, makes it inconsistent with the principles upon which modern trade and commerce are conducted; the doctrine of implied warranty is more in accord with the principle that 'honesty is the best policy,' and that both vendor and vendee, by fair exchange of values, profit by a sale."

As peculiarly applicable to this case, we quote from *Colonna v. Rosedale Dairy Co.* (Va., 1936), 186 S. E., 94, 97: "We hold that the doctrine of implied warranty must be applied, and for these reasons: It is a rule of the common law, and that law is ours by inheritance; it is a salutary rule; and tends to promote the health of all the people. Pecuniarily the vendor may suffer, but at times the vendee's life itself is at stake, and generally the vendor has opportunities for information as to the wholesomeness of his foodstuff which the vendee cannot have. In business for profit he must bear this burden which the law puts upon him."

From Williston on Sales (2nd Ed.), sec. 242, applicable to the argument rejecting implied warranty in cases of this kind, we quote: "The same argument, however, may be made in regard to any implied warranty, not only of food but of other articles where the seller could not discover the defect. Accordingly, if canned goods are to be made an exception to the general rule governing sales of food, the whole law of implied warranty should be revised and placed on the basis of negligence. But the general principle of the common law is opposed to this, and certainly if a dealer is ever to be made liable for injuries caused by defective goods where he has been guilty of no fault, the reasons are stronger for holding him liable for selling defective foods than in any other kinds of sale. According to the weight of authority, presumably for these reasons, a dealer is liable for selling such food even though in cans of reputable brand."

In this State the common law is in force by virtue of the statute—C. S., 970. While no person has a property or vested interest in any rule of the common law—*Hurtado v. California,* 110 U. S., 516, 532, 28 L. Ed., 232—we do not consider that the changed conditions pointed out in defendants' brief have rendered it obsolete and the matter under consideration is one for the Legislature. If the choice has become ours, then, upon reason and authority, we accept its rule as being commendably applicable to the present case.

The judgment of the court below is

Reversed.

G. L. TEMPLETON v. CLAUDE KELLEY, CHARLES ALEXANDER, BEATY SERVICE COMPANY, A CORPORATION, AND L. L. LEDBETTER, TREASURER OF THE CITY OF CHARLOTTE.

(Filed 10 May, 1939.)

1. Negligence § 1—Actionable negligence is failure to exercise due care under the circumstances, which proximately causes injury.

In order to establish actionable negligence, plaintiff must show failure of defendant to exercise proper care in the performance of some legal duty which he owed plaintiff under the circumstances in which they were placed, and that such negligent breach of duty proximately caused the injury and was one from which any man of ordinary prudence could have foreseen that such result was probable under all the facts as they existed. Chapter 407, Public Laws of 1937, sec. 103 (b), (e).

2. Automobiles § 12d—

Speed in excess of 20 miles per hour in a business district is *prima facie* evidence that the speed is excessive and unlawful, but such evidence is not *prima facie* proof of proximate cause, but is merely evidence to be considered with other evidence in determining actionable negligence.

3. Automobiles § 12a—

The fact that speed is within limits prescribed by statute does not relieve the motorist of the duty to exercise due care to avoid colliding with any pedestrian and to give warning by sounding the horn when necessary. Chapter 407, Public Laws of 1937, sec. 135 (c), (e).

4. Automobiles § 18g—

Evidence that the driver of a taxicab whipped around a car in front of him in a business district at a speed of 25 to 30 miles per hour and struck a pedestrian standing in the middle of the street, *is held* sufficient to be submitted to the jury upon the issue of negligence.

5. Negligence § 11—

There is no essential difference between negligence and contributory negligence, contributory negligence being merely negligence on the part of the plaintiff, and the same standard applies to both.

6. Automobiles § 7—

The failure of a pedestrian to observe the statutory provisions in crossing a street at an intersection at which traffic control lights are operated is not negligence *per se*, but is evidence to be considered with other evidence in the case in determining whether the pedestrian exercised due care for his own safety. Chapter 407, Public Laws of 1937, sec. 135 (c).

7. Automobiles § 18c—

Evidence that a pedestrian failed to observe statutory requirements in crossing a street at an intersection at which traffic control lights were maintained *held* not to establish contributory negligence as a matter of law.

APPEAL by plaintiff from *Olive, Special Judge,* at 6 February, 1939, Extra Term of MECKLENBURG.

TEMPLETON *v.* KELLEY.

Civil action for recovery of damages for alleged personal injury.

Plaintiff alleges that injuries sustained by him on 24 May, 1938, on West Trade Street in the city of Charlotte, N. C., resulted approximately from the negligence of the defendants in that they operated or caused to be operated their taxicab—(a) "In a careless and reckless manner, at an excessive rate of speed, . . . without due caution and circumspection, and without a proper lookout for pedestrians and others crossing West Trade Street," and (b) "in a way and manner so as to endanger or be likely to endanger this plaintiff and others who had occasion to cross said thoroughfare"; and (c) in that "defendants failed to exercise ordinary care in the operation of their said taxicab, but, on the contrary, drove the same or caused same to be driven at an excessive rate of speed in an improper and careless manner in view of the circumstances, traffic and other conditions prevailing upon said thoroughfare."

Defendants deny the material allegations in the complaint and plead contributory negligence of plaintiff as bar to his right to recover in this action.

Plaintiff offered evidence, briefly stated, tending to show: That he was struck by a taxi traveling west and operated by the defendant Claude Kelley, at a point on West Trade Street in a business district in the block between intersections of that street with Pine-Mint Street on the east and Graham Street on the west; that there are traffic lights at each of those intersections; that at that point West Trade Street is about 40 to 45 feet wide, and is a link in State Highways Nos. 27 and 74; that about 10 o'clock p.m., he got out of his automobile, parked in front of the post office on the south side of West Trade Street, about midway between the intersections of that street with Pine-Mint Street and Graham Street about 150 feet from each intersection, and started diagonally across West Trade Street to the bus station, which is on the north of said street; that there are two street car tracks approximately in the center of the street; and that two automobiles were traveling west on Trade Street. Plaintiff testified: "When I reached the third rail, one of those cars was practically in front of me and I stopped to let it by, but when I did, . . . this taxi . . . behind the car . . . whipped around to the left of the car in front, and hit me. . . . I was still standing in the street . . . waiting on the car to pass. . . . I did say that the car was traveling 25 to 30 miles per hour when it struck me. . . . There were plenty of lights there, street lights, and there were lights from the bus station. . . . I saw no other cars . . . going west on Trade Street. When I first saw them they were about 15 to 20 feet from me, the front car." On cross-examination plaintiff further testified, in part: "I got out of the left-hand door of my car. I stood there just a second or two. . . . I was not paying any attention to the signal light at the intersection at

the time and don't know whether it was red or green. . . . Before I started across I didn't notice either of those signal lights (referring to those at Pine-Mint Street and at Graham Street intersections). . . . I saw Kelley's car just a few seconds before it hit me, a few feet from me, but I couldn't move. Kelley's car was a good way behind the other car. . . . I was watching the front car, and I was watching back that way too, to the right. The front car was going slow, and I would say something like 15 miles per hour. Both cars were on this side of the lights when I saw them, on this side of Pine Street. I expect the light at the intersection changed a couple of times before I got across the street. . . . I did not go in front of the first car. . . . I did not run in front of the front car. . . . He (Kelley) was about 20 feet from me when I first noticed him, and I didn't have time to move."

E. C. Selvey, city traffic policeman, testified: "I was standing at the corner of Pine and West Trade Streets. I heard the noise. I ran down to the place where the accident took place. . . . When I got there Mr. Templeton was lying in the street to the right of the center of the line, right at the car tracks, . . . about 25 feet in front of the taxicab."

C. P. Yandle testified: "I saw the accident. . . . I was coming east on West Trade Street. . . . When the taxi came around the other car, Mr. Templeton was just about the middle of the car tracks. but he came in ahead there, and you couldn't judge just what happened to the second. . . . He was standing looking this way, that is, east. My opinion is that the rate of speed of the taxi when the collision occurred was 25 or 30 miles per hour. The taxi went probably 10 or 12 feet after it struck him. . . . I saw two cars going west, the first was going around 15, or maybe 20 miles per hour, just rolling down the street. . . . Mr. Templeton's body went about 20 feet after the accident, I imagine."

Plaintiff introduced in evidence the adverse examination of defendant Claude Kelley, in which he testified in part: "My car was going west on West Trade Street at 10 o'clock p.m., and the accident occurred in front of the bus station. . . . I stopped at the red light at the corner of Mint Street and Trade Street. . . . I started off in low gear and changed to second gear, and there were other cars passing me that were going down Trade Street. Mr. Templeton ran in front of a car passing me and ran right into the left headlight and fender of my car, the left headlight struck him. I was still in second gear. I was going approximately 20 miles per hour. . . . I saw Mr. Templeton just a second before he and my car came in contact. After the collision . . . he was right on the street and had been knocked approximately 15 feet west, but *kinda* on a 45 degree angle to my left . . ." On

cross-examination he further testified, in part: "I was on the right-hand side of the street. . . . After Mr. Templeton ran . . . into my car, I went approximately 10 feet before I stopped. . . . The brakes on my car were in good condition. . . . I cut to the left to try to dodge Mr. Templeton, but did not have opportunity to dodge him from the time he ran into my car."

At close of plaintiff's evidence, upon demurrer thereto by defendants, the court entered judgment as in case of nonsuit.

Plaintiff appeals to the Supreme Court and assigns error.

Uhlman S. Alexander for plaintiff, appellant.
H. L. Taylor for defendants, appellees.

WINBORNE, J. Two questions arise for determination of this appeal:

1. When taken in the light most favorable to plaintiff, is there sufficient evidence of negligence on the part of defendants to require the submission to the jury of an issue with respect thereto?

2. Upon all the evidence, is the plaintiff guilty of contributory negligence as a matter of law?

The first is answered in the affirmative, and the second in the negative.

1. In order to establish actionable negligence, "the plaintiff must show: First, that there has been a failure to exercise proper care in the performance of some legal duty which the defendant owed the plaintiff, under the circumstances in which they were placed; and, second, that such negligent breach of duty was the proximate cause of the injury—a cause that produced the result in continuous sequence and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such result was probable under all the facts as they existed." *Whitt v. Rand,* 187 N. C., 805, 123 S. E., 84; *Ramsbottom v. R. R.,* 138 N. C., 39, 50 S. E., 448.

In connection with the application of this rule to the present case, it is appropriate to refer only to those pertinent sections of the Motor Vehicle Act, chapter 407, Public Laws 1937. Sec. 103 provides in part: "(a) No person shall drive a vehicle on a highway at a rate of speed greater than is reasonable and prudent under the conditions then existing.

"(b) Where no special hazard exists the following speeds shall be lawful, but any speed in excess of said limits shall be *prima facie* evidence that the speed is not reasonable or prudent and that it is unlawful: (1) Twenty miles per hour in any business district; . . .

"(e) The foregoing provision of this section shall not be construed to relieve the plaintiff in any civil action from the burden of proving negligence upon the part of the defendant as the proximate cause of an accident."

In the present case there is evidence that the occurrence took place in a business district in the city of Charlotte, and at a time when the taxicab in question was being operated at a speed of twenty-five to thirty miles per hour. That speed, being in excess of twenty miles per hour—the limit prescribed for business districts, is *"prima facie* evidence that the speed is not reasonable or prudent and that it is unlawful." But, as was said by *Barnhill, J.*, in *Woods v. Freeman,* 213 N. C., 314, 195 S. E., 812, "It is not *prima facie* proof of proximate cause." It is only evidence of negligence to be considered with other facts in the case in determining whether the defendants are guilty of actionable negligence. *Sebastian v. Motor Lines,* 213 N. C., 770, 197 S. E., 539.

In subsection "c" of section 135 of said chapter 407, Public Laws 1937, with respect to "pedestrian's rights and duties" it is further provided that: "Between adjacent intersections at which traffic control signals are in operation pedestrians shall not cross at any place except in a marked cross walk." In subsection "e" of said section, however, it is provided that: "Notwithstanding the provisions of this section, every driver of vehicle shall exercise due care to avoid colliding with any pedestrian upon any roadway, and shall give warning by sounding the horn when necessary, and shall exercise proper precaution upon observing any child or any confused or incapacitated person upon a roadway."

Applying these principles to the evidence in the case in hand, when taken in the light most favorable to plaintiff, we are of opinion that there is sufficient evidence for submission to the jury of an issue of negligence under appropriate instruction. *Woods v. Freeman, supra.*

2. "The burden of showing contributory negligence is on the defendant, and motion for nonsuit may never be allowed on such an issue where the controlling and pertinent facts are in dispute, nor where opposing inferences are permissible from plaintiff's proof," *Hoke, J.*, in *Battle v. Cleave,* 179 N. C., 112, 101 S. E., 555; *Ferguson v. Asheville,* 213 N. C., 569, 197 S. E., 146.

In reality, there is no essential difference between negligence in the plaintiff and negligence in the defendant. *Liske v. Walton,* 198 N. C., 741, 153 S. E., 318. See also *Sebastian v. Motor Lines, supra. Stacy, C. J.*, there said: "The criterion for establishing both are the same. . . . The same standard applies alike to both."

In this connection it is again appropriate to refer to section 135 of chapter 407, Public Laws 1937, relating to "pedestrian's rights and duties." If the plaintiff, as pedestrian, violated the provisions of the statute relating to crossing between adjacent intersections at which traffic control lights are operated, this would be evidence of negligence, *Sebastian v. Motor Lines, supra; Marsh v. Byrd,* 214 N. C., 669, 200 S. E.,

389; *Stephens v. Johnson, ante,* 133, 1 S. E. 2d., 367, to be considered with other evidence in the case in determining whether the plaintiff is actually guilty of negligence which proximately caused or contributed to his injury.

Upon the evidence in this record, we are of opinion that the question is for the jury. With respect to the duty of plaintiff as well as the duty of defendant to keep a proper lookout, see *Quinn v. R. R.,* 213 N. C., 48, 195 S. E., 85.

The judgment below is

Reversed.

VIRGINIA SATTERFIELD, BY HER NEXT FRIEND, OLIVIA SATTERFIELD, v. THE McLELLAN STORES COMPANY AND M. B. THOMAS.

(Filed 10 May, 1939.)

1. Libel and Slander §§ 2, 11—Complaint held not to charge words actionable per se and demurrer should have been sustained in the absence of allegation of special damage.

The complaint alleged that defendant's manager spoke of and concerning plaintiff employee words which, under the circumstances, amounted to a charge that plaintiff was untruthful and was an unreliable employee. *Held:* Even conceding that the words were susceptible to the meaning attributed to them in the complaint, they are not actionable *per se,* and defendant's demurrer to the complaint was properly sustained in the absence of allegation of special damage.

2. Libel and Slander §§ 5, 11; Corporation § 25—Dictation of memorandum by corporate officer to stenographer held not a publication.

Plaintiff employee instituted this action for libel, and alleged that the manager of defendant corporation, upon plaintiff's request for a memorandum for the Unemployment Compensation Commission, made a notation on the blank indicating the reason for plaintiff's discharge and that the stenographer in accordance with instructions wrote the word "Misconduct." *Held:* The manager and the stenographer in the performance of the respective acts in the scope of their authority performed but one act for the corporate defendant and therefore there was no publication of the alleged libel, and since the allegations of the complaint itself negate publication, defendant corporation's demurrer to the complaint was properly sustained.

3. Principal and Agent § 10b—

Where the allegations of the complaint show that an alleged wrongful act of an agent was committed solely in his representative capacity and not in his individual capacity, the agent may not be held personally liable.

DEVIN, J., dissents.

APPEAL by defendants from *Harris, J.*, at November Term, 1938, of WAKE.

Civil action for recovery of damages for alleged libel and for alleged slander.

Plaintiff alleges substantially these facts: At intervals during the period of two years, prior to 6 June, 1938, she was employed as sales clerk in the store of defendant, the McLellan Stores Company, a corporation, in the city of Raleigh. Defendant M. B. Thomas was the manager of that store. On 6 June, 1938, while plaintiff was engaged in her usual duties as such sales clerk, and at the request of defendant Thomas, "acting for himself and on behalf of McLellan Stores Company," went "upstairs" where in the presence of W. J. Edwards, assistant manager, and a police officer of the city of Raleigh, Thomas asked her "if she had dated the said Edwards in the store." She replied that she had not, and after some discussion of the matter she was ordered by said Thomas to return to her work, and instructed to say nothing about the conversation that had taken place, and "specifically advised her that if she did so she would lose her employment." She returned as directed and resumed her duties. "Within a few minutes" thereafter plaintiff received message that she was again wanted by the manager, and upon going "upstairs," the manager told her that four girls had stated to him that she had disclosed the subject matter of the conversation just had, and on "her remonstrating as to that, he said: 'When I say anything I mean it . . . you may go to the office and get your money for the day.'"

Plaintiff further alleges: By this last statement M. B. Thomas meant "that the plaintiff had not told him the truth, and that she was untruthful and an unreliable employee, the consequence of which was her discharge from the employment of the said McLellan Stores Company by the said M. B. Thomas, manager thereof"; that the statements were false and slanderous and were given publication by the defendants and for which they are liable to plaintiff.

The plaintiff further alleges that: "9. The plaintiff, on learning that it was necessary for her to have a separation notice in order that it might be filed with the Unemployment Compensation Commission, which was a few days after her discharge, approached the defendant M. B. Thomas, in his capacity as an individual and as manager for the McLellan Stores Company, and requested of him a separation notice, and the said Thomas took the blank notice and indicated thereon that the cause of the separation should be inserted as 'Misconduct' and with the notation to that effect requested her to take the notice to the stenographer employed by the McLellan Stores Company who would fill it out for her; that the stenographer in filling out the separation notice inserted

as a cause of the separation the word 'Misconduct' which was in obedience to the orders given by the said M. B. Thomas, who was acting for himself and in the line of his duty and in the course of his employment for the defendant, the McLellan Stores Company, so that the separation notice read 'Cause of Separation—Code No. 4,' the Code for No. 4 being 'Misconduct,' thereby meaning that the plaintiff had misconducted herself and had made dates with the said Edwards for the purpose of going out at night and engaging in immoral relations and had made false statements to the said Thomas when she stated that she had not repeated the conversation had at the time plaintiff, Thomas, Edwards, and the police officer were present, which words contained in the separation notice were slanderous and libelous and were untrue and were known by the defendants to be untrue, but were inserted falsely and maliciously and published by said defendants."

The defendants demur to the complaint for that it fails to state a cause of action against defendants: (1) For libel in that: (a) the communication is privileged; (b) no facts are alleged to show publication; and (c) the words complained of are not libelous, or are, at most, ambiguous, with no supporting allegation that any third person understood them as libelous; and, (2) for slander in that: (a) the words alleged to have been spoken by defendant Thomas do not constitute slander *per se,* and (b) there is no allegation that any third person heard the words and understood them to be defamatory.

Upon the hearing the court below entered decree overruling the demurrer.

The defendants appeal to the Supreme Court, and assign error.

Little & Wilson for plaintiff, appellee.
Shepherd & Shepherd for defendants, appellants.

WINBORNE, J. Does the complaint in this action state facts sufficient to constitute a cause of action, either for slander or for libel? The answer is "No."

1. The allegation of slander is based upon this language used by the defendant Thomas: "When I say anything I mean it . . . you may go to the office and get your money for the day." If it be conceded that these words are susceptible of the meaning attributed to them as alleged in the complaint, no actionable wrong was committed. "The use of mere abusive epithets by defendant, and by him spoken of, or to the plaintiff, is not actionable." *Idol v. Jones,* 13 N. C., 162; *Ringgold v. Land,* 212 N. C., 369, 193 S. E., 267.

2. It is an elementary principle of law that there can be no libel without a publication of the defamatory matter. "To constitute a publi-

cation, such as will give rise to a civil action, there must be a communication of the defamatory matter to some third person or persons." *McKeel v. Latham,* 202 N. C., 318, 162 S. E., 747. In that case it was held that, without regard to the character of the language used, whether libelous or not, the sending of an uncovered post card through the United States mail addressed to plaintiff, is not a publication of the matter contained on the card.

In *Owen v. Ogilvie Pub. Co.,* 32 Appel. Div., 465, 53 N. Y. Sup., 1033, the factual situation is almost on all-fours with the present case. The headnote, epitomizing the decision, reads: "Where the manager of a corporation, in connection with its business, dictated a libelous letter to a stenographer in the corporation's employment, who copied and mailed the same to plaintiff, the dictation, copying, and mailing constituted but a single act of the corporation and did not amount to a publication of the letter." *Hatch, J.,* speaking to the question, said: "Under such circumstances, we do not think the stenographer is to be regarded as a third person in the sense that either the dictation or the subsequent reading can be regarded as a publication by the corporation. . . . We do not deny that there can be publication of libel by a corporation by reading the libelous matter to a servant of the corporation or delivering it to be read. Where the duties devolving upon such servant are distinct and independent of the process by which the libel was produced, he might well stand in the attitude of a third person by whom a libel can be published. But such rule cannot be applied where the acts of the servant are so intimate as are disclosed in the present record, and the production is the joint act of both." See, also, *Prins v. Mortgage Co.,* ..... Wash., ..., 181 Pac., 680, 5 A. L. R., 451.

In the *Owen case, supra,* the New York Court refers to and takes issue with the contrary view expressed by the Maryland Court in *Gambrill v. Schooley,* 93 Md., 48, 52 L. R. A., 87, 86 Am. St. Rep., 414, 48 Atl., 730.

While there is in this State no decision directly in point, the reasoning in the New York case is consonant with our views.

In the present case, upon the plaintiff requesting a separation notice as required by the Unemployment Compensation Commission, the acts of the manager in designating and indicating what should be inserted in that notice in answer to the question "Cause and separation," and the act of the stenographer in filling in the answer to the question, were both parts of one act. Each had a duty to perform in connection with the production. Under such circumstances, the stenographer is not a third person within the contemplation of law with respect to publication of a libelous matter.

As in *McKeel v. Latham, supra,* a general allegation of publication concerning the plaintiff might have been sufficient, but the plaintiff has

elected to allege the facts and circumstances upon which she claims the publication was made. These allegations negative publication.

While it is alleged that defendant M. B. Thomas acted individually and in the capacity of agent of defendant, the McLellan Stores Company, the alleged facts surrounding the transaction show that he acted only in representative capacity and not as an individual. See *Strayhorn v. Aycock, ante,* 43, 200 S. E., 912.

Since we have concluded there was no publication of the alleged defamatory matter, within the meaning of the rule relating to such publication, it is unnecessary to consider the questions as to privileged occasion or privileged communication, and as to whether or not the language used be libelous.

The judgment below is

Reversed.

DEVIN, J., dissents.

W. C. EDWARDS ET AL. v. T. B. FAULKNER.

(Filed 10 May, 1939.)

1. Wills § 33b—

The rule in *Shelley's case* obtains in this jurisdiction not only as a rule of law but also as a rule of property.

2. Same—

Where the limitation over after a life estate is to the general heirs of the first taker the rule in *Shelley's case* applies, but where the limitation over designates specific heirs who are to take without including all those within that class, the rule does not apply.

3. Same—Rule in Shelley's case held inapplicable to devise in this will.

The will in question devised the *locus in quo* to plaintiff "for his lifetime, and to his heirs if he dies without heirs, my property goes to" testatrix' brother and after his death to my "nephews children" H. T. and R. L. *Held:* It appearing that testatrix left her surviving heirs other than those named in the limitation over of the fee, the rule in *Shelley's case* does not apply and the devise conveys only a life estate to the first taker.

APPEAL by plaintiffs from *Bone, J.,* at November Term, 1938, of NASH.

Civil action for specific performance.

The plaintiffs, being under contract to convey a certain tract of land to the defendant, duly executed and tendered deed, sufficient in form to convey valid, fee simple title thereto, with full covenants of warranty,

and demanded payment of the purchase price as agreed. The defendant declined to accept the deed and refused to make payment, contending that the title offered was defective. Whereupon the plaintiffs instituted this action for specific performance.

On the hearing, a jury trial was waived and the case was submitted to the court on facts agreed.

It is stipulated that if in the opinion of the court, under the facts submitted, the plaintiffs are able to convey "a good and indefeasible, fee simple, merchantable title" to the *locus in quo,* judgment shall be entered for the plaintiffs; otherwise, for the defendant.

The court being of opinion that the plaintiffs were not vested with a good and indefeasible, fee simple, merchantable title to the land described in the contract, entered judgment for the defendant, from which the plaintiffs appeal, asssigning error.

Ben H. Neville for plaintiffs, appellants.
L. L. Davenport for defendant, appellee.

STACY, C. J. On the hearing, the title offered was properly made to depend upon the construction of the following clause in the will of Elizabeth Edwards:

"Second, I give and devise all my property, personal and real, to my nephew W. C. Edwards for his life time, and to his heirs if he dies without heirs, my property goes to my Bro. R. C. Edwards, and after his death to my nephews children H. T. Edwards, and R. L. Edwards."

The record discloses that W. C. Edwards and R. L. Edwards are sons of R. C. Edwards and nephews of the testatrix; that no person by the name of "H. T. Edwards" is known to the parties as in any way connected with the family; that W. C. Edwards has six living children and one living grandchild, and that R. C. Edwards died after the execution of his sister's will, leaving him surviving four children and four grandchildren.

The question for decision is whether W. C. Edwards takes a fee simple to the lands devised to him in the second item of his aunt's will. The answer depends upon whether the limitations in remainder are so framed as to attract the rule in *Shelley's case,* which obtains in this jurisdiction not only as a rule of law but also as a rule of property, *Brown v. Mitchell,* 207 N. C., 132, 176 S. E., 258, regardless of the particular intent of the testatrix. *Allen v. Hewitt,* 212 N. C., 367, 193 S. E., 275; *Bank v. Dortch,* 186 N. C., 510, 120 S. E., 60; *Hampton v. Griggs,* 184 N. C., 13, 113 S. E., 501. Indeed, the testatrix in the instant case doubtless never heard of the rule in *Shelley's case,* which says, in substance, "that if an estate in freehold be limited to A., with

remainder to his heirs, general or special, the remainder, although importing an independent gift to the heirs, as original takers, shall confer the inheritance on A., the ancestor." *Martin v. Knowles,* 195 N. C., 427, 142 S. E., 313.

The devise in question is to W. C. Edwards "for his life time," and then "to his heirs." Had the will stopped here, a typical case for the operation of the rule would have been presented, for, as said by *Black, J.,* in *Steacy v. Rice,* 27 Pa. St., 95, 65 Am. Dec., 447, "the law will not treat that as an estate for life which is essentially an estate of inheritance, nor permit anyone to take in the character of heir unless he take also in the quality of heir." *Rowland v. B. & L. Assn.,* 211 N. C., 456, 190 S. E., 719.

However, immediately thereafter the testatrix adds, "if he dies without heirs, my property goes to my Bro. R. C. Edwards and after his death to my nephews children H. T. Edwards and R. L. Edwards." The brother of the testatrix, R. C. Edwards, is the father of W. C. Edwards, and, therefore, potentially among the heirs general of the first taker. Hence, according to a number of decisions this would seem to take the case out of the operation of the rule in *Shelley's case,* and assign it to that class of cases of which the following may be said to be fairly illustrative: *Rollins v. Keel,* 115 N. C., 68, 20 S. E., 209; *Puckett v. Morgan,* 158 N. C., 344, 74 S. E., 15; *Jones v. Whichard,* 163 N. C., 241, 79 S. E., 503; *Pugh v. Allen,* 179 N. C., 307, 102 S. E., 394; *Blackledge v. Simmons,* 180 N. C., 535, 105 S. E., 202; *Wallace v. Wallace,* 181 N. C., 158, 106 S. E., 501; *Reid v. Neal,* 182 N. C., 192, 108 S. E., 769; *Hampton v. Griggs, supra; Welch v. Gibson,* 193 N. C., 684, 138 S. E., 25; *Doggett v. Vaughan,* 199 N. C., 424, 154 S. E., 660; *Brown v. Mitchell, supra; Gurganus v. Bullock,* 210 N. C., 670, 188 S. E., 85.

The distinction between this line of cases, in which it is held that the rule is not attracted by the limitations appearing therein, and the long line of decisions holding it to be applicable and firmly established as the law of this jurisdiction, was first pointed out in *Pugh v. Allen, supra,* and repeated in *Hampton v. Griggs, supra; Welch v. Gibson, supra; Doggett v. Vaughan, supra; Brown v. Mitchell, supra,* substantially as follows: Where there is an ulterior limitation which provides that upon the happening of a given contingency, the estate is to be taken out of the first line of descent and then put back into the same line, in a restricted manner, by giving it to some, but not to all, of those who presumptively would have shared in the estate as being potentially among the heirs general of the first taker, this circumstance may be used as one of the guides in ascertaining the paramount intention of the testator, and, with other *indicia,* it has been held sufficient to show that the words

"heirs" or "heirs of the body" were not used in their technical sense. See, also, and compare *Clark v. Clark,* 194 N. C., 288, 139 S. E., 437; *Yelverton v. Yelverton,* 192 N. C., 614, 135 S. E., 632.

This same line of demarcation was adumbrated by *Brown, J.,* in *Tyson v. Sinclair,* 138 N. C., 23, 50 S. E., 450, as follows: "The rule in *Shelley's case* applies and is in force in this State. *Starnes v. Hill,* 112 N. C., 1. It applies to devises as well as conveyances. *Chamblee v. Broughton,* 120 N. C., 175. It applies when the same persons will take the same estate, whether they take by descent or purchase; in which case they are made to take by descent; but when the persons taking by purchase would be different or have different estate than they would take by descent from the first taker, the rule does not apply, and the first taker is confined to an estate for life, and 'the heirs, heirs of the body,' etc., take as purchasers. *Ward v. Jones,* 40 N. C., 401."

By this test, the cases of *Benton v. Baucom,* 192 N. C., 630, 135 S. E., 629 (amplified in *Welch v. Gibson, supra*), and *Wool v. Fleetwood,* 136 N. C., 460, 48 S. E., 785, cited and relied upon by plaintiffs, are assigned to the "applicable" line of decisions; whereas, by the same token, the instant case is assigned to the "nonapplicable" line.

It all comes to this: If the limitation in remainder carry the estate to the heirs of W. C. Edwards, *as heirs,* the rule in *Shelley's case* applies and vests the fee in the first taker; otherwise, not. *Rowland v. B. & L. Assn., supra; Morehead v. Montague,* 200 N. C., 497, 157 S. E., 793; *Benton v. Baucom, supra.*

We agree with the court below that the rule in *Shelley's case* is not applicable and that the title offered is not "a good and indefeasible fee simple, merchantable title" as called for in the contract between the parties. The judgment denying specific performance will be upheld.

Affirmed.

S. W. GARRELL, JR., AND DOCK FOWLER, ON BEHALF OF THEMSELVES AND ALL OTHER CITIZENS AND TAXPAYERS OF COLUMBUS COUNTY, v. COLUMBUS COUNTY AND C. A. SMALL, H. G. AVANT, W. M. STEPHENS, W. L. HOBBS AND R. C. BENTON, CONSTITUTING THE BOARD OF COMMISSIONERS OF COLUMBUS COUNTY.

(Filed 10 May, 1939.)

Taxation § 38a—Action attacking validity of bond order of county commissioners must be instituted within 30 days after publication of order.

Plaintiff taxpayers instituted this action attacking a bond order passed by the board of county commissioners on the ground that said commissioners had failed to comply with provisions of section 14 of the County

Finance Act, requiring the filing of a true statement of the county debt. *Held:* The attack of the order is upon statutory as distinguished from constitutional grounds, and the action instituted more than 30 days after the first publication of the order cannot be maintained, such action being barred after the expiration of the 30-day period by express provision of the bond order and section 20 of the County Finance Act.

APPEAL by plaintiffs from *Harris, J.*, in Chambers, 7 March, 1939. From COLUMBUS.

Civil action to restrain the issuance of bonds for a county hospital, and levying of a tax to pay the principal and interest.

The record on this appeal shows that the board of commissioners of the county of Columbus, North Carolina, in session on 22 December, 1938, pursuant to adjournment of regular meeting in said month, by unanimous affirmative vote of its several members, passed a bond order, hereinafter set forth, which had been introduced at said regular meeting, and directed the clerk to said board to publish same in the *News Reporter,* a newspaper published at Whiteville in said county, as required by section 19 of the County Finance Act, Public Laws 1927, chapter 81.

Pursuant thereto the clerk, over his name as such, published in said newspaper for two successive weeks notice of said bond order in the following form:

"Order Authorizing $55,000 Bonds for a County Hospital—

"Be It Ordered And Resolved by the Board of Commissioners for the County of Columbus:

"1. That bonds of Columbus County be issued pursuant to the County Finance Act, as amended, in an amount not exceeding $55,000 for the purpose of erecting and equipping a County hospital, including the payment of debt theretofore incurred for such purpose.

"2. That a tax sufficient to pay the principal and interest of said bonds when due shall be annually levied and collected.

"3. That a statement of the County debt has been filed with the Clerk and is open to public inspection.

"4. That this order shall take effect when approved by the voters of the County at an election as provided by law.

"The foregoing order was finally passed on the 22nd day of December, 1938, and was first published on the 29th day of December, 1938. Any action or proceeding questioning the validity of said order must be commenced within thirty days after its first publication."

At the time of passing the said bond order the board of commissioners called a special election to be held on Tuesday, 7 February, 1939, to vote on the question of issuing of said bonds and levying of tax. The board ordered a new registration for such election. Notice of both the election and the new registration were duly published. Eight thousand

five hundred and nineteen voters registered and qualified to vote, of whom four thousand five hundred and twenty-five voted for the question submitted, as disclosed upon canvass duly made. A majority of the qualified voters having voted in favor of the issuance of the bonds and levying of the tax, the result was determined and declared, and published in accordance with provisions of County Finance Act. Thereafter, on 23 February, 1939, the board passed a resolution providing for the issuance of the bonds. The Local Government Commission of North Carolina, as authorized by law, advertised for bids for sale of the bonds.

Thereupon plaintiffs, citizens and taxpayers of Columbus County, instituted this action on 6 March, 1939, and in complaint filed attack the authority for the issuance of the bonds upon various grounds, which on this appeal are reduced to the contention that the board of commissioners failed to comply with the provisions of section fourteen of said County Finance Act, in that the true financial condition of the county is not revealed as there required; and further, that if the financial condition had been so correctly stated, the net debt of the county for other than school purposes would exceed the statutory limitation, and, consequently, the bond order would run counter to the provisions of section seventeen of said act; and that, as a result, the order of election and the election held are void.

Defendants deny the material allegations of the complaint and, as defense, set up in detail, and plead the regularity of the records of the proceedings, and, as a bar to plaintiffs' right to maintain this action, aver that it was not instituted within thirty days next after the first publication of the bond order, 29 December, 1938, the time limited by the provisions of section twenty of the County Finance Act.

Upon the complaint and answer the court below entered this judgment:

"This cause coming on for a hearing before his Honor, W. C. Harris, Judge, at Chambers, at Raleigh, N. C., by consent, and being heard out of the district by consent, and it appearing to the satisfaction of the court that the plaintiffs are not entitled to the restraining order as prayed for in the complaint;

"It is, therefore, ordered, adjudged and decreed by the court that this action be, and the same is hereby dismissed and the plaintiffs taxed with the cost of same."

Plaintiffs appealed therefrom to the Supreme Court, and assign error.

A. B. Brady and Varser, McIntyre & Henry for plaintiffs, appellants.

Junius K. Powell, Powell & Lewis, Tucker & Proctor, and Lyon & Lyon for defendants, appellees.

WINBORNE, J. Are plaintiffs barred of right to maintain this action? This is the decisive question, controlled and answered by the decisions of this Court in the cases of *Kirby v. Comrs.*, 198 N. C., 440, 152 S. E., 165, and *Jones v. Alamance County,* 212 N. C., 603, 194 S. E., 109.

No constitutional question is involved on this appeal, as was the case in *Sessions v. Columbus County,* 214 N. C., 634, 200 S. E., 418. Here the question relates to statutory law. While the plaintiffs, by the allegation in the complaint, direct their attack against the validity of the order of election and the election, the attack is in fact upon the bond order in that it is contended that the board of commissioners has failed to comply with the provisions of section fourteen of the County Finance Act, and that as a result the bond order, which is to become effective when approved by the voters at an election as provided by law, is invalid. Section seventeen, County Finance Act. These are questions which might be presented in an action instituted within thirty days after the first publication of the bond order, the time limit fixed by the provisions of section twenty of said act. In that section it is provided that: "After the expiration of such period of limitation, no right of action or defense upon the validity of the order shall be asserted, nor shall the validity or the order be opened to question in any court upon any ground whatever, except in an action or proceeding commenced within such period."

Speaking to the question in *Kirby v. Comrs., supra, Brogden, J.,* said: "The statute in plain and imperative English provides that the validity of a bond ordinance shall not be open to question unless the suit is brought within thirty days after the first publication of notice. This statute is part of the act authorizing the bond ordinance, and hence all parts of the same statute must be read and construed together. The effect of the time limit is that, after the lapse of thirty days, if no suit has been instituted, the bond ordinance is deemed to be valid for all purposes." To like effect is the case of *Jones v. Alamance County, supra.*

Plaintiffs, having failed to institute the present action within the time limited, cannot now be heard to attack the bond order.

The regularity of the proceedings providing for the election and of the conduct of the election is not challenged. These are matters which might be attacked in an action commenced within thirty days after the election, as limited by the provisions of section thirty of the County Finance Act.

The judgment below is

Affirmed.

GEORGE W. CASE v. G. B. ARNOLD AND MAUDE ARNOLD, HIS WIFE; W. K. ADOLPHI AND THELMA ADOLPHI, HIS WIFE; AND R. M. LEWIS.

(Filed 10 May, 1939.)

Mortgages § 12: Deeds § 10b—No notice takes place of registration as to purchaser for value, but only purchasers and creditors for value are protected.

Plaintiff instituted this action to reform a mortgage upon allegations that a certain lot belonging to mortgagor had been omitted from the description by mutual mistake and that the defendant who held a subsequent mortgage upon the property described in plaintiff's mortgage, including the lot omitted therefrom by mistake, had actual notice thereof and that he was not an innocent purchaser for value. *Held:* The allegation as to notice is unavailing, since no notice, however full and formal, will take the place of registration, but such defendant's demurrer *ore tenus* should not have been sustained, since the complaint alleges that he was not an innocent purchaser for value and the registration laws, C. S., 3309, 3311, protect only creditors and purchasers for value.

APPEAL by plaintiff from *Phillips, J.*, at February Term, 1939, of MOORE. Reversed.

Civil action to reform a mortgage from the defendants, other than R. M. Lewis, to the plaintiff so as to incorporate therein, as a part of the property conveyed, Lot No. 22 in Block D and 1 in the plan of Southern Pines, as shown by a recorded plat thereof, alleged to have been omitted from the description by mutual mistake. The plaintiff also seeks foreclosure.

Plaintiff alleges that the defendants, other than R. M. Lewis, being the owners of certain property in Southern Pines, including Lot No. 22 in Block D and 1, as shown on a recorded map of Southern Pines, on 28 April, 1927, executed and delivered to the plaintiff a mortgage to secure the payment of $1,000; that it was intended by the parties that the land conveyed by the mortgage should include Lot 22; that no part of the debt has been paid and the same is now due; that subsequently in January, 1937, plaintiff discovered that Lot 22, upon which the house and outbuildings were located, and which constituted the principal part of his security, was by the mutual mistake of the plaintiff and said defendants inadvertently left out and not fully described by its number as had been intended; that on 1 May, 1931, the defendants, other than R. M. Lewis, executed and delivered to the defendant R. M. Lewis a mortgage purporting to secure $1,000 and purporting to convey all of the property described in plaintiff's mortgage, including Lot 22; that at the time of the execution and delivery of the mortgage to R. M.

Lewis he had actual knowledge of the fact that it was intended that plaintiff's mortgage should include and embrace Lot 22; and that the said R. M. Lewis is not a purchaser or mortgagee for value and without notice.

The defendants, other than R. M. Lewis, having failed to answer, there was judgment by default as against them. The defendant R. M. Lewis demurred *ore tenus* to the complaint, for that the complaint on its face does not allege facts sufficient to constitute a cause of action against him. The demurrer was sustained and the plaintiff excepted and appealed.

Seawell & Seawell for plaintiff, appellant.
U. L. Spence and W. Duncan Matthews for Robert M. Lewis, appellee.

BARNHILL, J. The plaintiff alleges various circumstances which he contends were sufficient to put the defendant on notice that it was intended that the mortgage to the plaintiff should include and embrace Lot 22. Actual notice, however full and formal, does not take the place of registration. *McClure v. Crow,* 196 N. C., 657, 146 S. E., 713; *Sexton v. Elizabeth City,* 169 N. C., 385, 86 S. E., 344; *Blacknall v. Hancock,* 182 N. C., 369, 109 S. E., 72; *Robinson v. Willoughby,* 70 N. C., 358; *Duncan v. Gulley,* 199 N. C., 552, 155 S. E., 244. In any event, the allegations of notice to the appealing defendant is counterbalanced or negatived by the positive allegation in the complaint that a description of Lot 22 was omitted from the mortgage. If the mortgage sufficiently described this lot there is no occasion for reformation as sought by the plaintiff.

The plaintiff goes further and alleges that the defendant Lewis is not an innocent purchaser for value. If he can establish this as a fact in a trial before a jury then he, upon a proper showing of mutual mistake, is entitled to have a reformation of his mortgage as against Lewis, as well as against the original mortgagors. The registration laws are enacted for the protection of creditors and innocent purchasers for value. C. S. 3309, C. S. 3311. They protect only creditors and purchasers for a valuable consideration against unrecorded deeds, mortgages, leases and other paper writings affecting the title to the lands conveyed. *Twitty v. Cochran,* 214 N. C., 265, and cases there cited.

In the respect indicated the complaint sufficiently states a cause of action. There was error in the order sustaining the demurrer *ore tenus* interposed by the defendant R. M. Lewis.

Reversed.

MACMILLAN BUICK COMPANY v. O. L. RHODES.

(Filed 10 May, 1939.)

1. Sales § 24—

Where a sale is effected by actionable fraud, the buyer may usually elect either to rescind, or to affirm and seek damages for the fraud by action or by counterclaim in the seller's action for the purchase price.

2. Sales § 25—

Ratification of a sale after the discovery of the alleged fraud bars an action or counterclaim based upon rescission or renunciation.

3. Sales § 28—Ratification of sale after discovery of fraud does not bar right to damages.

Ratification of the sale after the discovery of the alleged fraud does not bar an action or counterclaim for damages, and therefore in the seller's action for the purchase price in which the buyer sets up a counterclaim for damages for the alleged fraud inducing the purchase of the chattel, an instruction that if the jury found that the buyer ratified the sale they should not answer the issues as to damages sustained by the buyer, is error.

4. Trial § 45—

A motion for judgment *non obstante veredicto* is, in effect, a belated motion for judgment on the pleadings, and is not properly made upon a party's contention that he is entitled to judgment upon the jury's answer to one of the issues notwithstanding its answer to a subsequent issue in favor of the adverse party.

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

Civil action to recover on promissory notes with ancillary remedy of claim and delivery to foreclose mortgage or conditional sales contract on Pontiac Sedan, 1933 Model, given as security.

The defendant pleaded fraud in the exchange of automobiles and demanded damages by way of recoupment or counterclaim.

Upon issues thus joined, the jury returned the following verdict:

"1. Did the defendant execute to the plaintiff the note and conditional sales contract, as alleged in the complaint? Answer: 'Yes.'

"2. In what amount is the defendant indebted to the plaintiff on account thereof? Answer: '$250.00.'

"3. What was the value of the automobile at the time it was seized? Answer: '$225.00.'

"4. Was the defendant induced to purchase the car involved in this controversy by the fraud and deceit of the plaintiff? Answer: 'Yes.'

"5. If so, did the defendant, by his conduct, ratify the said contract of purchase? Answer: 'Yes.'

"6. What amount, if any, is the defendant entitled to recover as actual damages? Answer: 'None.'

"7. What amount, if any, is the defendant entitled to recover as punitive damages? Answer: '$100.00.' "

The court instructed the jury: "If you answer the fifth issue 'Yes,' you need not answer the sixth and seventh issues." Exception.

From judgment on the verdict for plaintiffs disregarding the seventh issue—designated as *"non obstante veredicto,* the court having instructed the jury that if they answered the fifth issue 'Yes' not to answer the sixth and seventh issues"—the defendant appeals, assigning error.

Stevens & Burgwin for plaintiff, appellee.
C. D. Hogue for defendant, appellant.

STACY, C. J. Where a sale has been effected by actionable fraud, the purchaser usually has an election of remedies:

1. The one grounded upon recission or renunciation. *Fields v. Brown,* 160 N. C., 295, 76 S. E., 8; *Van Gilder v. Bullen,* 159 N. C., 291, 74 S. E., 1059.

2. The other based upon affirmation. *Kennedy v. Trust Co.,* 213 N. C., 620, 197 S. E., 130; *May v. Loomis,* 140 N. C., 350, 52 S. E., 725.

In the latter, the purchaser may bring an action to recover for the fraud by which he was induced to make the purchase, or he may recoup any damages which he has sustained if the seller sue him for money due on the contract, or other failure to perform it. *Frick Co. v. Shelton,* 197 N. C., 296, 148 S. E., 318.

It was error, therefore, to instruct the jury in the instant case not to answer the sixth and seventh issues, if the fifth issue were answered in the affirmative. This was equivalent to limiting the defendant to a single remedy, *i.e.,* one predicated on rescission or renunciation, whereas he had elected to affirm the contract and to recoup his damages by way of counterclaim. *Pryor v. Foster,* 130 N. Y., 171.

The case of *Abel v. Dworsky,* 195 N. C., 867, 142 S. E., 475, cited in support of the rulings below, is not at variance herewith. That was an action grounded on rescission or renunciation, and there was evidence tending to show the plaintiffs had ratified the sale after discovering the fraud. This is not our case. True, the defendant here has ratified the contract of purchase after discovering the fraud according to the jury's answer to the fifth issue, but his defense is based upon affirmation rather than recission or renunciation. Herein lies the distinction between the two cases. Ratification is not a bar to the defendant's counterclaim, but is in substantiation thereof. *Frick Co. v. Shelton, supra; May v. Loomis, supra.*

It is also observed that the motion for judgment *non obstante veredicto,* which, in effect, is but a belated motion for judgment on the pleadings, apparently was not well advised. *Little v. Furniture Co.,* 200 N. C., 731, 158 S. E., 490; *Jernigan v. Neighbors,* 195 N. C., 231, 141 S. E., 586; *Rankin v. Oates,* 183 N. C., 517, 112 S. E., 32.

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

New trial.

FLOYD C. McLEAN, TRADING AS McLEAN SUPPLY COMPANY, v. A. F. POPE AND HENRY WHITEHEAD.

(Filed 10 May, 1939.)

Sales § 21—

Where the seller seeks to recover chattels from a third person which had been placed in the possession of the buyer under an alleged consignment agreement, he must identify the chattels as those subject to the agreement, and in the absence of such evidence, whether the transaction was a conditional sales or a consignment is immaterial.

APPEAL by plaintiff from *Bivens, J.,* at October Term, 1938, of SCOTLAND.

Civil action to recover the value of tires and tubes, possession of which defendants are alleged to have wrongfully and unlawfully acquired.

Plaintiff alleges in substance: That, on 20 April, 1938, when Frank Weaver abandoned a service station operated by him, near Erwin, N. C., there were in the station eight tires and twenty-one tubes of the value of $95.15, which plaintiff had placed with Weaver for sale under a consignment agreement which had existed between them and under which they had operated for two years; and that defendants, with notice of contract, knowingly and unlawfully, took possession of same, and refuse upon demand to return same or to pay therefor.

Defendants deny any knowledge or information as to a consignment agreement between plaintiff and Weaver. They admit that in the latter part of April, 1938, they received from Frank Weaver five tires and nineteen tubes of the value of $47.00, but aver that they paid full value therefor, and deny any knowledge or information as to where or from whom Weaver obtained the tires and tubes. They admit refusal to comply with demand of plaintiff, but deny right of plaintiff either to possession of tires and tubes received by them from Frank Weaver, or to be paid therefor.

Upon the trial below the only evidence introduced by plaintiff came from the witness, Frank Weaver, whose pertinent testimony is as follows: "I know Mr. Floyd C. McLean of Laurinburg and have had dealings with him. My first dealings with him were in 1936, when I entered into a contract with him." Witness then identified his signature to the contract. Plaintiff, admitting that it was not registered, offered to introduce same in evidence, but upon objection by defendant it was excluded. Plaintiff excepted. Thereupon the examination continued. Q. ". . . Did you receive any tires under this contract?" Objection. Sustained. Exception. Q. "What was your contract with the McLean Supply Company?" Objection. Sustained. Exception. Q. "Mr. Weaver, were any tires consigned to you by the McLean Supply Company? A. Yes." Plaintiff rests.

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

Joe M. Cox for plaintiff, appellant.
J. A. McLeod for defendant, appellee.

PER CURIAM. We are unable to find error in the judgment below. Why debate the question as to whether the contract between plaintiff and Frank Weaver be of conditional sale or of consignment, when there is no evidence in the record identifying any tires and tubes defendant received from Weaver as those, or any of those, plaintiffs may have delivered to Weaver? There must be proof as well as allegation.

The judgment below is

Affirmed.

STATE v. DAVE BURNEY.

(Filed 24 May, 1939.)

1. Homicide § 25—Evidence held sufficient for jury on question of defendant's guilt of murder in the first degree.

The evidence for the State tended to show that defendant became angered with deceased and her daughter about the daughter's conduct, that he purchased shells for his gun and left the loaded gun at a tobacco barn on the premises, enticed deceased and her daughter to the barn, that he got into a fight with the daughter, that deceased retreated toward the house, and that he thereafter shot deceased while she was in the yard, inflicting fatal injuries. *Held:* The evidence was plenary to be submitted to the jury on the question of murder in the first degree.

2. Criminal Law § 41a—

Where a witness testifies that she had conversed with defendant during the trial it is competent for the State to elicit testimony explaining the reasons for such conversation.

3. Criminal Law § 81c—

Even conceding the implication of a question asked the witness by the solicitor was improper, an objection thereto cannot be sustained when the witness' answer negatives the implication.

4. Same—

The admission of negative evidence with little, if any, probative force cannot be held prejudicial or reversible.

5. Homicide § 20: Criminal Law § 29b—Evidence of immoral relations in defendant's household held competent to show motive, and not objectionable as tending to impeach defendant's character by showing commission of particular crimes.

The evidence tended to show that defendant's wife and several other women lived with him in his house and worked with him on his farm. Defendant was charged with the murder of one of the women. The State contended that defendant was head of the household, sought to control deceased and her daughter as members thereof, and that he became angered with deceased and her daughter because of misconduct of which he thought the daughter guilty with another man, that they had an altercation resulting in the fatal shooting of the deceased. The State elicited testimony tending to show the relationships between members of the household and that defendant had had immoral relations with the women living in his house. *Held:* Exceptions to the evidence cannot be sustained, since the evidence is competent for the purpose of giving the setting and tending to show motive for the murder, defendant himself having testified to practically the same matter, and objection to the evidence on the ground that it tended to prejudice defendant in the eyes of the jurors and impeach his character by showing guilt of particular offenses, is untenable.

6. Homicide § 27h—Court is not required to charge on question of manslaughter when there is no evidence of guilt of this degree of the crime.

In this prosecution for homicide the State contended and offered evidence to show that defendant killed deceased after premeditation and deliberation and with malice. Defendant made conflicting contentions that he intended to shoot deceased's daughter or that he intended to shoot a man who had made threats against him, and that in the dark he shot deceased through mistake. *Held:* The evidence, in no aspect, presents the question of defendant's guilt of manslaughter, and the failure of the court to submit the question of manslaughter to the jury will not be held for error.

7. Homicide §§ 2, 27g—Where party kills one person while intending to kill another, he is guilty in the same degree as though he had killed the person intended.

Where defendant, intending to kill a certain person, by mistake inflicts fatal injuries on another, he is guilty in the same degree as though he

had killed the person intended, and therefore an instruction that if the jury should be satisfied beyond a reasonable doubt that defendant intended to kill a certain person with malice and with premeditation and deliberation and that by mistake he shot and killed deceased, defendant would be guilty of murder in the first degree, is without error.

8. Homicide §§ 4c, 27c—Length of time elapsing between formation of fixed intent to kill and the execution of the intent is immaterial.

An instruction correctly defining premeditation and deliberation and instructing the jury that if defendant formed a fixed design to kill a certain person, and pursuant to such fixed design kills such other person, the killing would be premeditated and deliberated, regardless of how soon the fixed design to kill is executed after its formation, is without error, since it is not necessary to constitute premeditation and deliberation that the fixed design to kill be formed on an occasion prior to the fatal encounter.

APPEAL by defendant from *Frizzelle, J.*, and a jury, at September Term, 1938, of JONES. No error.

The defendant, Dave Burney, was indicted for the murder of Mordie Kinsey on 25 August, 1938, and entered a plea of "not guilty." The jury rendered verdict, "That the defendant is guilty of murder in the first degree." The court below rendered judgment on the verdict, "Shall cause the said prisoner, Dave Burney, to inhale a sufficient quantity of lethal gas to cause the death of the said prisoner."

The evidence was to the effect that Dave Burney was a tenant on the farm of Clifford Harris in Jones County. The defendant had in his home his wife and the deceased Mordie Kinsey, her daughter, Orphie Kinsey, Lula May Hall, Cricket Hobbs, and including grown persons and children about twenty in all. It was in evidence that there was bad feeling between defendant and Clyde Morgan, on account of Morgan's attention to Lula May Hall and Orphie Kinsey, daughter of Mordie Kinsey, all of whom were living with and working for defendant. It was in evidence that on the day of the killing, 25 August, 1938, on his way from Kinston in the evening, the defendant had purchased some shells with No. 4 shot for a gun which he owned. On reaching home he had Clyde Morgan take the gun down to the tobacco barn on the place, some quarter of a mile away. Later, about 8:00 or 8:30 o'clock the same night, he had Orphie Kinsey and her mother to go to the barn. There he had a fight with Orphie and tore some of her clothes off and she fled. He later shot her mother, Mordie Kinsey, near the house.

The following witnesses for the State testified, in part:

George A. Moore: "And we sat on the porch and we heard some things, and we said. Soon after he came back from the tobacco barns he (defendant) and whoever was with him went on down to his home again, and I heard him cursing, and he said to someone, "G— damn

you. You know all about it. I am going to kill you, G— damn you." Well, in just a short while, I don't know how long, I wouldn't like to say, but it was just two or three minutes, it seemed to me (in fact, it didn't seem to be over a minute) I heard a gun fire. Up until that time I heard Dave cursing right loudly, but immediately after the gun fired everything was quiet down there. I heard nothing more for several minutes. And then I heard a beating noise, in two or three minutes, I guess it was, from the time I heard the gun fire, it might have been five minutes."

Orphie Kinsey: "I am 21 years old and live with Uncle Dave Burney; my mother lived there also. I was eight years old when we moved there, was living there at the same time with my mother and his niece and three of we girls. One of them was his niece's girls, and two of them were mother's girls. To tell the truth about it, I really don't know whether mother had any children by him while she was staying there, and she and he didn't sleep together. Yes, he had intercourse with me one time. . . . That night he came back from Kinston, and he told me and her (meaning her mother) to come, that he wanted to talk with us some, and me and her started with him. He didn't say where. He had come from Kinston at 7:00 o'clock Thursday night, and we started with him at the house, and he got half way from the house to the tobacco barn, and he said, 'Orphie, you and your mother are sons of bitches, aren't you?' and I said, 'No, we ain't,' and he said, 'You is,' and she turned around then and started back to the house or went back to the house. I don't know what she went back for, and I went on with him, and we got to the tobacco barn door, and me and him started in to wrestling, and he throwed me down and beat me in the face. He beat me with his fist, and then I got loose from him and he tore my clothes. . . . I run from there to the corn field but he didn't run after me. . . . She (a neighbor) told me to go to Uncle Frank Greene's, so I went there. I reckon that was a mile and a half from where we lived. . . . Since I talked to you yesterday, Dave Burney has seen me. He saw me today, right here and talked to me, but he didn't say anything, only asked me how the children were getting along and where I was living and everything. He was with the sheriff and told me to come on around to the jail. Q. And that's the reason you are testifying like that? Ans.: No, sir, he didn't ask me anything about this. He just asked me how I was getting along and how were the children. (First objection.) (Defendant objects to the question and answer; overruled, defendant excepted.) Q. Who else was there? Ans.: Cricket Hobbs. Q. Cricket is another one of his women living there? (Second objection.) (Defendant objects; overruled, defendant excepted.) Ans.: She is a girl that lives there. He raised her and she

stays there. I have a baby six years old, both of them was born while I was living with Dave. Yes, I talked to Dave's lawyer this morning. I didn't tell you that, because you didn't ask me if I had talked to him. I have been living there with Dave Burney since I was eight years old, and he took care of me and treated me like he would his daughter. On the week-end before the shooting I went off and stayed, and mother didn't know where I was and I reckon that was what he was mad with me about. . . . I said I spent one night away from home. I left that way because Dave told me to go up there and stay with Lillie Foy the third Sunday before that Thursday, and when I went back home he was not there, and when he came he had a little stick in his hand, and he hit me with the stick and I ran, and he got his gun and pointed out the window. I was outside, and I got away and left that time, and that was the cause of my leaving. I had been back there before this night on which my mother was killed. I came back on Monday about 4:00 o'clock, I reckon, before she was shot on Thursday."

C. F. Brooks: "I live close by Dave Burney. I live on the same farm. I heard cursing. He was doing the cursing. He was cursing the woman, told her she had told a damn lie. That woman that he shot. And he said, 'I am going to kill you.' And about that time the gun fired, I heard some fussing down there. Something like three-quarters of an hour. Dave Burney was doing the cursing then. He was cursing Orphie. I can't tell you what he was saying down there. He was using vulgar language. I did not go there that night. I went the next morning. I found the dress lying in the tobacco barn torn, and saw a dress with some blood on it. . . . Practically a whole dress. Torn practically all to pieces and there was buttons lying around all about all on the path. And I picked them up and gave them to the sheriff. Two pieces of underwear. . . . I heard some cursing; it was at Dave's house or right around his house, about the porch, somewhere. He was cursing people, saying that he was going to kill people about there, and that there were two or three more he was going to get, and then he was going to die and be satisfied and go to hell."

J. P. Taylor: "I saw the shot that came out of this woman's body; they were No. 4's. I got some of the wadding, but I didn't get the shot. That was taken from the wound in the hospital on Friday. I saw the leg that was all swollen up. It was mangled and there was a hole about an inch and a half in diameter. The leg was almost cut in two."

Leo Kinsey: "I was not there when mamma was shot. He said, 'Mordie, you are nearly dead, and G— damn you, I am going to finally kill you.' He was talking to mamma then. At that time I was in the kitchen. He hit my mamma with a stool chair and a rocking chair.

That was after he shot her. . . . The door in the room where I was in was shut, and in the middle room the door was open. The door that I set out through was open. Nobody told me to come here and tell anything. I seed what I told, and I am positive about it. (Court) How long have you lived with Dave Burney? Ans.: I don't know. (Court) That was your mamma who was killed? Ans.: Yes. (Court) Do you know who your father is? Ans.: No." (Exception.)

Dr. R. G. Tyndall: "I am a practicing physician and surgeon in Kinston. I remember when this woman, Mordie Kinsey, was carried to the hospital. I don't know the date, but I remember very well the case. Sometime in August. . . . Her right leg from her knee to her shoe-top on the back, from the calf of her leg, it was all torn wide open, and I judge it was about three-quarters—were peppered from her knee to her ankle with about fifteen or twenty on the other leg at about the same level. They had the leg all wrapped up in her clothing and it was, of course, all saturated with blood. After the nurse helped me to clean out the wound and pull out the gun wadding I gave her some stimulant for her heart hoping that we could do something else about it. Next day we gave her some blood, and her leg from the knee down became cold from lack of circulation. And Dr. Parrot and I consulted, and we decided the leg would have to come off, but not in that condition. And we were hoping for some improvement in her condition, but she gradually got worse until she died. I can't say for certain, but it was three or four days before she died. I have an opinion satisfactory to myself as to the cause of her death. It was shock and hemorrhage from the wound in her leg. She is dead."

Sheriff J. W. Creagh: "This matter was brought to my attention on Friday, the 26th of August. The day after the shooting. I went to Dave Burney's house to make some inquiries, and arrested him and brought him to jail, and then went back up there and found that the woman was in Kinston in the hospital. I then went to Kinston and attempted to question her. Dave Burney made a statement to me, and he made that statement freely and voluntarily without any reward or hope of reward or any threats. . . . That was in my car and Dave was under arrest, and we were on the way to jail. I warned him of his constitutional rights and told him that anything he said would be used against him, and I told him that again in jail. (Court) You have said you did not hold out any reward or hope of reward, or make any threats? No, sir. Dave stated that he had shot this woman, but that his intentions were to shoot Orphie Kinsey. . . . I asked Mordie Kinsey if she knew her condition and she said she knew it, and expected to die. Her statement was that she knew she might die any minute and wanted to tell the truth before she died. She stated that Dave

Burney, when he came from Kinston, called her and her daughter from the house and told them to go with him, and that they went down the road towards the tobacco barn and that after they had gotten part of the way to the tobacco barn that Dave and her daughter started fighting and that she went back to the house. She said a few minutes later that she saw Dave coming back to the house and that she went out into the lot. She stated that Dave came out to the lot, to the barn with a gun and that she saw him. The statement that she made me was that she sort of stooped, squatted, and that he shot her. She stated that he then came out to the lot and dragged her back to the house and made the statement, 'G— damn you, I haven't killed you, but I will.' And struck her several times with a chair. She said then she was put on a quilt on the floor, and one of those women was told to watch her, Fannie, she called her. And then she said, Dave left the house, and she stayed there until the next day about noon, when Mr. Harris came and brought her to the hospital. She said that she was not put on a bed; that she was put on the floor on a quilt. She said that nothing was done for her from that time until next day at twelve o'clock. She said he struck her with the chair on the head. She said that he cursed both of them and that he and her daughter started fighting and she went back. The lot is right at the house, Dave Burney's house. I should say ten or fifteen steps from the house. The tobacco barn is between a quarter and a half mile from the house. . . . She did not say Dave carried her in the house; she said he dragged her in the house, a distance I would say of about twenty or twenty-five yards. Her statement regarding when they first went out, she and her daughter together, was that he cursed both of them, but he did not make any threats. (Court) Sheriff, do you recall whether she stated he had a gun when he requested her and her daughter to go with him in the direction of the tobacco barn? Ans.: He did not; she said he didn't. That tobacco barn that they were proceeding in the direction of was the same one referred to, or described by the witness, Clyde Morgan." J. P. Taylor corroborated the testimony of the sheriff.

The following witnesses for defendant testified, in part:

Clifford Harris: "I own the farm on which Dave Burney lives. . . . I saw Dave Burney on about August 25th. I saw him at the farm and he went to Kinston with me that day, that afternoon. I saw him the next day, at my home and in Kinston. He told me he had shot Mordie. He asked me to go with him to his home. He told me he wanted me to go down there to see her. I asked if she was shot badly, and he said he didn't think so, that she was shot in the legs. And he told me to go to see her and if we had to take her to the hospital that he wanted me to help to get her there. I went. He didn't go with me

in my car. As soon as I could get ready to go I went and he came back right behind me. Some colored woman brought him out in an automobile, and he got there in a few minutes after I got there. I saw the women. She was suffering pretty badly. She was shot in the legs, both legs; the right leg was shot worse and I told him to get her to the hospital as quickly as possible. He carried her to the hospital. He went part of the way with his colored woman, and I was behind him. I was going to make arrangements at the hospital so that they would take her in. That was about noon, I will say, and he had been to Kinston and back. He doesn't have a car of his own. He has no means of transportation. I made arrangements at the hospital for him. He didn't have any money. I saw Mordie at the hospital. The doctor asked her who shot her and she said, 'Dave,' and he said, 'How come him to shoot you?' And she said, 'Accidentally.' And he said, 'Well, how come him to shoot you?' And she said he was shooting at somebody else. And the doctor asked her who was he shooting at, and she said, 'I don't know.' And then Dave told the doctor that he was shooting at her daughter. Dave was in the hospital when she said what she did to me, or rather, she wasn't telling me, she was telling the doctor. That was on Friday, immediately after we got her in the hospital, about one o'clock. (Cross-examination): Q. How many women did he have there? Ans.: Why, there was, let's see, about five, I think, grown women. Q. And all of them have children, haven't they? Ans.: I think so. Q. There are about twenty-odd children around there, are there not? Ans.: Something like that. Q. And they are his, aren't they? Ans.: I don't know, sir. Q. And some of them are kin to him? Ans.: Some of the people staying there are kin to him." (Defendant objects as this is not relevant.) (Court) "I am assuming that he is offering it on the question of motive. If that is not it, I will exclude it. On what theory is that testimony offered, Mr. Solicitor? (Solicitor): On the theory that he was planning to get rid of this woman." (Defendant objects to questions and answers; overruled; defendant excepts.)

Dave Burney, the defendant, testified, in part: "Clyde Morgan was messed up with some of them girls there. They call them grown women, but there ain't but two women there except my wife. The rest of them is nothing but children I raised up myself. Clyde Morgan got to putting a whole lot of trouble on me and got to running around and ganging around, you know, and I asked him to cut it out, and he would not do it. I said, 'Clyde, this costs me right smart. It costs me about seventy-five dollars for one of the girls' doctor bill, and the child died,' and he wouldn't help me pay a cent of it. It hadn't been long since the child died, but me and Clyde had some words one Saturday. And one Satur-

day night I and he had some words about it. He kept on messing with the girls, and I had some words with him about it, and he got to calling me all kinds of sons of bitches, and flatheaded sons of bitches. And he said if anyone said they were his children they lied. And I struck him. . . . And when I saw him with his gun I got mine. That made the third time he had started after me with his gun that morning. He was hiding with his gun on the ditch banks and in the cornfields ever since until this night that the shooting took place. He threatened me. He threatened that Sunday night me and him had words, and then again in Kinston the day the tobacco market opened I saw him in Kinston. He came to me and wanted some money. I let him have five dollars and got after him about throwing his gun after me and cussing me like he did. He said to me, 'Uncle Dave, you know I have been going with them girls when I got ready, and that he was going with them right on and kill the hell out of me on top of it.' That's what he said to me in Kinston. He came back with me. . . . I did not buy any shells that day. I did not stop anywhere at any filling station. Orphie Kinsey is a girl I raised. She is a daughter of the woman who was shot. I did not give Clyde Morgan a gun to carry anywhere. He got out at my home. He went on home. I did not have any words with him at my home. I did not have any words on the way home, not a word with him. What happened, happened mostly in town. . . . And I asked her 'where have you been, you haven't been home since Saturday night,' and she said she had been with Miss Liza, that she was sick and wanted her to cook for her. And I had a little stick in my hand, and she jumped and ran. . . . And I got Mr. Jesse Jones to take her mother and little brother to go and see if she could find her, if she was at her Uncle Ernest's. But she didn't come back. And I said, 'How did she get down there do you reckon?' And she said she walked. And her mother was crying around all that day, and she went to look for her again that evening, and my wife went with her. And she came back with her. And I asked her where she had been, and she said she was at Ernest's. I saw Otis Roberson in Kinston, and he said. And I came back and asked Orphie that same night, said, 'Orphie, how is it you said you stayed to your Uncle Ernest's last Sunday.' She said, 'I did.' And I said, 'You stayed right over there at Phil Otis Roberson's.' And she said she didn't. And I said, 'Otis Roberson said you stayed with him, and he carried you down the road Monday morning.' And that's all I know about it, except the shooting. Me and Mordie and this girl goes down the path that night. This girl was going to leave me and go stay with her uncle, and I got a lot of clothes that same day to fix for her to go the next day. And her uncle sent some word by her to me about what arrangements he could make to fix for her. And

we were talking about that, and I got after her about the tales she told me about, the tales she said about staying to her uncle's and she stayed somewhere else. And I grabbed her. And I don't know whether I hit her or not, but she got away from me. I was mad with her about the tales she had told me. I hadn't had a cross word with her mother. When she got away from me we were down the path a little ways, we were near the tobacco barn, one tobacco barn. I went back to the house and Mordie came back to the house. That's the dead woman who came back to the house and after this girl got away from me I came back to the house. And as I came back somebody was standing at the horse lot, and I didn't know who it was, and I took it to be Clyde Morgan, on account of the threats he had been making. It was dark. I couldn't tell who it was. I got my gun and I shot out that way, and that's how that woman got the load in her legs. I didn't know the woman was out there. I went out there and got her and brought her to the house. So far as dragging her, and I may have went out and got her and she walked to the house, and she walked into the hospital when me and Mr. Harris carried her there. I didn't intend to shoot her. Not a cross word have I had with her. I tried to get her a doctor. I done everything in this world that I could, and kept right on working until I got her to the doctor. I don't know a thing in this world about a chair. After I discovered that I had shot Mordie I went out there and got her and brought her back and laid her on the floor on a feather-bed so she could keep cool. . . . I went to the hospital with Mr. Harris. When we carried her to the hospital and put her on the hospital bench the doctor asked her who it was shot her, and I said, 'It was me.' That it was an accident, that she was out there and caught the load. And she said the same thing. And he said he thought she would be all right in a week, and to bring sixty dollars with me. And when I came back I got Mr. Harris to go by Mr. Hargett's store to get me eighty dollars that a man owed me. And he was gone to Greenville, with some tobacco. And then I went and gave myself up to the sheriff. . . . Yes, I think I did look at her leg, but I didn't see but one hole in there. I didn't beat her over the head with a chair. It was Saturday when I went to the window and pointed a gun at Orphie, but I didn't say I would blow the day-lights out of her. When I pointed the gun at her I was just messing—that wasn't the first time. I did start to beating her, but she ran. I didn't lay off to have her lay out night after night and get in trouble with the men folks. The trouble I was talking about with Clyde Morgan didn't happen a month before this. It happened about two weeks before. It was all combined together . . . Clyde Morgan was with me, and although I say he threatened to kill me in spite of that, I brought him home, because he didn't have any way to

come home, and I had a great big car, but I ain't give him no gun. When I left with Mordie and Orphie I had started down the path to fix for this girl to get away the next day. Yes, we went towards the tobacco barn, but there are tobacco barns both ways. We were about as far as from here to the back of the courthouse along the path when we started to fighting. I didn't knock her down, and I didn't kick her. I don't know whether I beat her in the face or not. I was so mad with her, I don't know. I was mad because of the way she had had men laying with her, and I was mad with her because she ought to have been at work. Yes, she's grown, and she didn't have a right, if I had to work in the field for her; I wasn't trying to get her to the tobacco barn when she got away, and I say I wasn't mad enough to kill her. I didn't tell the sheriff I was shooting at her, Orphie, not as I know of. I was so worried when I saw that woman that I didn't have good sense. I don't know, sir, whether I told him that or not. My wife and my niece helped me get her in there. We went out there and got her in the house. I picked her up by the arms; she walked to the house with us—walking each side of her, holding her arms. . . . This is not the first time I have been in trouble. I shot a man's ear, and the doctor had to take it off, and it wasn't my fault that I didn't shoot his head off. . . . I don't know how many of the children there are mine, but I take care of them. I have been supporting them, and the other fellow where helped get 'em is not taking care of them. I thought more of Mordie than anybody else out there in the house, except my wife. She wasn't old—only about forty. These younger women were not more attractive, and I didn't think I could get rid of her in this way. I shot that night not knowing who I was shooting at, because Clyde Morgan had been slipping around there and threatening my life with guns for two or three weeks. I was at the barn of the lot; I was between the house and the barns, and I shot and I hit him. I told the sheriff I was shooting at a man, but I didn't shoot at anybody to kill them. And they weren't No. 4 shot; I ain't had any No. 4 shots in my house in years. No, sir, I didn't kill her, she died. I don't know whether the doctor took a shot out of her leg and that Mr. Taylor saw them, and that they are No. 4 shot. They were No. 6's. I swear to that because I didn't buy any other kind. There is as much truth in that as anything else I have said."

Lula May Hall: "I am a niece of Dave Burney. I live there with him. I was at home the night that the shooting occurred. I was there when my Uncle Dave came back from Kinston. In the kitchen. I did not see shooting. I did hear the gun fire. I saw Mordie Kinsey after the shooting, in the house. They brought her to the house. She walked up to the house. She was between mamma and Uncle Dave and Aunt

Fannie. She was put on the floor on a pallet. I stayed with her after that. I waited on her. I did not see my Uncle Dave strike her at any time. . . . I am fifteen years old and had one child that died when it was thirteen months old, and his daddy was Clyde Morgan. That is what I told Dave, and that's what Dave accused him of; Dave was not its daddy. . . . I said I saw Clyde Morgan that night, but didn't see him with a gun."

Carl Foy: "I didn't hear the gun fire on August 25th over at Dave's house. I was asleep, but my wife heard it. That same night Dave Burney came over to my house. He stopped in front of my place, and said to two of my boys for me to come down there. I asked the boy had he been drinking, and they said he had been drinking but was not drunk. I told them my wife was sick, and I couldn't go. One of Mordie's boys asked me if I heard the gun shoot, and I said I didn't, and then he said, 'Well, Uncle Dave has shot mamma,' and I told him to go back and look out for himself. Dave Burney caught me before I got to the house. When he called me to come down there my wife told me not to go. She was sick, so I went to the back door and he said, 'Come to the road,' and I said, 'I ain't,' and he said, 'You are scared,' and I said, 'No, I ain't scared,' and I said, 'Come here.' And he came there to the back and sat down at my feet and talked about ten minutes, and then he said, 'Come out here; I have got something to tell you,' and I went about ten steps. I just had on my pants and was barefooted, and he told me, 'I shot Mordie.' And I said, 'Did you shoot her bad?' And he said, 'Yes, from her knees down,' and he didn't say whether it was an accident or not, and he said he wanted to get someone to get her to the hospital. And I said, 'You get Mr. Jones and I will do all I can.' He didn't have any car or any other kind of transportation."

The State proved by several witnesses that the general reputation of defendant was bad.

The defendant made numerous exceptions and assignments of error and appealed to the Supreme Court. The material ones and necessary facts will be set forth in the opinion.

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

John D. Larkin, Jr., for defendant.

CLARKSON, J. At the close of the State's evidence and at the conclusion of all the evidence, the defendant in the court below made motions for judgment of nonsuit. C. S., 4643. The court below overruled these motions and in this we can see no error. The evidence on the part of the State was plenary and abundant to be submitted to a jury as to the defendant's being guilty of murder in the first degree.

Exceptions and assignments of error were made on the trial below to the following questions and answers (which cannot be sustained): When Orphie Kinsey was being examined by the State, the following questions and answers were given: "Q. And that's the reason you are testifying like that? Ans.: No, sir, he didn't ask me anything about this. He just asked me how I was getting along and how were the children. Q. Who else was there? Ans.: Cricket Hobbs. Q. Cricket is another one of his women living there? Ans.: She is a girl that lives there. He raised her and she stays there." This evidence was to explain the reasons why the witness was conversing with defendant. It may be that the question "Cricket is another one of his women living there?" was improper. The answer destroys the imputation, as the witness answered, "She is a girl that lives there. He raised her and she stays there." We cannot hold this as prejudicial or reversible error.

When Clifford Harris, the defendant's employer, was being questioned on cross-examination, the following testimony was admitted: "Q. How many women did he have there? Ans.: Why, there was, let's see, about five, I think, grown women. Q. And all of them have children, haven't they? Ans.: I think so. Q. There are about twenty-odd children around there, are there not? Ans.: Something like that. Q. And they are his, aren't they? Ans.: I don't know, sir. Q. And some of them are kin to him? Ans.: Some of the people staying there are kin to him." When the objection was first made by the defendant it was on the ground that the testimony was not relevant. This evidence was admitted on the ground of motive. The State's evidence was to the effect that defendant had purchased shells with No. 4 shot and had sent the gun to the tobacco barn and had later had Orphie and her mother, Mordie Kinsey, to go down there with him. Defendant was drinking, cursing, and had a fight with Orphie Kinsey. He tore her clothes. The mother went back towards the house and he shot her. Defendant himself, in his testimony, gave the members of his household. Defendant was angered with Orphie, the daughter of the deceased woman. Orphie had left the home. The reason is given in his testimony. It seems that his motive was to control Orphie and her mother who lived with him—he was head of the household of women and children. On the whole we do not think the evidence prejudicial or reversible error.

The following questions were asked Leo Kinsey, a son of the deceased woman: "Q. How long have you lived with Dave Burney? A. I don't know. Q. That was your mamma who was killed? Ans.: Yes. Q. Do you know who your father is? Ans.: No." This evidence is mainly negative and has little, if any, probative force. We see in it no prejudicial or reversible error.

The defendant contends that all of this evidence was prejudicial and was incompetent, reflective of defendant's character under the principle laid down in *S. v. Bryant,* 189 N. C., 112, and *S. v. Shinn,* 209 N. C., 22. The *Bryant case* was decided on the ground that it impinged C. S., 564. At p. 115, it is said: "If we treat the remarks made by the presiding judge to the witnesses, Loudermilk and Henson, as harmless and inadvertences, we are still confronted with the expression, 'This witness has the weakest voice or the shortest memory of any witness I ever saw.' —language which was clearly susceptible of any construction that the testimony of the witness was at least questioned by the court, if not unworthy of credit. The fact that exception was not entered at the time the remark was uttered is immaterial. The statute is mandatory, and all expressions of opinion by the judge during the trial, in like manner with the admission of evidence made incompetent by statute, may be excepted to after the verdict. *Broom v. Broom,* 130 N. C., 562."

In the *Shinn case* is the following (at pp. 23-4): "S. J. Critz, who had testified as a witness for the defendant, on his cross-examination by the solicitor for the State, testified that he knew the general reputation of the witness, Luther Mesimer, and that it was 'pretty good.' He was then asked the following questions by the solicitor for the State: 'Q. How many times has Luther Mesimer been up in court? Ans.: Two or three times. Q. In the last six years, hasn't he been involved in affrays with deadly weapons at least half a dozen times, and isn't that his reputation? Ans.: I don't know how many times—several times. Q. Didn't he serve 8 months sentence for an assault with a deadly weapon, to wit: a knife? Ans.: Yes, sir.' The defendant's objections to these questions and the answers thereto, all made in apt time, were overruled, and the defendant excepted." The Court granted a new trial, basing its decision on *S. v. Holly,* 155 N. C., 485. In that case, at p. 490: "Dr. Bell, a witness for the State, testified upon cross-examination that the general character of the defendant was good. Upon the re-direct examination the witness was asked by the State if he had not heard that the prisoner had been accused of killing his wife. The witness answered 'Not until after the present charge was brought.' To this question and answer the defendant objected and excepted." At p. 492-3, speaking to the subject, it is said: "If one collateral question of this character can be raised and tried, the same rule would permit a hundred others. The authorities in this State are numerous and uniform that it is error to allow such questions on the cross-examination of a witness as to character. In *Barton v. Morphes,* 13 N. C., 520, it was held inadmissible to ask 'if he had not heard Morton accused of stealing a penknife'; in *Luther v. Skeen,* 53 N. C., 357, that 'there was a current report in the neighborhood that plaintiff had sworn to lies while living

in Randolph'; in *S. v. Bullard,* 100 N. C., 487, 'Do you not know that it was extensively talked about and said that the defendant practiced a fraud upon the firm of Worth & Worth?'; in *Marcom v. Adams,* 122 N. C., 222, 'Have you not heard that defendant had committed forgery?', 'Do you not know that the defendant had been indicted for forgery?'; and in *Coxe v. Singleton,* 139 N. C., 362, 'Have you not heard that the defendant committed rape on a Negro girl?', 'Have you not heard he padded his pay-roll at the mill?'" (At p. 494): "That the evidence was prejudicial cannot be doubted. The prisoner was charged with murdering, by poison, a member of his household, and the evidence was circumstantial. It was calculated to excite feeling against him in the minds of the most intelligent and upright jurors to know that he had been charged with killing his wife."

The evidence in the present case, which was objected to, tended to show motive. It gave the setting. Defendant was head of the household—a tenant with a large force to work the crops. The evidence indicated that he attempted to control Orphie Kinsey, who had left home, and her mother, Mordie Kinsey, the deceased. The defendant practically admitted all the testimony objected to. We cannot hold it prejudicial or reversible.

The defendant contends that the court in its charge did not present for the jury's consideration, manslaughter. The court below gave an accurate charge as to burden of proof, reasonable doubt, malice, premeditation and deliberation; what constituted murder in the first degree, the second degree, and stated fully the evidence and law applicable to the facts on which aspect the jury could return a verdict of not guilty. The evidence and contentions were fairly set forth on both sides of the controversy. The court below charged the jury: "Now, the court instructs you, gentlemen, that under the bill of indictment, and under the evidence offered in support of the bill of indictment, the jury can render one of three verdicts, to wit: guilty of murder in the first degree; guilty of murder in the second degree; or not guilty. There is no evidence to warrant the court in submitting to the jury the question of manslaughter." From a careful review of the evidence which is in the record, without repeating same, we cannot see any element of manslaughter. The facts in this case are distinguishable from the cases of *S. v. Kennedy,* 169 N. C., 288, and *S. v. Robinson,* 188 N. C., 784, cited by defendant.

In 4 Warren, Homicides (1938), p. 447, is the following: "Where there is no evidence of passion and where one of two theories only can be accepted by the jury, either that of murder or self-defense, the defendant is not entitled to an instruction on manslaughter," etc. *S. v.*

Byers, 100 N. C., 512; *S. v. McKinney,* 111 N. C., 683; *S. v. Johnson,* 172 N. C., 920.

In *S. v. McKay,* 150 N. C., 813 (815), it is written: "The court further instructed the jury that they should return a verdict of murder in the first degree, murder in the second degree, or not guilty. There was no evidence in the case to reduce the crime to manslaughter, and therefore it would have been improper for the judge to have submitted to the jury a view of the case unsupported by any testimony whatever. *S. v. Hicks,* 125 N. C., 636; *S. v. White,* 138 N. C., 704." *S. v. Dixon, ante,* 438.

The following exception and assignment of error made by defendant cannot be sustained: "It is largely a question of fact for you gentlemen. If you reject and refuse to accept, to adopt the defendant's theory of the case, and upon all of the evidence in the case you should be satisfied upon the evidence beyond a reasonable doubt that he did shoot the deceased, mistaking her for Orphie Kinsey; that he intended to shoot Orphie Kinsey and to kill her, and if you find that he did it with malice aforethought and with premeditation and deliberation, then the court instructs you that as a matter of law he would be guilty of murder in the first degree, because under the law of this State, where a person with malice aforethought and with premeditation and deliberation intends to kill some particular person, but through mistake kills another, he is just as guilty as if he had killed the person he intended to kill."

In Wharton on Homicide (3rd ed.), part sec. 359, p. 574, is the following, which is well settled law in this jurisdiction: "The rule is nearly, if not quite, universal that one who kills another, mistaking him for a third person whom he intended to kill, is guilty or innocent of the offense charged the same as if the fatal act had killed the person intended to be killed."

In *S. v. Sheffield,* 206 N. C., 374 (382), speaking to the subject, is the following: "In Wharton's Criminal Law, 12th ed., Vol. 1, part sec. 442, pp. 677-678, we find: 'Where A. aims at B. with malicious intent to kill B., but by the same blow unintentionally strikes and kills C., this has been held by authorities of the highest rank to be murder.' *S. v. Benton,* 19 N. C., 196; *S. v. Fulkerson,* 61 N. C., 233; *S. v. Cole,* 132 N. C., 1069."

The court also charged the jury correctly in regard to defendant's testimony in reference to thinking he was shooting at Clyde Morgan, who had made threats against him.

The court charged the jury as follows: "Murder in the first degree is the unlawful killing of a human being with malice aforethought and with premeditation and deliberation. Premeditation means to think about beforehand for some length of time, however short. Deliberation

means to think about, to revolve over in one's mind and weigh. A person forms a purpose to kill another and weighs this purpose in his mind long enough to form a fixed design to kill at a subsequent time, no matter how soon, nor how late. And pursuant to said fixed design kills said person; this would be a killing with premeditation and deliberation. And when done with malice would constitute murder in the first degree. A fixed purpose to kill means preceding the act of killing, although the length of time between the time it is formed and carried into effect is immaterial." Defendant excepted and assigned error, which cannot be sustained. *S. v. Bowser,* 214 N. C., 249 (253).

In *S. v. Dowden,* 118 N. C., 1145 (1153), it is said: "If the prisoner weighed the purpose of killing long enough to form a fixed design to kill, and at a subsequent time, no matter how soon or how remote, put it into execution, there was sufficient premeditation and deliberation to warrant the jury in finding him guilty of murder in the first degree. *S. v. Thomas, ante,* 181; *S. v. Norwood,* 115 N. C., 790; *S. v. Covington,* 117 N. C., 834; *S. v. McCormac,* 116 N. C., 1033. This Court has not followed the intimations of some of the courts of other states that, in order to constitute deliberation, there must be evidence of a definite design formed on some occasion, previous to the meeting at which the killing was done, and cherished up to and at the time of putting it into execution. The court properly told the jury that where the intent to kill was formed simultaneously with the act of killing the homicide was not murder in the first degree. This was but another mode of expressing the rule that there must be a preconceived and definite purpose to kill, the question of the time that elapses between the determination to kill and the killing being immaterial." *S. v. Hawkins,* 214 N. C., 326 (334).

From the entire record we can find no prejudicial or reversible error. The defendant drinking and maddened by the troubles, or fancied troubles, with Orphie Kinsey and her mother, who were living at his home—Orphie having left his home and come back—purchased No. 4 shells for his gun the evening of the homicide and sent the gun to the tobacco barn loaded. Defendant enticed Orphie and her mother to go to the barn; near the barn defendant and Orphie got into a fight in which he nearly denuded her but she escaped. The mother retreated towards the house and while in the yard defendant shot her as she crouched on the ground. The shot that hit her and from which she died was No. 4. The whole record discloses a "jungle" situation—liquor, women and the sequel murder.

In the judgment of the court below, there is

No error.

NORTH CAROLINA SELF HELP CORPORATION, ROY L. DAVIS, R. BRUCE ETHERIDGE, GUY E. LENNON, R. B. LENNON AND J. B. PETERSON, v. ZEB V. BRINKLEY AND WIFE, MAY L. BRINKLEY.

(Filed 24 May, 1939.)

1. Boundaries § 2: Frauds, Statute of, § 9—

An uncertain description in a deed may be aided by parol to fit the description to the land when the deed itself refers to the source from which evidence *aliunde* may be sought to render the description certain, and when the description in the deed is not patently ambiguous.

2. Same—Description in this deed held sufficiently certain to render evidence aliunde competent to fit the description to the land.

The grantors in the deed in question owned an undivided one-half interest in a tract of land upon which a store building was located, and owned the fee in an adjoining tract, both tracts being within the limits of an incorporated town, and being all the land owned by the grantors within the town at the time. The deed recited that the grantors conveyed all their title and interest "in and to a certain store lot in the town . . . containing one-half acre, more or less, the interest hereby conveyed being an undivided one-half interest." *Held:* The term "store lot" may be interpreted as "store house lot," and using all phrases of the description it describes a certain lot on which there is a store house in the said town, and conveys the grantors' one-half interest therein, and since the grantors owned but one lot in the town answering this description, it is sufficiently certain and a peremptory instruction that the deed conveyed the grantors' one-half interest in the first tract of land is without error, but the description is wholly insufficient to include the second tract in which the grantors own the fee, the words "containing one-half acre, more or less," being insufficient even though both tracts together contained one-half acre.

3. Adverse Possession § 20: Trial § 29b—Charge held for error in failing to instruct jury as to substantive feature of case arising on the evidence.

When defendants introduce evidence that plaintiffs went into possession of a certain tract of land after asking and obtaining permission of defendants, it is error for the court to fail to instruct the jury that such possession would not be adverse to defendants, even without a request for special instruction, since this is a substantive feature of the case arising on the evidence.

4. Estoppel § 6a—Elements of equitable estoppel in general.

An equitable estoppel arises when a party's words or conduct amount to a misrepresentation or concealment of material facts, with knowledge, actual or implied, of their falsity, and with intent that they should be relied on by the other party or the public generally, and the party asserting the estoppel must have been ignorant of the falsity of the representations at the time they were made and at the time they were acted upon, and must have acted in reliance on the representations and have placed himself in a position in which he would be prejudiced if the party estopped were permitted to deny the truth thereof.

5. Same: Trial § 29b—Charge held for error in failing to instruct jury that party asserting estoppel must have been ignorant of falsity of representations at the time of acting upon them.

Plaintiffs' evidence tended to show that they went to defendant and sought to buy a certain tract of land, that defendant represented that his sister owned the property and went with plaintiffs to her and knew of their negotiation with her for its purchase, and that some time later they purchased the property from defendant's sister in accordance with the agreement then reached. Defendant elicited evidence that plaintiffs lived near the courthouse and were familiar with business transactions and the registration of deeds, and contended that they had actual or constructive knowledge of defendant's title, and that therefore defendant was not estopped to assert same. *Held:* It was error for the court to fail to charge the jury that plaintiffs must have been ignorant of the facts not only at the time they were negotiating for the purchase of the land, but also at the time they acted on the representations and paid the purchase price to defendant's sister in order for defendant to be estopped by misrepresentation from asserting his title thereto.

APPEAL by defendants from *Thompson, J.*, at October Term, 1938, of DARE.

Civil action to remove cloud upon title to certain land in the town of Manteo, Dare County.

It is admitted that both plaintiffs and defendants claim title under W. T. Brinkley, who died seized of a certain boundary of land fronting on Water Street in the town of Manteo, Dare County, leaving as his only heirs at law four children, Camille Brinkley, Susie Drinkwater, W. C. Brinkley and defendant Zeb V. Brinkley.

Prior to August, 1910, in special proceeding instituted in the Superior Court of Dare County by Theodore S. Meekins, who had acquired the undivided interest of Susie Drinkwater in and to the W. T. Brinkley land, against W. C. Brinkley, Zeb V. Brinkley and Camille Brinkley, said land was actually divided into four separate parts and allotted as follows: Lot No. 1 to Theodore S. Meekins, Lot No. 2 to Camille Brinkley, Lot No. 3 to W. C. Brinkley, and Lot No. 4 to defendant, Zeb V. Brinkley. Beginning with No. 1 on the north the lots adjoin in numerical order.

Upon death of Camille Brinkley in 1915, Susie Drinkwater acquired title to Lot No. 2. On 17 April, 1921, W. C. Brinkley died intestate, seized of Lot No. 3, and leaving as his only heirs at law Susie Drinkwater and defendant Zeb V. Brinkley.

By reason of the foregoing facts, on 29 September, 1922, Susie Drinkwater owned all of Lot No. 2 and an undivided half of Lot No. 3, and Zeb V. Brinkley owned an undivided half of Lot No. 3, and all of Lot No. 4. This was all the property Zeb V. Brinkley owned in the town of Manteo, North Carolina, at that time.

(a) On that date defendants executed and delivered to Susie Drinkwater a deed which is duly registered, containing the following description: "The parties of the first part . . . convey all of their right, title, interest and estate in and to a certain store lot in the town of Manteo, in the County of Dare, North Carolina, containing one-half acre, more or less, the interest hereby conveyed being an undivided one-half interest." (b) On 3 October, 1922, Susie Drinkwater and husband executed and delivered deed to S. A. Griffin and O. J. Jones, purporting to convey by specific description a boundary of land covering Lots 2, 3 and 4. (c) On 1 September, 1923, S. A. Griffin and O. J. Jones executed and delivered to Jesse Midgett, Jr., a deed purporting to convey by specific description all of Lot No. 2 and the adjacent, or northern, half of Lot No. 3, including the old W. T. Brinkley store building. (d) On 1 January, 1926, O. J. Jones executed a deed to S. A. Griffin purporting to convey one-half undivided interest in the remaining southern half of Lot No. 3 and all of Lot No. 4. (e) On 15 July, 1935, S. A. Griffin executed and delivered deed to plaintiff Roy L. Davis, purporting to convey the same property described in the deed to him from O. J. Jones, and (f) by *mesne* conveyances from Roy L. Davis, his coplaintiffs claim interests and rights therein. All of these deeds were introduced in evidence over defendants' objection.

1. Plaintiffs allege and contend that by their deed to Susie Drinkwater, on 29 September, 1922, defendants conveyed not only an undivided half interest in Lot No. 3 but all of Lot No. 4. Defendants deny that this is the effect of that deed, and contend that the description there is patently ambiguous and void for uncertainty. On the trial below plaintiffs were permitted to offer parol evidence, over objection by defendants, tending to show that the boundary before the partition was known in the community as the Brinkley property, or the Brinkley store lot, and that after the partition Lots Nos. 2, 3 and 4 were so known; that there was a store building on the boundary; that after the partition this building was situated partly on Lot No. 2 and partly on Lot No. 3; and that Lots 2, 3 and 4 contained one-half acre. The witness O. J. Jones, testifying for plaintiff, said: "During the time Mr. Griffin and myself had in possession Lots 2, 3 and 4, we sold half of the tract which would be all of Lot No. 2, and about one-half of Lot No. 3 to Jesse Midgett, Jr. We made the property into two lots instead of three." Evidence for plaintiffs further tends to show that there were then many store lots in the town of Manteo.

Plaintiff was also permitted to offer, over defendants' objection, evidence tending to show that at the time the defendants executed and delivered to Susie Drinkwater the deed of 29 September, 1922, she conveyed to defendant Zeb V. Brinkley certain farm property which she received from the W. T. Brinkley estate.

2. Plaintiffs further allege and contend, and offer evidence tending to show, that upon delivery of deed from Susie Drinkwater on 3 October, 1922, O. J. Jones and S. A. Griffin went into possession of the property and occupied the store building and continued to so hold same until 1 September, 1923, when they sold to Jesse Midgett, Jr., Lot No. 2 and half of Lot No. 3, including the part on which the store building was situated; that while the remaining portion of Lot No. 3 and all of Lot No. 4 were then vacant, with no fence around any of it, they were in possession of same; that within the year after 1 January, 1926, the date that O. J. Jones sold his interest in same to S. A. Griffin, Griffin built a garage in the southern corner of Lot No. 4, and that the garage was used by him continuously until other buildings were placed upon the property after the conveyances to plaintiff Roy L. Davis, and that since then he and those claiming under him have occupied those buildings.

On the other hand, defendants deny that O. J. Jones and S. A. Griffin, or either of them, have been in adverse possession of southern half of Lot No. 3 or of Lot No. 4. They aver and offer evidence tending to show that before erecting the garage S. A. Griffin obtained express permission from the defendant Zeb V. Brinkley to place it on the property and to use and occupy it. Defendants also offer testimony tending to show that Griffin otherwise recognized their ownership of Lot No. 4.

3. Plaintiffs further alleged and offered evidence tending to show that O. J. Jones, being interested for himself and his partner, S. A. Griffin, in buying Lots 2, 3 and 4 of the W. T. Brinkley property, went to Virginia Beach, Virginia, where defendants then resided, and on Labor Day, 1922, talked with defendant Zeb V. Brinkley about purchasing same; that at that time Brinkley stated that he had sold his interest in the property to his sister, Mrs. Drinkwater, who lived nearby; that thereupon Brinkley went with him to the home of Mrs. Drinkwater, and was present when he, Jones, acting and relying upon the statements of Brinkley, negotiated with her for the purchase of the property, at the price of $2,000; that he did not then pay to Mrs. Drinkwater any part of the purchase price, but did pay a part when the deed was delivered and the balance afterwards.

By reason of this evidence plaintiffs contend that defendants are estopped to assert title to any of the said land.

On the other hand, defendants deny the material parts thereof, and by cross-examination of O. J. Jones, witness for plaintiffs, elicited evidence tending to show that in 1922 Jones was a man of business experience, having been county commissioner, postmaster and merchant for many years; that during the period between Labor Day and 3 October, 1922, the date of deed from Mrs. Drinkwater, his place of business was

across the street from the courthouse; and that he knew records of deeds for Dare County were kept in the courthouse. Thereupon defendants contend that Jones knew, or by the exercise of reasonable diligence should have known the condition of the title, and that plaintiffs cannot invoke the doctrine of equitable estoppel. Pursuant to these contentions the case was submitted to the jury on these issues:

1. Are the plaintiffs Roy Davis, R. Bruce Etheridge, Guy H. Lennon, R. B. Lennon, and J. B. Peterson, the owners of that portion of the lands described in paragraph 11 of the complaint which embraces a portion of Lot No. 3 of the W. T. Brinkley division?

2. Are the plaintiffs Roy Davis, R. Bruce Etheridge, Guy H. Lennon, R. B. Lennon and J. B. Peterson, the owners of Lot No. 4 of the W. T. Brinkley division?

3. Are the defendants estopped by their conduct from asserting title to Lot No. 4 of the W. T. Brinkley division?

The court peremptorily instructed the jury to answer the first issue "Yes." The jury also answered the other issues "Yes."

From judgment on the verdict for plaintiffs, defendants appeal and assign error.

McMullan & McMullan, Royall, Gosney & Smith, and Howard E. Manning for plaintiffs, appellees.

Worth & Horner for defendants, appellants.

WINBORNE, J. We are of opinion that defendants' exceptive assignments with respect to failure of the court to charge in relation to the second and third issues are well taken. We find no error in the judgment below as it relates to the first issue.

1. Defendants challenge the sufficiency of the description in the deed of 29 September, 1922, from Zeb V. Brinkley and wife to Susie Drinkwater, to include their undivided one-half interest in Lot No. 3 or the fee in Lot No. 4.

"It is . . . a general rule that the deed must be upheld, if possible, and the terms and phraseology of description will be interpreted with that view and to that end, if this can reasonably be done. The Court will effectuate the lawful purposes of deeds and other instruments if this can be done consistently with the principles and rules of law applicable." —*Merrimon, J.*, in *Edwards v. Bowden*, 99 N. C., 80, 5 S. E., 283.

The decisions of this Court generally recognize the principle that a deed conveying land within the meaning of the statute of frauds must contain a description of the land, the subject matter of the deed, either certain in itself or capable of being reduced to certainty by reference to something extrinsic to which the deed refers. *Massey v. Belisle*, 24

N. C., 170; *Harris v. Woodard,* 130 N. C., 580, 41 S. E., 790; *Cathey v. Lumber Co.,* 151 N. C., 592, 66 S. E., 580; *Bateman v. Hopkins,* 157 N. C., 470, 73 S. E., 133; *Patton v. Sluder,* 167 N. C., 500, 83 S. E., 818; *Timber Co. v. Yarbrough,* 179 N. C., 335, 102 S. E., 630. The office of description is to furnish, and is sufficient when it does furnish, means of identifying the land intended to be conveyed. Thompson on Real Property, Vol. 4, sec. 3074. *Harrison v. Hahn,* 95 N. C., 28; *Cathey v. Lumber Co., supra; Bissette v. Strickland,* 191 N. C., 260, 131 S. E., 655. Where the language used is patently ambiguous, parol evidence is not admissible to aid the description. But when the terms used in the deed leave it uncertain what property is intended to be embraced in it, parol evidence is admissible to fit the description to the land. Such evidence cannot, however, be used to enlarge the scope of the descriptive words. The deed itself must point to the source from which evidence *aliunde* to make the description complete is to be sought. Thompson on Real Property, Vol. 4, sec. 3088, *et seq. Murdock v. Anderson,* 57 N. C., 77; *Capps v. Holt,* 58 N. C., 153; *Robeson v. Lewis,* 64 N. C., 734; *Edwards v. Bowden, supra; Blow v. Vaughan,* 105 N. C., 198, 10 S. E., 891; *Cathey v. Lumber Co., supra; Alston v. Savage,* 173 N. C., 213, 91 S. E., 842; *Green v. Harshaw,* 187 N. C., 213, 121 S. E., 456.

Descriptions such as these have been held to be sufficiently definite to admit of parol proof to identify the land: "My house and lot in the town of Jefferson, N. C."—*Carson v. Ray,* 52 N. C., 609; "Her house and lot north of Kinston"—*Phillips v. Hooker,* 62 N. C., 193; "My farm"—*Sessoms v. Bazemore,* 180 N. C., 102, 104 S. E., 70. On the other hand, "One house and lot in the town of Hillsboro" is held insufficient. *Murdock v. Anderson, supra.* These are indicative of the trend of decisions in this State.

Applying these principles and adverting to the description in the deed before us, these are the means by which the lot intended to be conveyed may be identified: (1) "A certain store lot;" (2) "In the town of Manteo, in the said County of Dare, North Carolina;" (3) "All of their (grantors') right, title, interest and estate;" and (4) "The interest hereby conveyed being an undivided one-half interest." Webster gives as one of the many definitions of the word 'store': "A storehouse; a warehouse; magazine; . . . any place where goods are kept for sale; . . . a shop." That definition may reasonably be applied here to mean a certain storehouse lot. Hence, the descriptive words may be fairly interpreted as meaning a certain lot on which there is a storehouse in the town of Manteo, Dare County, North Carolina, in and to which all the right, title, interest and estate of the grantors thereby conveyed is an undivided one-half interest. We are of opinion that the

description is sufficiently definite to admit of parol evidence for the purpose of identification. The question then arises: On the evidence in this case, does this description fit any particular lot in the town of Manteo? The evidence indicates conclusively that it fits only Lot No. 3 of the subdivision of the W. T. Brinkley property. That is the only store lot in Manteo in which the defendants then had an undivided one-half interest. In other words, it requires the combined phrases to make the description sufficient to identify Lot No. 3. Hence, we hold there is no error in the ruling and instruction of the court with respect to the first issue. We are of opinion, however, that the description is wholly insufficient to include Lot No. 4.

The words "containing one-half acre, more or less" are of too general meaning to materially aid the description given.

2. Defendants assign as error the failure of the court to charge the law with respect to their contention that possession of Lot No. 4 by S. A. Griffin with permission of Zeb V. Brinkley would not be adverse possession. The court defined adverse possession, but, in applying the definition to the evidence, failed to charge that if the erection and use of the garage by Griffin were with the permission and approval of Brinkley such possession would not be adverse and would not tend to ripen title in plaintiffs. This affected a substantive right to which without request defendants are entitled. *Spencer v. Brown,* 214 N. C., 114, 198 S. E., 630. This failure is error affecting the second issue.

3. Defendants assign as error, with respect to the third issue, the failure of the court to charge the jury in substance, that if O. J. Jones at the time of taking the deed from Mrs. Drinkwater and paying the purchase money knew, or by the exercise of reasonable diligence could have known, the status of the title to the property involved, then the doctrine of equitable estoppel would not apply. In the light of the evidence in the case we are of opinion that this exception is well taken. The constituent elements of a good equitable estoppel are stated in *Boddie v. Bond,* 154 N. C., 359, 70 S. E., 824, quoting from Eaton in treatise on Equity, as follows:

"1. Words or conduct by the party against whom the estoppel is alleged, amounting to a misrepresentation or concealment of material facts.

"2. The party against whom the estoppel is alleged must have knowledge, either actual or implied, at the time the representations were made, that they were untrue.

"3. The truth respecting the representations so made must be unknown to the party claiming the benefit of the estoppel at the time they were made and at the time they were acted on by him.

"4. The party estopped must intend or expect that his conduct or representations will be acted on by the party asserting the estoppel, or by the public generally.

"5. The representations or conduct must have been relied and acted on by the party claiming the benefit of the estoppel.

"6. The party claiming the benefit of the estoppel must have so acted, because of such representations or conduct, that he would be prejudiced if the first party be permitted to deny the truth thereof."

The vice in the charge of the court is that it appears to relate only to the time the statements were alleged to have been made by defendant Zeb V. Brinkley on Labor Day, and not to the time Jones paid the purchase price. The truth respecting the representations must be unknown to the party claiming the benefit of the estoppel, not only at the time they were made but at the time they were acted on by him.

Other assignments are not considered, as the matters to which they relate may not recur on another trial.

Plaintiffs are entitled to judgment on the first issue, but there must be a new trial on the second and third issues.

Affirmed in part.

New trial in part.

J. R. HORNE v. NITA EDWARDS AND JULIA E. HELMS,

and

J. R. HORNE v. NITA EDWARDS AND JULIA E. HELMS.

(Filed 24 May, 1939.)

1. Judgments §§ 22b, 22f—Independent action will not lie to set aside judgment for intrinsic fraud.

Where judgment is obtained through extrinsic fraud, which deprives a party of an opportunity to present his case, such judgment may be attacked and set aside by independent action; but where a judgment is obtained by intrinsic fraud, which arises within the proceeding itself and concerns some matter involved in the determination of the cause upon its merits, the proper remedy is by motion in the cause made in apt time, since a party must be prepared to meet perjury upon the trial, and since public policy demands that there should be an end of litigation under the maxim *interest reipublicæ ut sit finis litium*. The exception to the general rule excluding intrinsic fraud as ground for equitable relief when perjury has been established by conviction or by deed, writing or unimpeachable record, discussed by *Mr. Justice Seawell*, and the exception disposed of under the principal of *cessat ratio cessat lex*, since conviction of perjury now goes only to the credibility of the witness but does not disqualify him.

2. Same—Action held one to set aside judgment for intrinsic fraud, and demurrer was properly sustained.

This action was instituted to set aside a prior judgment in ejectment upon allegation that it was obtained by fraud in that the plaintiff therein pointed out a fictitious corner of the tract of land in dispute and that the court surveyor, with knowledge of its falsity and the fraud intended to be perpetrated, adopted such corner and built up a fictitious plat and that the verdict of the jury was based upon such false and manufactured evidence. *Held:* Perjury or the use of false or manufactured evidence is intrinsic fraud, and defendant's demurrer to the complaint was properly sustained, since an independent action will not lie to set aside a judgment for intrinsic fraud.

No. 611—APPEAL of plaintiff from *Phillips, J.*, at Chambers, January Term, 1939, of ANSON.

No. 612—APPEAL of plaintiff from *Phillips, J.*, at March Term, 1939, of ANSON.

The plaintiff instituted this action to set aside the judgment in favor of the defendants (plaintiffs in that action), rendered at April Term, 1938, of Anson County Superior Court, on the ground that the judgment was irregular and fraudulently procured, and obtained a restraining order to prevent execution on the judgment. Upon the hearing, at chambers, the injunction was dissolved, and plaintiff appealed. No. 611. Transcript was filed in this Court, and before this appeal could be heard in regular order, the matter came on for a hearing on the merits, at April Term, 1939, of Anson Superior Court. Then, defendants demurred to the complaint as not constituting a cause of action, and the demurrer was sustained and plaintiff appealed. No. 612.

The original cause was one in ejectment affecting a small area of land, the title to which depended upon the proper location of the dividing line between the parties. The defendants in this case prevailed in the suit and also recovered a money judgment of $125.00 as damages.

Subsequently, execution was issued upon this judgment for the collection of the $125.00 and for the possession of the land described in the judgment, which necessitated a survey of the lands. At that time the plaintiff herein alleges that he discovered that a fraud had been perpetrated on the court by the present defendant, Nita Edwards, and the court surveyor, with regard to the survey and evidence introduced in the original trial.

J. M. Furr, Jr., and another, had been appointed court surveyors, and had furnished to the court the map which was used in the case. The plaintiff complains that Mrs. Edwards falsely and fraudulently pointed out to the court surveyor a certain beginning point which plaintiff says was determinative of the location and hence of the action in court, which point of beginning was, to the knowledge of the said defendant, wholly

erroneous; and that the court surveyor, Furr, in collusion with the said Mrs. Edwards, built up a survey and plat based upon the fraudulent representations of Mrs. Nita Edwards, and "manufactured point 1" as the beginning point on the plat made by him, "knowingly, corruptly, falsely and fraudulently," and that by reason of the false and fraudulent representations of Mrs. Edwards and the said J. M. Furr, Jr., a judgment was obtained which deprived the plaintiff of about 14 acres of land described in the complaint.

It is further alleged that the said J. M. Furr, Jr., court surveyor, "willfully, knowingly, corruptly, falsely and fraudulently represented on the aforesaid plat a line from point 6 to point 7 and to point 8, which line has never been in existence or either in the minds of the parties of this action or in their contentions; but that he knowingly, falsely, corruptly and fraudulently 'built in' or manufactured this line for the purpose of substantiating lines from point 6 to 5 to 4, to 3, to 2, to 1."

The complaint alleges that the false evidence thus manufactured was used upon the trial and constituted the basis for the verdict of the jury and the judgment of the court, without which it is contended the judgment could not have been procured.

After the dissolution of the temporary injunction, the $125.00 awarded by the original judgment was collected. The defendants here moved in this Court to dismiss the action because, as they contend, after the payment of the amount named in the execution, the subject of the controversy no longer exists and the contentions have become academic.

E. A. Hightower and Thomas W. Ruffin for plaintiff, appellant.
B. M. Covington for defendants, appellees.

SEAWELL, J. The complaint seems to have omitted no word necessary to the legal denunciation of the fraud which plaintiff conceives was committed against him in the procurement of the judgment which he seeks to have vacated. But, as was necessary to good pleading, he set up the facts constituting the alleged fraud; *McNeill v. Thomas,* 203 N. C., 219, 165 S. E., 712; *Colt v. Kimball,* 190 N. C., 169, 129 S. E., 406; and this brings it within a classification that is not particularly helpful to him in this proceeding. It has been held by much the greater weight of authority in American courts that equity will not interfere in an independent action to relieve against a judgment on the ground of fraud unless the fraud complained of is extrinsic and collateral to the proceeding, and not intrinsic merely—that is, arising within the proceeding itself and concerning some matter necessarily under the consideration of the court upon the merits. *McCoy v. Justice,* 199 N. C., 602, 155 S. E., 452; *Kinsland v. Adams,* 172 N. C., 765, 90 S. E., 899;

United States v. Throckmorton, 98 U. S., 61, 26 L. Ed., 93; Black on Judgments, 4th Ed., sec. 372; Freeman on Judgments, pp. 2582, 2585. In *Duchess of Kingston's case,* 3 Smith's Lead. Cas., 9th Ed. (Eng.), 1998, 20 How. St. Tr., 554, it is said: "Fraud is an extrinsic collateral act which vitiates the most solemn proceedings of courts of justice."

A recognized leading case on this subject is *United States v. Throckmorton, supra,* from which copious extracts are made in *McCoy v. Justice, supra.* In both the *McCoy case, supra,* and the supporting *Throckmorton case, supra,* extensive illustrations are given, appropriate to an understanding of the distinction and the necessity of applying the rule, and a reading of these cases will greatly aid our discussion of this case.

The paramount consideration involved is expressed in the maxim *"interest reipublicæ ut sit finis litium";* that there should be an end of litigation for the repose of society. This demand of public policy yields to the ends of justice where extrinsic fraud has been practiced only because it is the main characteristic of such fraud that it deprives the party of the opportunity of presenting his case, or his defense, upon the hearing, and renders the result as to him no trial at all in the legal sense. *United States v. Throckmorton, supra; McCoy v. Justice, supra.* Intrinsic fraud, as for example, perjury, or the use of false or manufactured evidence, has no such effect.

It is apparent that protracted litigation between the same parties over the same matter and probably with the same witnesses would likely follow a relaxation of the rule. Embarrassing situations would arise in the administration of the law, since either any taint of fraud at all must be considered sufficient to set aside a judgment, or the impossible task must be imposed on the Court to decide whether the fraud is of little or of grave importance, and what influence it may have had on the final result.

In the case at bar the complaint sets up as ground for setting aside the judgment that the defendant, Nita Edwards, fraudulently pointed out a fictitious corner in the Horne tract of land as a true corner, and that the court surveyor, Furr, with knowledge of its falsity and of the fraud intended to be perpetrated by Mrs. Edwards, adopted such corner and manufactured and built up a fictitious plat, which was subsequently presented to the court, resulting in a judgment adverse to plaintiff. The complaint may be considered as alleging a conspiracy between Mrs. Edwards and the court surveyor, under which the false evidence was manufactured and given on the trial.

In the opinions of the courts, with few exceptions, such fraud has been classed as intrinsic and not sufficient ground for vacating a judgment in an independent action for that purpose.

"Although some few cases sustain the doctrine that equity may grant relief against a judgment obtained by means of false testimony, provided it was procured, concocted, and intentionally produced by the successful party, the weight of authority is to the effect that there is no ground for equitable interference with a judgment in the fact that perjury was committed by such party or his witnesses at the trial, or that he suborned the witnesses and conspired with them to secure a judgment in his favor." 34 C. J., pp. 475, 476, sec. 744; Black on Judgments, 4th Ed., secs. 323, 372; Freeman on Judgments, pp. 2582, 2585.

In this State the rule has been qualified respecting judgments obtained through perjured or false evidence. In a long line of cases, running back to *Peagram v. King,* 9 N. C., 295 and 605, intrinsic fraud, consisting of perjured testimony or false evidence, is recognized as ground for equitable relief against the judgment in law upon condition that the perjured witnesses have previously been convicted of perjury or the falsity of the evidence established by deed or writing or unimpeachable record. *Kinsland v. Adams,* 172 N. C., 765, 90 S. E., 899; *Moore v. Gulley,* 144 N. C., 81, 56 S. E., 681; *Dyche v. Patton,* 56 N. C., 332; *Burgess v. Lovengood,* 55 N. C., 457; *Peagram v. King, supra.* See, also, *McCoy v. Justice,* 199 N. C., 602; *McCoy v. Justice,* 196 N. C., 553. Compare: *Scales v. Trust Co.,* 195 N. C., 772, 143 S. E., 868; *Stockton v. Briggs,* 58 N. C., 314. An examination of these cases, however, will sustain the view that they proceed by way of a relaxation of the rule excluding intrinsic fraud as grounds for such relief in the particular instance of conviction, rather than by way of imposing a restriction upon its general use in that connection, which the cases themselves condemn.

The principle adopted in these cases is that declared in *Tovy v. Young,* Prec. in Ch. 193, 24 Eng. Reports, 93, in which the Lord Keeper dismissed a bill to set aside a judgment, saying: "New matter may in some cases be ground for relief; but it must not be what was tried before; nor when it consists in swearing only, will I ever grant a new trial, unless it appears by deed or writing, or that a witness, on whose testimony the verdict was given, were convicted of perjury, or the jury attainted."

In *Moore v. Gulley, supra,* the *Tovy case, supra,* is explained as follows: "The reason of the rule requiring a previous conviction of the witness, upon an indictment for the perjury charged against him, has been said to be, besides the inconvenience of repeated trials, the difficulty of knowing whether upon another trial the same or new witnesses would swear to the whole truth and nothing but the truth; hence, to induce the Court to interfere, the falsehood of the former testimony must be shown, not merely by other witnesses, but by evidencee of a higher

grade, by writing, or by the unimpeachable record of a conviction for perjury." We conceive the true philosophy underlying the *Tovy case, supra,* to be somewhat different and, too, in a respect which makes it no longer applicable to procedure in our courts. Intrinsic fraud has been rejected as a ground for equitable relief in an independent action on account of the public necessity of ending litigation. But under the English law at the time the *Tovy case, supra,* became authority, the conviction of the perjured witnesses disqualified them from giving testimony in the case again and, therefore, the principle *interest reipublicæ ut sit finis litium* was not greatly damaged. Since conviction of perjury now goes only to the credibility of the witness, but does not disqualify him, it seems logical to apply the principle *cessat ratio cessat lex,* and dispose of the exception.

We understand this Court, in *McCoy v. Justice, supra,* to have adopted the authority of the cases cited in support of the decision, especially that of the *Throckmorton case, supra,* notwithstanding the deference paid the earlier cases dealing with conviction of perjury under the principle of the much venerated *Tovy case, supra.* The case before the Court complied with neither rule. So, in the present case, there has been no conviction; but, regardless of that fact, we apply the rule more consistent with the imperative demands of public policy and more in harmony with the principle so repeatedly approved in our own decisions. From this point of view, all the facts alleged in the case at bar are drawn within the classification of intrinsic fraud and are not available as grounds of equitable relief against the judgment in an independent action.

If it should be considered a hardship to require a litigant party to meet perjury as it presents itself, it must be said that the principle is well established in the cases above cited. *McCoy v. Justice, supra.* In *Pico v. Cohn,* 91 Cal., 129, 25 P., 970, cited with approval in *McCoy v. Justice, supra,* the Court said: "It must be a fraud extrinsic or collateral to the questions examined and determined in the action, and we think it is settled beyond controversy that a decree will not be vacated merely because it was obtained by forged documents or perjured testimony. The reason of this rule is that there must be an end of litigation, . . . when he has a trial he must be prepared to meet and expose perjury then and there." This necessity is also a part of the philosophy on which our judicial system is founded.

"What is truth?" Two thousand years ago this question probed the heart of a dramatic and tragic occasion. Now, as then, religious mystery, philosophy, science, law, have no present answer. Truth is the objective; but judicial procedure frankly admits the impossibility of arriving at absolute truth in every controversy. It does intend to achieve certainty—the repose of conventional truth. The result is *veredictum*

only because the jury has so labeled it and society has decreed that the label shall stick. Obviously, when contradictory evidence is addressed to the establishment or defeat of any proposition, the evidence on one side or the other is inconsistent with reality, and whether intentionally or mistakenly so, the adversary party must be prepared to meet it.

Generally speaking, where the fraud is extrinsic or collateral, operating from without, the remedy also may be from without, and the judgment may be set aside by an independent action. But when the fraud is intrinsic, operating from within upon some matter within the line of consideration of the Court upon the merits, the remedy also must be from within, by motion in the cause made in apt time.

We have felt impelled to consider these matters at some length, on account of the important relation they may have to the practice in this somewhat difficult field.

For the reasons herein stated, the judgment sustaining the demurrer is Affirmed.

LUCIUS DURANT v. LEIGH R. POWELL AND HENRY W. ANDERSON, RECEIVERS OF S. A. L. RAILWAY COMPANY.

(Filed 24 May, 1939.)

1. Contracts § 4—Party accepting offer by rendering services may not do so with secret reservations as to compensation.

The evidence tended to show that plaintiff was employed upon a regular eight-hour shift, that thereafter, due to unfavorable business conditions, the employer required him to work eight hours out of twelve hours each day, the employee to get four hours off during each 12-hour period, and that this change was fully explained to the employee and that he continued to work and draw his pay for an 8-hour day. The employee instituted this action contending that he had worked a 12-hour day and was entitled to 4 hours time and a half for each day he worked. *Held:* A contract is the agreement of both parties and its legal consequences are not dependent upon the impressions and understandings of one of them alone, and plaintiff employee could not accept the offer of employment with full knowledge and later insist on his secret mental reservations as to compensation.

2. Contracts § 8—

The courts must construe a contract as made by the parties and cannot grant relief merely because the contract is a hard one.

3. Compromise and Settlement § 2: Estoppel § 6g—A person accepting checks with knowledge that they were tendered in full settlement is estopped from asserting the contrary.

Plaintiff employee instituted this action to recover for overtime services which he claimed he had performed in addition to his regular hours of

employment. The defendants, receivers of the employer, introduced in evidence checks drawn to the order of plaintiff and cashed by him, each stipulating that it was in full for the prior two weeks services, and plaintiff himself testified that he cashed and used the proceeds thereof with full knowledge that defendants claimed they constituted full payment, but that he accepted same with mental reservations. *Held:* The acceptance of the checks by plaintiff with full knowledge estops him from claiming that they were not in full payment for all services rendered as stipulated thereon, and an instruction to answer the issue of indebtedness nothing, if the jury should find these facts by the greater weight of the evidence, is not error.

APPEAL by plaintiff from *Bivens, J.*, and a jury, at September Term, 1938, of RICHMOND. No error.

This is an action brought by plaintiff against defendants to recover the sum of $1,508.04. The allegations of the complaint as to the foundation of the indebtedness, are as follows: "That for a period of two years, eight months and twenty-seven days previous to January 27, 1935, the defendants called upon and required of him (the plaintiff) that he work, and he did work, twelve hours each day continuously for said period, thereby performing during said period . . . of overtime work and he was entitled to receive pay for the same at the rate of 71c per hour. That the defendants paid the plaintiff for his regular time of eight hours per day during said period, but failed to pay the plaintiff for his overtime services. That the plaintiff instituted this action on July 14, 1936, and exclusive of his lost time, and within a period of three years previous to said date, he performed overtime service for the defendants consisting of 2,124 hours, and for which the defendants are indebted to him at the rate of 71c per hour, amounting to a total of $1,508.04, and by reason of the defendants' failure to pay plaintiff for his overtime services, the defendants have breached their contract and agreement with the plaintiff, and the plaintiff is entitled to recover of the defendants the sum of $1,508.04, the same representing his overtime services performed for the defendants at the request and upon the demand of the defendants, their overseers and foremen, within the period of three years next preceding the institution of this action." The demand for payment is for $1,508.04.

In answer the defendants say: "That the plaintiff was employed for a period of eight (8) hours service, said period under the terms and conditions of his employment, as prescribed by the agreement between Seaboard Air Line Railway Company and employees, relating to stationary engineers and firemen, which terms and conditions were communicated to the plaintiff and accepted by him, was to be spread over a period of twelve hours. These defendants are informed and believe and therefore allege that the said plaintiff observed the said terms of his

employment, having taken during the time herein involved his four hours of relief during the period of twelve hours, and that he did not work over eight hours over spread of twelve, and that these defendants neither contracted for nor had any knowledge of any other hours than specified in their agreement."

For a further defense, these defendants say: "That the plaintiff was employed for eight hours service, spread over period of twelve hours and under the terms and conditions of his employment was paid for all services rendered twice each month by checks of the defendants, each of which said checks, there being one for each fifteen days of employment for services rendered during said time, was accepted by the plaintiff, with full knowledge that the same were tendered in full payment for all sums that the defendants claimed were due the plaintiff, and each of said checks was accepted and the amount thereof received by the said plaintiff and applied to his own uses and purposes. . . . The defendants plead said payment and plead the checks hereinbefore enumerated as an estoppel against any recovery on the part of said plaintiff against these defendants whatsoever."

The evidence of plaintiff was to the effect that he was a faithful colored employee of the S. A. L. Railway Company and had worked for it nearly thirty years. He is now retired from the service on a pension. He worked as fireman of a stationary boiler at the round-house in Hamlet for over fifteen years. He was employed to work eight hours a day and was to receive for same $3.77, and for overtime of 4 hours a day 71c an hour for 2,124 hours, amounting to $1,508.04.

Plaintiff testified, in part: "That lasted until June 1, 1932. At that time Mr. Tallevast said 'Old nigger, it will be 12 hours after Monday, June 1, 1932.' After that time I was on duty at the boiler 12 hours every day and during that 12 hours no one but me looked after it. That status continued up until January 27, 1935. They never paid me for any overtime during that period. The agreement was that I was to get $3.77 for eight hours service each day. . . . Mr. Tallevast was the head man over the stationary boilers. It was my duty to perform my work as directed by Mr. Tallevast. He told me that after a certain time that I would have to work eight hours over a spread of twelve; yes, that is what is meant, that eight hours over a spread of twelve was that you were to work eight but spread it over twelve so as to get four hours off. That is what he told me I was to do. . . . Beginning the first of January, 1932, I got a check from the railroad which I endorsed and got the money on. I never noticed what was printed on the check. I did not look at it, I was looking at the amount that was on there. I only looked at my initials and the amount. No, I paid no

attention to what was printed on the check. I know that check was for the last fifteen days in December, 1931, when I endorsed it. I knew that the railroad claimed that was all that they were due me. . . . I got the money on the check and used it. In February, 1932, I got a check for the second half of the month of January. Q. You knew they contended that was all they owed you? Ans.: Yes. I took the check, got the money on it and used it. Q. Lucius, I hand you 24 checks purporting to be drawn by the receivers of the Seaboard Air Line Railway Company to your order. I wish you would look at them and tell me if you got these checks? Ans.: Yes, my name is on them. I must have drawn them. Q. When you got a check you knew the railroad sent you that check for what they contended they owed you for services for the preceding fifteen days, don't you know that is right? Ans.: It was right the way they had it. . . . Q. You knew that they were insisting that was all they owed you? Ans.: That was all they claimed. I had some mental reservations about that was not right. There was no need to tell them anything about it."

E. T. Huguelet, witness for plaintiff, testified, in part: "Yes, he was paid on a basis of eight hours within a spread of twelve, plus $3.77 per day for Sundays and holidays. I had no complaint about that not being correct. I have had no conversation with Lucius about his pay. If there was any dispute between Lucius Durant and the receivers of the Seaboard Air Line Railway Company, I do not know about it. There was no complaint or dispute made to me as timekeeper."

C. J. Tallevast, witness for defendant, testified, in part: "In 1932 I had a conversation with him in respect to his firing the stationary boiler at Hamlet. At that time business conditions were poor with the railroad and traffic was light, and as a result thereof, a change was made with reference to the firing of the stationary boiler. At that particular time Durant was taken off a standard eight-hour basis, that is, working a standard eight hours without time off, and placed on a period of working eight hours over a spread of twelve or within a spread of twelve hours. That means, eight hours actual work spread over a period of twelve hours. That rule applies to stationary boilers and firemen. It applied to other stationary firemen and oilers than Durant, and also to other employees. Durant was told that his hours would be changed effective a certain date. I don't recall the particular day. But he was told he would work eight hours over a spread of twelve."

H. Ballenberger, witness for defendant, testified, in part: "I am in the employ of the Seaboard Air Line Railway Company at Hamlet as master mechanic. Mr. Tallevast is general foreman of the Locomotive Department. I am his immediate superior. My territory is Virginia, North Carolina division, from Cary, South Carolina, to Richmond,

Virginia. Ten shops are under my supervision. I know about the rule of eight hours over a spread of twelve. We work that at practically every point. It is general throughout the shops and the general rule applies to stationary firemen at Hamlet. Q. Does that general rule apply to other stationary firemen at other shops? Ans.: Yes, that applies to stationary firemen and other laborers. I had no notice of any complaint on the part of Lucius Durant as to hours and rate of pay until this action was instituted. . . . Business was dull in 1932, '33 and '34, cut down to four or five days a week. It was over that time that Lucius was working eight hours over a spread of twelve.

The issue submitted to the jury and their answer thereto were as follows: "Are the defendants indebted to the plaintiff, and if so, in what amount? Ans.: 'Nothing.'"

The court below rendered judgment on the verdict. The plaintiff made numerous exceptions and assignments of error and appealed to the Supreme Court. The material ones and necessary facts will be set forth in the opinion.

Douglass & Douglass, Jones & Jones, and R. L. McMillan for plaintiff.
Varser, McIntyre & Henry for defendants.

CLARKSON, J. Did the trial judge commit reversible error? We think not. This is the plaintiff's only statement of the question involved. The cause of action instituted by plaintiff against defendants is bottomed on the following allegations in the complaint: "He performed overtime service for the defendants consisting of 2,124 hours, and for which the defendants are indebted to him at the rate of 71c per hour, amounting to a total of $1,508.04."

In answer to this the defendants say: "That the plaintiff was employed for a period of eight (8) hours service, said period under the terms and conditions of his employment, as prescribed by the agreement between Seaboard Air Line Railway Company and employees, relating to stationary engineers and firemen, which terms and conditions were communicated to the plaintiff and accepted by him, was to be spread over a period of twelve hours." It appears in evidence that the reason why the "8 hours over a spread of 12" was adopted was on account of the deflation. As stated by a witness for defendant, "Business was dull in 1932, '33 and '34, cut down to 4 or 5 days a week. It was over that time that Lucius was working 8 hours over a spread of 12."

From the evidence of plaintiff himself, he understood the new contract made between himself and defendant S. A. L. Railway Company. He testified: "That is what it meant, that 8 hours over a spread of 12 was that you were to work, but spread it over 12, so as to get four hours off.

That is what he told me I was to do." Under this agreement plaintiff continued to work and draw his pay—$3.77 a day. No murmur or complaint from him until this action was commenced. From the allegations of plaintiff's complaint, we see no reversible error in the court below refusing to allow one of plaintiff's witnesses to state whether certain rules and working regulations applied to the plaintiff during the period under consideration. Nor do we think what defendants' witnesses testified to in regard to the application of such rules reversible error. We think the rules as explained by defendants' witnesses were substantially the rules as contended for by plaintiff, and there was no substantial variance. In fact, plaintiff entered into the contract with defendants knowing nothing about the so-called rules and working regulations. This being the case, the matter was immaterial and could lend no light. *Henley v. Holt,* 214 N. C., 384 (387-8).

A "contract" is an agreement upon sufficient consideration, to do or not to do a particular thing, resulting from the concurrence of minds of two or more persons, and its legal consequences are not dependent upon the impressions or understandings of one alone of the parties to it, but on what both agree. *Overall Co. v. Holmes,* 186 N. C., 428; *Belk's Department Store v. Ins. Co.,* 208 N. C., 267.

A court cannot grant relief from a contract merely because it is a hard one. *Forbes v. Mill Co.,* 195 N. C., 51.

"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." *Cheek v. R. R.,* 214 N. C., 152 (156).

"An offer may invite an acceptance to be made by merely an affirmative answer, or by performing or refraining from performing a specified act, or may contain a choice of terms from which the offeree is given the power to make a selection in his acceptance." Restatement of Law-Contracts, Amer. Law Inst., Vol. 1, sec. 29. The court below charged correctly the meaning of a contract.

The plaintiff contended that "The trial judge committed error in charging the jury that acceptance of pay checks by the plaintiff estopped the plaintiff from asserting his claim for pay for overtime work." We cannot so hold.

The agreement from the evidence, made by defendants and accepted by plaintiff, was thoroughly understood by the plaintiff. He was *sui juris,* could read and write. He was receiving good wages—$3.77 a day. No doubt plaintiff, being a faithful employee of long standing defendants did not want him to lose his job and made the offer, which was accepted by plaintiff, that he could continue in the service on full-time

work "8 hours over a spread of 12." It is undisputed in the record that plaintiff admitted that he received the twenty-four checks in evidence from defendant. "Q. You know they contended that was all they owed you? Ans.: Yes, I took the checks, got the money and used it. . . . Q. You know that they were insisting that was all they owed you? Ans.: That was all they claimed. I had some mental reservation that that was not right. There was no need to tell them anything about it."

In *DeLoache v. DeLoache,* 189 N. C., 394 (398), it is said: "In *Moore v. Assurance Corp.,* 173 N. C., on page 538, *Walker, J.,* says: 'This Court has held in numerous cases that when on the face of the check is stated the purpose for which it is given, or the condition of the payment which it represents, the party to whom it is given or sent cannot accept and use it and afterwards repudiate the condition.' Citing *Kerr v. Sanders, supra* (122 N. C., 635); *Armstrong v. Lonon,* 149 N. C., 434; *Aydlett v. Brown,* 153 N. C., 336. In the latter case, the Court says: 'He will not be permitted to collect the check and repudiate the condition.' . . . When the plaintiff accepted the check with the statement written thereon that it was in full settlement and then cashed the check, he is bound thereby. *Ore Co. v. Powers,* 130 N. C., 152; *Petit v. Woodlief,* 115 N. C., 120; *Cline v. Rudisill,* 126 N. C., 525; *Wittkowsky v. Baruch,* 127 N. C., 315; *Armstrong v. Lonon, supra; Drewry v. Davis,* 151 N. C., 295; *Supply Co. v. Watt,* 181 N. C., 432; . . . *Long v. Rockingham,* 187 N. C., 199 (211)." . . . "Business transactions cannot be safely conducted upon secret reservations of mind that are totally inconsistent with the open acts." *Lawson v. Bank,* 203 N. C., 368 (372), 75 A. L. R., 907-922.

We see no error in the charge of the court below. It gave the contentions fairly to both sides, placed the burden of proof correctly, charged the law applicable to the facts and also charged the jury (to which exception and assignment of error was made by plaintiff which cannot be sustained): "If you find from the evidence and by its greater weight, that the plaintiff accepted the checks of the defendants, which have been offered in evidence, containing the recitals in each check thereof, that it was in full for services rendered during the half month just previous to the date of each check, and that he knew that at the time he received said checks that the defendants were offering them in full payment for his services, and that the defendants contended then that the amounts of the said several checks were the correct amounts due the plaintiff, and that at the time he cashed said checks, he had a reservation in his mind, which he did not express to the defendants, that he would use the proceeds of said checks, and later make a claim for additional pay for his services, then the law does not permit such mental

reservations to invalidate the condition expressed in the face of the checks, and the plaintiff would not be entitled to recover herein, and if you so find, you will answer the issue 'Nothing.' That is to say, gentlemen of the jury, if the plaintiff at the time accepted those checks, and accepted them in full payment of the services that he had rendered to the company, knowing all the conditions, and he accepted them at that time, that would make a settlement in full; the law saying that was a contract entered into between the defendant and the plaintiff, and he would be bound by it."

In the judgment of the court below, we can find

No error.

STATE v. EDMOND CARPENTER AND HENRY CARPENTER.

(Filed 24 May, 1939.)

1. Intoxicating Liquor § 4a—Provision of Turlington Act permitting possession for personal use applies solely to structure used exclusively as dwelling.

The evidence disclosed that 7½ pints of tax-paid liquor were found in a structure used by defendants as a store and dwelling, the store-room and bedroom being separated only by a partition with a door. The county in which defendants resided had not approved the Alcoholic Beverage Control Act. *Held:* The provision of the Turlington Act, Michie's N. C. Code, 3411 (j), permitting the possession of not over one gallon of intoxicating liquor for personal use applies only to possession in a structure used exclusively as a dwelling, and therefore defendants' possession in the structure used as a dwelling and store house was illegal, the applicable provision of the Turlington Act not having been repealed by the Alcoholic Beverage Control Acts, ch. 493 and ch. 418, Public Laws 1935; ch. 49, Public Laws 1937.

2. Intoxicating Liquor § 2—

The Alcoholic Beverage Control Acts do not repeal the provisions of the Turlington Act in regard to the possession and transportation of intoxicating liquors except in so far as the control acts are inconsistent with the Turlington Act.

APPEAL by defendants from *Phillips, J.*, and a jury, at January Term, 1939, of ANSON. No error.

The defendants were put on trial in the Anson County criminal court on the following warrants:

"State of North Carolina—Anson County.

Anson County Criminal Court.

"First Count: L. C. Hunt, being duly sworn, complains and says that in county aforesaid, on or about the 12th day of November, 1938,

Edmond Carpenter and Henry Carpenter did unlawfully and willfully have and keep in their possession certain intoxicating liquors for the purpose of sale, barter or exchange, to furnish or otherwise dispose of, contrary to the form of statute and against the peace and dignity of the State.

"Second Count: L. C. Hunt, being duly sworn, complains and says that in the county aforesaid, on or about the 12th day of November, 1938, Edmond Carpenter and Henry Carpenter unlawfully and willfully did have in their possession certain intoxicating liquors for beverage purposes not then and there having the same in their private dwelling and not for their families, nor their personal consumption and use of their families residing therein or their *bona fide* guests; contrary to the form and statute, and against the peace and dignity of the State.

"L. C. HUNT, S. H. P.

"Sworn and subscribed to before me, this the 13th day of November, 1938.

"G. D. DAVIDSON,
"Justice of the Peace."

At the December 13th Term, 1938, of the Anson County criminal court, the defendants were tried on the foregoing warrant, both of said defendants having pleaded "not guilty" to said indictment. Whereupon, the judge of the Anson County criminal court, acting as jury, found the defendants guilty as charged.

Judgment was pronounced as follows: "1. Four months in jail to be worked on the public roads, and pay a fine of $25.00 and the costs of this action, including a solicitor's fee in each court. 2. Prayer for judgment continued from day to day until further orders of the court." Defendants excepted, assigned error and appealed to the Superior Court.

At the January Term of the Anson County Superior Court for the trial of criminal cases, his Honor, F. Donald Phillips, Judge Presiding, the defendants Edmond Carpenter and Henry Carpenter were tried on the aforesaid warrants, both of said defendants having pleaded not guilty to said charge. A jury was duly impaneled to try the issues joined between the State and the defendants.

The evidence was to the effect that L. S. Allen, a sergeant of the State Highway Patrol, in company with several other peace officers, on or about 12 November of last year, went out to a place known as "The Rock," located south of the town of Wadesboro. He testified: "I can't say what sort of business is conducted there but he had a few items in there that would be sold in any kind of business, tomato juice, bottled drinks and some spools of thread—about $10.00 worth of merchandise. There is an old gasoline tank there somewhere. The building has two

rooms downstairs; there was something upstairs, a window or door at the end of the building. In the other room there was some junk piled up and a bed in there. We found Edmond Carpenter there. (The following statements of the defendant Edmond Carpenter were allowed only as to Edmond Carpenter): Edmond Carpenter stated that he was left there to look after the business until the other one, Henry Carpenter, went to town and bought some supplies. Edmond said that Henry owned the business. We had a search warrant and we started searching and found seven pints of whiskey intact and one pint one-half full of whiskey in the cabinet about waist-high with drawers in the back that he had for a counter. There were three or four pints in one drawer and two or three in another, and I think one pint was up in one of the drawers. It was bottled in bond, stamped whiskey. I don't recall what brands it was. The place the liquor was kept looked more like a cabinet than a regular store counter. That he saw the bed but did not pay any particular attention to it. That the bed was not in the room where the merchandise was kept and that the whiskey was found in the room where the merchandise was kept. That the store-room and the bedroom are in the same house with only a partition between with a connecting door. That the only stove I saw there was in the store-room."

L. C. Hunt testified: "That he is a State Highway patrolman stationed in Wadesboro and that he was in company with the other officers when they went out to the place where the Carpenter boys were arrested. That they searched the place and found seven and one-half pints of whiskey. That they found this empty case in the outhouse 10 or 15 steps from the back door. That he did not recall what brands of liquor it was they found but that he thought it was mixed brands. That Edmond Carpenter was the defendant present when the search was made (the statement of Henry Carpenter was admitted only as to the defendant Henry Carpenter). Henry said that he did not know the whiskey was in the place and his brother got him to keep it while he was gone to town. That he assisted in arresting the other boy about one hour and 45 minutes after the search of the aforesaid premises and that Edmond Carpenter told him that he ran the place and that Edmond Carpenter had some supplies in the car which he was taking back to the place, consisting of canned meat and stuff like that." There was other corroborative evidence. The defendants introduced no evidence.

The jury, having heard the evidence, the argument of counsel and the charge of his Honor, returned a verdict of guilty as to both defendants. On the verdict rendered, the court below pronounced the following judgment:

"That the defendant Henry Carpenter be confined to the common jail of Anson County for a term of six months and assigned to work

under the supervision of the State Highway and Public Works Commission. That the defendant Edmond Carpenter be confined in the common jail of Anson County for a period of three months and assigned to work under the supervision of the State Highway and Public Works Commission." To the judgment both defendants excepted, assigned error and appealed to the Supreme Court.

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

E. A. Hightower for defendants.

CLARKSON, J. We think the evidence plenary and sufficient to be submitted to the jury that the defendants had in their possession "blind-tiger," or "boot-leg" liquor, contrary to law.

Public Laws of N. C., Extra Session, 1923, chap. 1 (known as the "Turlington Act") is, in part:

"SEC. 1. When used in this act—(1) The word 'liquor' or the phrase 'intoxicating liquor' shall be construed to include alcohol, brandy, whiskey, rum, gin, beer, ale, porter, and wine, and in addition thereto any spirituous, vinous, malt, or fermented liquors, liquids, and compounds, whether medicated, proprietary, patented, or not, and by whatever name called, containing one-half of one per centum or more of alcohol by volume, which are fit for use for beverage purposes. . . . (N. C. Code, 1935 [Michie], sec. 3411 [a]—this section is not now applicable to wine and beer.)

"SEC. 2. No person shall manufacture, sell, barter, transport, import, export, deliver, furnish, purchase, or possess any intoxicating liquor except as authorized in this act; and all the provisions of this act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented, . . . (*Supra,* sec. 3411 [b] —This section not now applicable to wine and beer.)

"SEC. 10. From and after the ratification of this act the possession of liquor by any person not legally permitted under this act to possess liquor shall be *prima facie* evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished, or otherwise disposed of in violation of the provisions of this act. But it shall not be unlawful to possess liquor in one's private dwelling while the same is occupied and used by him as his dwelling only, provided such liquor is for use only for the personal consumption of the owner thereof, and his family residing in such dwelling, and of his *bona fide* guests, when entertained by him therein." (*Supra,* sec. 3411 [j]—this section not now applicable to wine and beer.)"

There is no sufficient evidence that the place where the liquor was found is "one's private dwelling while the same is occupied and used

by him as his *dwelling only.*" In *S. v. Hardy,* 209 N. C., 83 (87), it is said: "All the evidence is to the effect that the filling station with bedroom and kitchen were connected and used together. The building *'is not occupied and used by him as his dwelling only.'* The statute was no doubt passed to cover the very situation as shown in this case."

The law in reference to the facts in this controversy has been fully set forth recently in *S. v. Davis,* 214 N. C., 787. The material part we quote: (p. 790), "Under chap. 1, Public Laws 1923, sec. 1, 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 statutes. 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. . . . (p. 791). 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 and in 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* (214 N. C., 525); *S. v. Langley,* 209 N. C., 178."

It is not necessary in the warrant or indictment to "include any defensive negative averments, but it shall be sufficient to state that the act complained of was then and there prohibited and unlawful." Public Laws 1923, Extra Session, ch. 1, part sec. 9. *S. v. Epps,* 213 N. C., 709 (716-717). In the *Davis case, supra,* citing numerous authorities, is the following: "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 the defendant."

The county of Anson has not availed itself of the provisions of the Alcoholic Beverage Control Act. The court below charged the law fully as to reasonable doubt, aiders and abettors, also actual and constructive possession. The defendants cannot complain of the charge of the court below; it is more liberal than the defendants were entitled to. The court below left it to the jury to say whether the place was a "dwelling only." Under all the evidence, the possession of the liquor, as disclosed by the evidence, was unlawful.

In the judgment of the court below, we find

No error.

S. B. TROXLER v. J. R. C. BEVILL, ADMINISTRATOR OF A. W. TROXLER.

(Filed 24 May, 1939.)

1. Judgments § 17a—

A plaintiff is entitled to that relief within the jurisdiction of the court warranted by the facts alleged and proven, or, in courts where written pleadings are not required, to the relief warranted by the facts established, but the form of the action determines the course of judicial investigation and plaintiff will be bound in the appellate court by the theory of trial in the lower court.

2. Bailment § 6: Trial § 22b—

The burden is on plaintiff to show the contract of bailment sued on, whether express or implied, by competent evidence, and the fact that the alleged bailee is dead, rendering incompetent testimony as to any transaction or communication with him to establish the bailment, C. S., 1795, is not a circumstance to be considered in passing upon the sufficiency of the evidence.

3. Bailment § 6—Evidence held insufficient to establish conversion of funds by bailee.

The evidence showed that plaintiff had in his brother's safe deposit box an envelop with his name and the sum of $285.00 written thereon in his brother's handwriting, that after his brother's death, on the second witnessed opening of the safe deposit box, the envelop had a mark through the $285.00 and the figures $60.00 written thereunder and that the envelope, which actually contained but $60.00, was turned over to plaintiff. *Held:* Even conceding the evidence sufficient to support an inference of bailment, it is insufficient to be submitted to the jury on the question of the alleged bailee's conversion of the difference between the two sums, there being no evidence of demand and refusal to raise any presumption, and withdrawal by plaintiff being as consonant with the facts shown as the contention of conversion, and as between the two inferences the law will make the inference of innocence.

4. Money Received § 1—

Evidence merely tending to show that intestate had in his safe deposit box a sum of money belonging to plaintiff, and that after intestate's death a much smaller sum belonging to plaintiff was found in the safe deposit box, is insufficient to support a recovery for money had and received, since the evidence is silent as to the reason for the diminution in the amount of money.

APPEAL of defendant from *Sink, J.*, at 9 January Term, 1939, of GUILFORD. Reversed.

This was an action by the plaintiff to recover of the defendant administrator $220.00, which he contends was the balance of a sum of money deposited with defendant's intestate and in his possession at the time of his death.

Judgment was rendered in favor of the plaintiff in the municipal court of the city of Greensboro, and, upon appeal of defendant, tried *de novo* in the Superior Court of Guilford County.

Summarized, the pertinent evidence is as follows: Sometime during the year 1933 the intestate, A. W. Troxler, leased from the Security National Bank a safe or safety deposit box in the vault of the bank, to which S. R. Troxler had free access. On the death of S. R. Troxler in March, 1935, the safe was opened and the contents inventoried by J. P. Shore, deputy clerk, in the presence of Isabel C. Beall, manager of the safety deposit department, and defendant's intestate, A. W. Troxler. Inventoried as amongst the contents of this box was "$285.00 in currency within envelope on which was the name of S. B. Troxler." Actually, the envelope contained the name of S. B. Troxler and the figures and symbol "$285.00" in A. W. Troxler's handwriting. The property of S. R. Troxler was removed from the safe upon his death, and A. W. Troxler executed a new lease for the safe. After the death of A. W. Troxler, the clerk of the Superior Court opened the safe and inventoried the contents in the presence of the widow of the deceased, J. R. C. Bevill, deputy sheriff, and William V. Capps, vault custodian. Inventoried as amongst the contents of the box at that time is an item designated: "Envelope marked S. B. Troxler containing $60.00 in cash." Nothing at this time was removed from the box. On distribution of the contents of the box on the 9th day of February, 1937, the defendant delivered to the plaintiff the sum of $60.00, which was taken out of a white No. 10 envelope marked "S. B. Troxler, $285.00," with a line drawn through the $285.00 and $60.00 marked underneath. The envelope was thrown in the waste basket. The plaintiff receipted for the sum without protest to the defendant, although the evidence is he "shook his head" and, subsequently, explained to this defendant that he did so because he was $220.00 short.

At the time of the death of defendant's intestate, plaintiff was indebted to his estate in the sum of approximately $70.00, which he paid to defendant on 15 December, 1937. The suit was filed on the 30th day of December following.

It will be noted that there is a discrepancy of $5.00 between the original amount plaintiff alleged to have been deposited with the intestate and the sum sued for, plus the $60.00 which plaintiff received. In his charge to the jury the trial judge observed: "The plaintiff contends and insists that there is a variance of $5.00 there that he cannot explain because of the rule of law closing forever the mouth of one engaging in a conversation or transaction with a deceased person." There seems to be no other reference to this matter in the record.

In the Superior Court there was a verdict favorable to the plaintiff, followed by a judgment for the sum demanded, from which defendant appealed.

Frazier & Frazier for plaintiff, appellee.
O. W. Duke for defendant, appellant.

SEAWELL, J. Under our liberal system of pleading the court is no stickler for form. The plaintiff is entitled to such relief as the facts set up in the complaint may warrant, consistent with the jurisdiction of the court in the particular matter. *Bolich v. Ins. Co.*, 206 N. C., 144, 173 S. E., 320; *McNeill v. Hodges,* 105 N. C., 52, 11 S. E., 265; *Knight v. Houghtalling,* 85 N. C., 17.

A fortiori, in those courts where written pleadings are not required the plaintiff is entitled to any appropriate relief upon the facts established, unless on the trial he has adopted and insisted upon a contrary theory of the case which might bind him in the appellate court.

But the designated form of the action is important, sometimes controlling, as it indicates the character of the transaction out of which the right of action arises, and carries with it legal implications affecting both the course of the judicial investigation and the remedy available to plaintiff. In that sense form becomes substance.

The able counsel for the plaintiff seemed uncertain as to whether they should insist that his cause of action rests in bailment or assumpsit for money "had and received." The dilemma is one naturally arising from the fact that the subject of the controversy is a sum of money and the evidence available might have an aspect favorable to both views. But we fear it is not sufficient to establish either.

While no pleadings were required in the municipal court of the city of Greensboro, where the case originated, it appears from the record that it was regarded as one of bailment, and we shall first consider it in that aspect.

The burden was on the plaintiff to show the contract of bailment, whether express or implied, by competent evidence. *Perry v. R. R.*, 171 N. C., 158, 88 S. E., 156; *Nutt v. Davison,* 54 Colo., 586, 131 P., 390. A substantial part of his embarrassment in this endeavor obviously arose from the fact that he was incompetent to testify as to any transaction or communication between himself and his deceased brother under C. S., 1795. As to this, the court cannot aid him, nor is it a circumstance to be considered in passing on the probative value of the evidence actually presented.

We are asked to draw such inferences as may be necessary to establish plaintiff's case from evidence almost wholly circumstantial. This consists, substantially, of two pictures in the flat and the background against which they are placed. These show little more than the presence in intestate's strong box, at the first witnessed opening in 1935, of an envelope inscribed with plaintiff's name and showing a content in money of $285.00, and the similar presence, at the second witnessed opening in 1937 (after A. W. Troxler's death), of an envelope marked "S. B. Troxler, ~~$285.00,~~" all in intestate's handwriting.

$60.00

It appears that at the first opening, property of S. R. Troxler was removed from the box. At the second opening, this defendant did not question the ownership of the $60.00 found in the box and tagged with plaintiff's name. Plaintiff's counsel draws the inference in their brief that A. W. Troxler was the "banker of the family" and had in keeping the money of his brother.

We might concede that the circumstances point to an inference that intestate had in his possession the sums mentioned at the first and second witnessed openings of the safe and that it was money of the plaintiff. We might even concede that this gives rise to the inference of bailment, although there may be a split of authority here which we do not undertake at this time to reconcile. 6 Am. Jur., sec. 64, p. 191.

But in the absence of any evidence or any presumption as to the nature and terms of the bailment or the intention of the parties, or a more complete history of the transactions between the parties, we are left to speculation with regard to further facts essential to plaintiff's recovery. With as little as has been revealed to us with regard to the bailment, if it was a bailment, we cannot accept the suggested diminution in the contents of the envelope as raising an inference of conversion on the part of defendant's intestate, or other negligent or tortious act resulting in liability for failure to return the original deposit intact. Plaintiff may be correct in his contention that intestate was "the banker of the family"; and this evidence points as strongly to withdrawal by the plaintiff and rebailment as it does to conversion by the

intestate. Of the two inferences, the law will make the inference of innocence. This is rather accentuated by the circumstance that as to $5.00 of the difference, at any rate, some transaction between the parties was supposed by plaintiff to relieve the intestate of liability to that extent.

There was no demand by plaintiff and refusal by defendant's intestate which might have given rise to presumptions or might have enlightened the jury as to the relations and obligations between the two. *Elon College v. Trust Co.*, 182 N. C., 298, 109 S. E., 6; *Southern Railroad Co. v. Prescott*, 240 U. S., 632, 60 L. ed., 836; *Perry v. R. R., supra.* The demand by suit against the administrator after A. W. Troxler's death, in the absence of more substantial proof concerning the bailment than the evidence affords, is not sufficient to raise such liability.

With regard to the theory of assumpsit, we find a like infirmity of proof, in respects so similar that we consider detailed consideration would lead only to repetition.

The demurrer to the evidence should have been sustained, and the judgment is

Reversed.

WACHOVIA BANK & TRUST COMPANY, TRUSTEE, UNDER THE WILL OF WILLIAM E. HOLT, DECEASED, v. WILLIAM E. HOLT; AMANDA CALDWELL HOLT; LOIS HOLT TATE; LOUISE TATE SHELTON; THOMAS McKENDREE SHELTON; LOIS HOLT SHELTON; ALICE TATE; ETHEL HOLT VIVIAN; ROBINS C. VIVIAN; ETHEL HOLT VIVIAN, JR.; EMILY VIVIAN; CLAUDIA HOLT OATES; ANNE OATES ASHLEY; HAL H. ASHLEY; HOLT ASHLEY; JOAN ASHLEY; WILLIAM HOLT OATES; MARY ELIZABETH TUCKER OATES; MAUD HOLT MAULSBY; DAVID LEE MAULSBY; WILLIAM EDWIN HOLT MAULSBY; S. LEE MAULSBY; ALLEN FARISH MAULSBY; EMILY HOLT HUNDLEY, AND JOHN MASON HUNDLEY, JR.; J. V. MOFFITT; WACHOVIA BANK & TRUST COMPANY, TRUSTEE FOR CLAUDIA HOLT OATES, UNDER THE TRUST INDENTURE OF 12 OCTOBER, 1925; WACHOVIA BANK & TRUST COMPANY, TRUSTEE FOR ETHEL HOLT VIVIAN, UNDER THE TRUST INDENTURE OF 29 NOVEMBER, 1935; AND ALL UNBORN PERSONS WHO MAY BE INTERESTED IN THE DETERMINATION OF THIS CAUSE.

(Filed 24 May, 1939.)

1. Wills § 33c—Under terms of this will, upon death of widow, share held in trust for her should be paid directly to testator's children and not held in trust with ultimate disposition contingent.

The residuary clause of the will in suit provided that the remainder of testator's estate should be equally divided between testator's children and his widow, with further provision that, at the time for the final settlement of the estate, the widow's share and the share of any child without

any living heirs of his body should be paid to a trustee for their respective benefits and the income therefrom paid to them, with further provision that upon the birth of an heir to any such child his share should be paid directly to him, with further provision that upon the death of the widow or the death of any child without issue him surviving the share of such beneficiary should be paid to the surviving children share and share alike. At the time for final settlement of the estate two of testator's children were without bodily heirs, and the shares of such children and the share of the widow were paid to the trustee for their respective benefits. *Held:* Upon the death of the widow and the termination of the trust for her benefit, the respective interests therein of the children without bodily issue should be paid directly to them and not to the trustee for their benefit, and if one of the children should die without bodily heirs him surviving the surviving child without bodily heirs would also be entitled to the payment of his interest in such deceased child's share.

2. Wills § 31—

Where the terms of a will are plain and unambiguous, its express terms should be given effect, and there is no occasion for judicial interpretation or the presumption of an intention at variance with the language employed.

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

APPEAL by plaintiff and defendant, F. Gaither Jenkins, guardian *ad litem* for minors, and any and all persons who may hereafter be born, interested in the determination of this cause, from *Sink, J.*, at February Term, 1939, of DAVIDSON.

Civil action under the Uniform Declaratory Judgment Act (Public Laws 1931, ch. 102) for construction of portions of the will of William E. Holt, deceased.

Pertinent facts alleged by plaintiff, and admitted by all parties and found by the court below, are substantially these: William E. Holt, a resident of Davidson County, North Carolina, died on 26 May, 1917, leaving a last will and testament in which, after providing in item two dower for his wife in all real property of which he may die seized, and for equal division of the remainder of his real property among his children, or the heirs of the body of any child who may be dead, it is provided as follows: "Third: I give and bequeath all the remainder of my estate to my wife, Amelia L. Holt, my son, William E. Holt, and my daughters, Claudia Oates, wife of R. M. Oates, Ethel Vivian, wife of R. C. Vivian, Lois Tate, wife of R. L. Tate, Maud Maulsby, wife of D. L. Maulsby and Emily Holt, to be divided equally among them share and share alike; provided, however, that should any of my said children have no heirs of their body living at the date of the final settlement of my estate, my executors hereinafter named, shall convey such child's or children's share or shares to the Wachovia Bank & Trust Company of Winston Salem, N. C., such share or shares to be held in trust by the

said Wachovia Bank & Trust Company for such child or children; the income derived from such share or shares so trusteed to be paid to such child or children, semiannually, upon the first days of January and July in each and every year during the life of said trusteeship, but if such child or children shall have living issue born after the creation of said trust or trusts, then the trusteeship above created shall cease and determine and the corpus of such share or shares shall vest in such said child or children absolutely, but in the case any of my said children whose share or shares may have been trusteed as above provided should die leaving no heirs of their body surviving them, then the trusteeship of each share or shares shall cease and determine, and the said Wachovia Bank & Trust Company shall divide and distribute any such share or shares equally among my said children surviving, or the heirs of the body of such of my said children that may be deceased, share and share alike, the child or children of any of my children that may be deceased representing and standing in the place of their parent or parents. Provided further, should my said wife, Amelia L. Holt, be living at the final settlement of my estate, my executors hereinafter named, shall convey her said share to the Wachovia Bank & Trust Company, of Winston Salem, N. C., said share to be held in trust for the said Amelia L. Holt during her life and the income derived from said share to be paid to her semiannually upon the first day of January and July in each and every year during the life of said trust; and upon the death of my said wife, Amelia L. Holt, the trusteeship herein created shall cease and determine, and the aforesaid Wachovia Bank & Trust Company shall divide and distribute equally the share of my said wife among my said children, the heirs of the body of any of my said children as may be deceased shall represent and stand in the place of their parent or parents . . ."

The testator was survived by his wife and all of his children, all of whom are named in the said third item of his will.

At the date of the final settlement of the estate of the testator by his executors, neither his son, William E. Holt, nor his daughter, Emily Holt Hundley, *nee* Emily Holt, had any heirs of the body living, and under the provisions of the third item of the will the executors conveyed to plaintiff two shares of the estate of the testator to be held in trust and administered under the provisions in said item of the will for the benefit of said two children, both of whom are now living. No child has been born to either of them and their shares in said estate are still being held by plaintiff under said item of the will.

Amelia L. Holt, wife of testator, was living at the date of the final settlement of the testator's estate and under the provisions of the third item of this will her share of said estate was conveyed by said executors to plaintiff and, since the receipt thereof, plaintiff has held the same in

trust under the provisions of said item of the will. Amelia L. Holt died 6 September, 1938, and the properties in said trust are now distributable in accordance with the provisions of said item.

The question has arisen as to whether under a proper interpretation of the third item of the will the respective shares of William E. Holt and Emily Holt Hundley in the properties in the said trust for the benefit of Amelia L. Holt shall be turned over to them outright, as contended by them, or shall same be added to the respective trusts now held and administered for their benefit by the plaintiff, as contended by others of the defendants.

Plaintiff prays the court to construe the will, particularly the third item, and to determine not only the rights of defendants in the distribution of the properties held in trust by plaintiff under said item of the will for the benefit of Amelia L. Holt during her lifetime, but to determine in the event either William E. Holt and Emily Holt Hundley shall die without having had issue, whether the survivor shall participate equally with the other children in the distribution of the share of the one so dying in and to the properties held in trust by the plaintiff under said item of the will for their benefits respectively.

In the judgment rendered below after reciting that: "It further appearing to the court from the evidence offered that all persons, both those *in esse* and those not *in esse,* who have, or might have, any interest or claim under or by virtue of said will have been made parties to this action; that a suitable guardian *ad litem* has been appointed for all the minors and persons not *in esse* who are parties to the action and that all persons named in the complaint as defendants have been duly served with summons and copy of the complaint," the court adjudges that: "1. In reference to the property held in trust and administered by the said Wachovia Bank & Trust Company as trustee under the provisions of Item Third of said will for the benefit of Amelia L. Holt during her lifetime, the court holds that, since the death of said Amelia L. Holt, it is the duty of said trustee, after dividing the properties in said trust into six equal shares, to convey, transfer and deliver one of said shares each to William E. Holt and Emily Holt Hundley, respectively, absolutely free and discharged of any trust or contingency whatever, each of said shares to thereafter be the absolute property of the said William E. Holt and Emily Holt Hundley.

"2. In reference to the two shares of the estate of the said William E. Holt, now being held in trust for the benefit of William E. Holt and Emily Holt Hundley, by the said Wachovia Bank & Trust Company, trustee, under the provisions of Item Third of said will of William E. Holt, the court holds: (a) If either the said William E. Holt or Emily Holt Hundley should have living issue, then the share now being held

in trust for such one so having living issue shall be conveyed, transferred and delivered to such one absolutely free and discharged of any trust or contingency whatsoever.

"(b) If either the said William E. Holt or Emily Holt Hundley should die without ever having had living issue, and leaving the other surviving, then such survivor, whether he or she shall ever have had living issue or not, shall equally participate with the other children, and the representatives of any deceased children, *per stirpes,* of William E. Holt, deceased, in the distribution of the share of the one so dying, and the interest of the said survivor of the two in the share of the trust estate held for the benefit of such decedent under the provisions of Item Third of said will shall be distributed to the survivor, absolutely free and discharged of any trust or contingency whatsoever."

From this judgment plaintiff and only the defendant F. Gaither Jenkins, guardian *ad litem* of Lois Holt Shelton, Joan Ashley, Holt Ashley, S. Lee Maulsby and Allen Farish Maulsby, minors, and any and all persons who may hereafter be born, interested in the determination of this cause, appeal to the Supreme Court and assign error.

Manly, Hendren & Womble for appellants.
Robinson & Jones for appellees.

WINBORNE, J. Did the court in the judgment below properly construe the third item of the will of William E. Holt? Apparently out of abundance of caution, plaintiff in fiduciary capacity, and the guardian *ad litem* representing minors and unborn persons who may become interested in the estate, present this question. We are of opinion that the judgment follows the manifest intent of the testator as clearly expressed in the words used by him. The language of the will is plain English, unequivocal, and unambiguous, and there is no occasion for judicial interpretation. *Wooten v. Hobbs,* 170 N. C., 211, 86 S. E., 811; *Scales v. Barringer,* 192 N. C., 94, 133 S. E., 410; *Williams v. Best,* 195 N. C., 324, 142 S. E., 2; *Bell v. Gillam,* 200 N. C., 411, 157 S. E., 60.

Appellants contend that the will shows an intention of William E. Holt to keep his estate in his own blood stream. As was stated by *Adams, J.,* in *Power Co. v. Haywood,* 186 N. C., 313, 119 S. E., 500, in speaking to a similar factual situation, "We are not permitted to substitute a presumed intention which is at variance with the obvious meaning of the language employed."

Affirmed.

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

HILTON LUMBER COMPANY v. THE ESTATE CORPORATION, THE WILMINGTON SAVINGS & TRUST COMPANY, F. L. FORMY DUVAL, AND O. P. CORBETT.

(Filed 24 May, 1939.)

Venue § 2a—Held: Action was one to determine amounts to be paid for extension of rights under timber deed and not one affecting realty.

The timber deed in question provided that the grantee should have the right of annual renewals for a period of five years upon the payment of a sum proportionate to the amount of timber still uncut out of the total amount of standing timber. The grantor in the timber deed sold the fee, subject to the rights under the timber deed. This action was instituted to enforce the right of renewal upon tender of the amount claimed by the grantee in the timber deed as the amount entitling him to renew. *Held:* The motion of the grantees of the fee to remove the cause to the county in which the uncut timber is situate on the ground that the action involved realty, C. S., 463, 470, was properly denied, since the action is to determine the amount to be paid for the privilege of extension under the provisions of the timber deed and to enforce the right to such extension, and since movants have no right nor interest in the amounts to be paid for the annual extensions to the grantor in the timber deed.

APPEAL by defendants other than The Estate Corporation from *Cranmer, J.*, at September Term, 1938, of NEW HANOVER. Affirmed.

E. K. Bryan for plaintiff, appellee.
Bellamy & Bellamy for defendants, appellants.

SCHENCK, J. This is an appeal from an order denying the petition for removal as a matter of right from New Hanover County to Bladen County, duly filed by the defendants other than The Estate Corporation before time for answering had expired, C. S., 470, upon the alleged ground that the action relates to the determination of rights and/or interests in real property in Bladen County. C. S., 463. The defendant, The Estate Corporation, has filed answer.

The complaint alleges that the defendant, The Estate Corporation, sold to the plaintiff, the Hilton Lumber Company, the timber on two tracts of land, one tract in Bladen County and one tract in Pender County, and that simultaneously with the delivery of the deeds for said timber, The Estate Corporation delivered to the plaintiff an agreement wherein it was provided that the plaintiff should have ten years from the date thereof, August 1, 1927, in which to cut and remove the timber, and upon the payment of $3,500 to The Wilmington Savings & Trust Company, for the use and benefit of The Estate Corporation, the plain-

tiff should have annual extensions of the time to cut and remove the timber, not to exceed five years, and, if desired, after some of the timber was cut and removed, the plaintiff should have annual extensions, not to exceed five years, in which to cut and remove the balance of the timber upon the payment to The Wilmington Savings & Trust Company for the benefit of The Estate Corporation of such portion of $3,500 as bore the same ratio to the timber still uncut as $3,500 bore to the estimated whole of the timber, namely, 18,000,000 feet, the minimum amount to be so paid being fixed at $500, and in the event of a dispute as to the amount to be paid for any extension of time for cutting and removing timber such amount was to be finally determined by The Wilmington Savings & Trust Company.

The complaint further alleges that The Estate Corporation, shortly after the execution and delivery of the timber deeds and agreement to the plaintiff, conveyed the lands upon which the timber stood to one L. B. Rogers, subject to all rights which the plaintiff had by virtue of its timber deeds and agreement, and especially reserved the Estate Corporation's right to any amount or amounts paid for extension of time in which to cut and remove any timber under the agreement; that the timber in Pender County was all cut and removed during the first ten years of the agreement, and there is no controversy involving payments for extensions of time to cut any of it; that the defendants F. L. Formy Duval and O. P. Corbett, through *mesne* conveyances from him, acquired all right, title and interest of L. B. Rogers in the lands upon which the timber stood or stands.

The complaint further alleges that on 31 July, 1937, the plaintiff, the Hilton Lumber Company, tendered to the defendant, The Wilmington Savings & Trust Company, a deed of release for the lands in Pender County and for that portion of the lands in Bladen County from which the timber had been cut and removed, to the defendants Formy Duval and Corbett, and also tendered to said Savings & Trust Company $500, and demanded a year's extension of its right to cut and remove the balance of the timber in Bladen County, which tender and demand The Wilmington Savings & Trust Company declined; and that the plaintiff then tendered said deeds of release and $500 to the defendants F. L. Formy Duval and C. R. Corbett, then claiming to the plaintiff that they were entitled to any and all extension money as successors in title to The Estate Corporation, and demanded a year's extension of its right to cut and remove the remaining timber in Bladen County, which tender and extension were declined by said defendants; that on 1 August, 1937, The Wilmington Savings & Trust Company advised plaintiff that it knew nothing of the matter and preferred not to assume any responsibility under the deeds and agreement heretofore mentioned, and declined

to act, which was the first notice plaintiff received of said Savings & Trust Company's position in the premises.

The complaint further alleges that the plaintiff, the Hilton Lumber Company, desires another year's extension of time from 1 August, 1938, in which to cut and remove the remaining timber in Bladen County, and that it stands ready, willing and able to pay $530 for the extension from 1 August, 1937, to 1 August, 1938, and $500 for an extension from 1 August, 1938, to 1 August, 1939, and asks, upon the payment of such amounts to The Wilmington Savings & Trust Company for the use and benefit of The Estate Corporation, that such extensions be judicially declared, or, in the event the said Savings & Trust Company declines to receive said amounts, that it, the plaintiff, be authorized to pay same direct to The Estates Corporation, and that thereupon such extensions be judicially declared.

A perusal of the complaint divulges that this is an action to determine the amounts to be paid by the plaintiff, the Hilton Lumber Company, for the use and benefit of the defendant, The Estate Corporation, for annual extensions of time under the agreement existing between them for cutting timber on land in Bladen County, and upon the refusal of The Wilmington Savings & Trust Company to receive said amounts for the use and benefit of The Estate Corporation, as provided in said agreement, to have it declared that such amounts shall be paid direct to The Estate Corporation; and that upon payment of said amounts either to the said Savings & Trust Company or to The Estate Corporation, the annual extensions of time be declared by the court. It further appears from the complaint that the appealing defendants have no right nor interest in the amounts to be paid for the annual extensions of time in which to cut the timber, or as to whom, or by whom, such amounts are to be paid. These are questions between the plaintiff, the Hilton Lumber Company, and the defendant, The Estate Corporation. Under such circumstances we are constrained to hold that the action does not relate to any right or interest in real property, but is only an action for a judgment declaring the rights and statuses of the parties to the agreement alleged in the complaint. Public Laws 1931, ch. 102, sec. 1 (N. C. Code of 1935 [Michie], 628 [a]).

The order of the Superior Court is

Affirmed.

MRS. SARAH C. DAILEY v. SARAH M. BAY AND GEORGE G. BAY.

(Filed 24 May, 1939.)

Highway § 15—Appeal will lie to Superior Court from judgment of clerk that petitioner is not entitled to establishment of cartway.

In this proceeding under C. S., 3835, 3836, to establish a private cartway over lands of defendants, the clerk entered judgment that petitioner was not entitled to the relief demanded, and petitioner appealed to the Superior Court. *Held:* The judgment of the clerk determined the rights of the parties and an appeal to the Superior Court was proper and not premature, and the order of the Superior Court remanding the case to the clerk upon the apprehension that an appeal would not lie until after the appointment of a jury of view and the laying out of the cartway and the assessment of damages, is erroneous. The distinction between proceedings to establish a cartway, in which the right to its establishment is the primary question, and proceedings in eminent domain in which petitioner is ordinarily entitled to the easement as a matter of right and the primary question is the bounds of the easement and the assessment of damages, is pointed out.

APPEAL by defendant from *Rousseau, J.*, at January-February Term, 1939, of POLK. Error and remanded.

Petition before the clerk for the establishment of a private cartway from the lands belonging to the petitioner over and across the lands of the defendants to a public road.

The petitioner seeks to have a path or cartway already existing across the lands of the defendants and heretofore used by her established as a private cartway under the provisions of C. S., 3835 and C. S., 3836. The defendants, answering, denied plaintiff's right to a private cartway across their land and alleged that plaintiff's land adjoins the public highway, but that she has conveyed a portion thereof bordering on the public road as a subterfuge to enable her to assert that she had no proper outlet; that the grantee in said deed holds title to the tract of land thus conveyed for the use and benefit of the plaintiff; and that a private cartway from plaintiff's land to the public road was established in 1926, but that the plaintiff and her predecessor in title have failed and refused to construct and use the cartway thus laid off and established.

When the cause came on to be heard before the clerk he entered judgment, finding as a fact and concluding as a matter of law, that: "It is not necessary, reasonable and just for the petitioner to have a cartway over the lands of the defendants, as prayed for in the petition.

"It is, therefore, ordered, adjudged and decreed that the petition of the plaintiff for a cartway be denied and that the petitioner be taxed with the costs of this proceeding."

The petitioner excepted and appealed.

Thereafter, the petitioner served notice on the defendants that she would appear before the judge at term on 30 January and move to have the above entitled cause remanded to the clerk, with instructions to appoint a jury of view to lay off the cartway.

When the said motion came on to be heard, "it appearing to the court that the proper procedure in said cause is for the clerk to rule both upon the facts and the law in said cause to which either the plaintiff or the defendant may note their exceptions, and for the clerk of the Superior Court to then proceed to the appointment of a jury of view to lay off said cartway in accordance with the petition and to assess the damages therefor," the judge, purporting to act in the exercise of his discretion, remanded the cause to the clerk of the Superior Court with directions to appoint a jury of view to lay off said cartway in accordance with the petition filed in this cause and that the said jury assess such damages as the defendants may sustain by reason thereof. It further provides for a report by the jury and exceptions thereto by the injured party.

The defendants excepted and appealed.

Hamrick & Hamrick for plaintiff, appellee.
Thos. H. Franks and J. E. Shipman for defendants, appellants.

BARNHILL, J. The court below did not purport to act upon the merits of plaintiff's appeal from the clerk. Acting under the apprehension that an appeal would not lie from the clerk's order until the clerk had first followed the procedure outlined by the statute for the laying off of the cartway and the assessment of damages, the judge granted plaintiff's motion to remand. In this there was error.

The judgment of the clerk is final and, until reversed or modified, is determinative of the rights of the parties in this controversy. An appeal therefrom is not premature. This court has heretofore determined this question. In *Warlick v. Lowman,* 101 N. C., 548, 8 S. E., 120, there was an adjudication by the clerk that it was necessary, reasonable and just that the petitioner should have a private way to a public road specified. The defendant appealed before a jury of view was appointed to lay out the cartway and assess the damages. Upon motion of the plaintiff the appeal was dismissed on the ground that it was prematurely taken. This was held for error. *Cook v. Vickers,* 141 N. C., 101, 144 S. E., 312, is to like effect. Surely the converse is true. If, as the clerk adjudged, the plaintiff is not entitled to a cartway as prayed in her

petition it would be a fruitless waste of time and expense to have a jury of view appointed to lay off and establish a cartway and assess the damages accruing to the defendants by reason thereof. In fact, by the express terms of the statute, C. S., 3836, as amended by ch. 448, Public Laws 1931, the clerk is not authorized to appoint a jury of view until it is first adjudged that it is necessary, reasonable and just that the petitioner shall have a private way to a public road, as prayed in the petition.

C. S., 3835 provides: "From any final order or judgment in said special proceeding, any interested party may appeal to the Superior Court for trial *de novo* and the procedure established under Chapter thirty-three, entitled 'Eminent Domain,' shall be followed in the conduct of said special proceeding in so far as the same is applicable and in harmony with the provisions of this section." Whether this language relates to the procedure after appeal from the clerk, as it seems to indicate, we need not now decide. There is a necessary distinction drawn as to the right of appeal in condemnation proceedings and in proceedings for the establishment of a cartway. Ordinarily the municipal or public service corporation seeking a right-of-way by condemnation is entitled to the easement as a matter of right. The establishment of the bounds of the easement and the assessment of damages are the matters primarily involved. No appeal lies until the easement is laid out and the damages assessed. In proceeding under C. S., 3836, as amended, the right to the cartway is primarily at issue. An adjudication as to that affects a substantial right of the parties and is deemed to be a final judgment from which either party may appeal. Due to this distinction the cases cited by petitioner are not decisive of the question here presented.

Upon the docketing of the appeal upon the civil issue docket the Superior Court acquired full jurisdiction thereof and it is its duty to determine the issues of fact and questions of law involved. If it is finally adjudged that plaintiff is entitled to a cartway across the lands of the defendants as prayed, then, and only then, may the judge in his discretion remand the cause to the clerk for the procedural action necessary under the statute for the execution of the judgment rendered. C. S., 637.

The cause is remanded to the end that it may be reinstated upon the civil issue docket of the court below for further proceedings.

Error and remanded.

J. P. MICHAEL v. W. F. BROWN ET AL.

(Filed 24 May, 1939.)

Deeds § 24—Evidence held insufficient to show that grantee cut timber from lands of grantor not embraced in the timber deed.

This action was instituted by the grantor in a timber deed to recover for timber which he alleged had been cut from other of his lands not embraced in the timber deed. Plaintiff admitted that he had been paid for all timber cut from the land embraced in the deed. The description of the land in the timber deed required reference to other instruments as an aider to make certain the land therein described. Plaintiff's agent, who negotiated the sale of the timber, testified that he went upon the land with the grantee and pointed out the boundary, and that neither the grantee nor his assignee had cut any timber from land not embraced therein. *Held:* Defendant's motion of nonsuit was properly granted.

APPEAL by plaintiff from *Olive, Special Judge,* at October Term, 1938, of DAVIDSON.

Civil action to recover damages for alleged trespass in wrongfully cutting timber on plaintiff's land.

On 25 September, 1934, the plaintiff, by deed duly executed, sold to J. L. Bullard, for a consideration of $3,050.00, "all the sawable timber on the following described lands, owned by party of the first part, situate in Tyro Township (Davidson County), adjoining the lands of Byerly and Jordan, J. A. Myers' heirs, Gid Sink and others, known as the Betsy Sowers land and containing about one hundred (100) acres, more or less."

On 23 August, 1935, J. L. Bullard assigned and conveyed all his right, title and interest in said timber to the Piedmont Lumber Company.

Thereafter, on 20 November, 1935, the plaintiff, for a consideration of $550.00, repurchased from the Piedmont Lumber Company all the uncut timber then on the land and covered by the original timber deed.

It is alleged that the defendants, during the time they were cutting and removing the timber conveyed in this deed, overstepped the boundaries of the "Betsy Sowers" tract and cut a quantity of timber on an adjoining tract of 36 acres, belonging to the plaintiff, and known as the "Leonard land."

There was evidence tending to show that the defendants cut timber on the tract designated by the plaintiff as the "Leonard land," but they contend that it was embraced within the boundaries of their deed.

The plaintiff admitted that he had been paid for all the timber covered by the contract, and further testified: "There is nothing in the contract to show just where the timber is located."

Conrad Michael, witness for plaintiff, testified in part, as follows: "I am a nephew of the plaintiff. . . . My uncle owned various tracts of land in the neighborhood—one known as the Sowers place. . . . The property involved in this case is known in that section as the Sowers place. . . . My uncle described the land that he wanted me to sell the timber on. (Witness draws sketch on board to illustrate). My uncle says there was about 100 acres in those boundaries. . . . The 100 acres described in the deed known as the Betsy Sowers (place) is the land inside the marks drawn by me. The land he is now calling the 'Leonard land' is included in that tract. . . . The tract was known and called the Sowers place. That is the way it was put in the contract. . . . After uncle asked me to sell it, and I found a buyer in Bullard, I went out there with Bullard. I showed him the boundaries that I am now showing the court and jury. I sold him the timber on the 100 acres in these boundaries for $3,050.00 as agent for my uncle. . . . I didn't see any trees cut outside of the boundaries. . . . I went out there about the time my uncle bought the timber back. There had been no timber cut outside of the lines that I have just described that I know of. . . . The drawing I have made on the board, as I understand it, is the land uncle asked me to sell the timber on as his agent. There was no timber cut outside of these boundaries to my knowing, and I was out there after they quit cutting."

W. F. Brown was named as a defendant because the plaintiff did not know whether the timber in question was cut by him individually or by the corporate defendant of which he is president.

From judgment of nonsuit entered at the close of plaintiff's evidence, he appeals, assigning error.

J. Eugene Snyder and McCrary & DeLapp for plaintiff, appellant.
Martin & Brinkley for defendants, appellees.

STACY, C. J. The testimony of plaintiff's nephew and agent, Conrad Michael, who negotiated the sale, is in full support of the judgment of nonsuit. The record discloses that plaintiff has been paid for all timber cut by the defendants. The timber was sold according to the boundaries pointed out by plaintiff's agent. The uncut portion of the timber was later repurchased according to the same boundaries. "That is the way it was put in the contract," says Conrad Michael, and "the land uncle is now calling the 'Leonard land' is included in that tract." Plaintiff admits, "there is nothing in the contract to show just where the timber

is located." An aider under the doctrine of *id certum est,* etc., is required for its exact location. *R. R. v. Olive,* 142 N. C., 257, 55 S. E., 263.

As we understand the record and interpret it, the plaintiff has no just cause for complaint. The timber cut was the timber which the plaintiff sold and the defendants bought. The nonsuit will be sustained.

Affirmed.

J. C. HAMMOND AND J. B. HAMMOND, COPARTNERS, TRADING AND DOING BUSINESS AS HAMMOND BROTHERS, v. E. T. WILLIAMS.

(Filed 24 May, 1939.)

1. Limitation of Actions § 3b—Conflicting evidence as to whether last item entered properly obtained in mutual, open and current account held for jury.

Plaintiffs, copartners, contended that the last item in the mutual, open and current account with defendant was entered within three years next preceding the institution of the action. Defendant contended that this item was entered after the partnership had been incorporated and that therefore it was not an item in the mutual, open and current account with the partnership. Plaintiff contended that notwithstanding the granting of a charter of incorporation the partnership continued to do business until some time after the item in question was entered. *Held:* Conflicting evidence as to whether the item in question was entered in dealings with the partnership or with the corporation was properly submitted to the jury.

2. Appeals and Error § 39d—

The exclusion of evidence cannot be held prejudicial when the record fails to show what the answer of the witness would have been had he been permitted to answer the question.

3. Same—

Appellant must show that evidence excluded was material in order for its exclusion to be held prejudicial.

4. Corporations § 4a—

While incorporators became a body incorporate from the date the certificate of incorporation is filed in the office of the Secretary of State, C. S., 1116, there is no presumption that the corporation is organized and doing business as such from that time, the time from which it begins to do business as a corporation being a question of fact to be proved as any other fact.

5. Appeal and Error § 39e—

The charge must be prejudicial to appellant in order for his exception thereto to be sustained.

HAMMOND *v.* WILLIAMS.

APPEAL by defendant from *Bivens, J.*, at September Term, 1939, of MOORE.

Civil action to recover upon mutual, open and current account.

Plaintiffs allege and on trial offered evidence tending to show that upon accounting between them and defendant of mutual dealings from 22 October, 1928, to 21 June, 1934, defendant is indebted to them in the sum of $790.85, as balance due on mutual, open and current account.

Defendant in his answer and on the trial admits such dealings prior to 2 January, 1934, but denies that he is indebted to plaintiffs in any amount whatever, and pleads the three-year statute of limitation as to any item charged against him by plaintiffs more than three years prior to the date of the institution of this action. C. S., 421 and 441. Further, by way of counterclaim defendant avers and offered evidence tending to show that upon a correct accounting of their dealings with him, plaintiffs are indebted to him in the sum of $646.74.

In reply plaintiffs deny that they are indebted to defendant in any sum as averred in his counterclaim, and as against such claim plead the three-year statute of limitations. C. S., 421 and 441.

Issues were submitted to and answered by the jury as follows:

"1. Is the defendant indebted to the plaintiffs, and, if so, in what amount? A. '$790.85.'

"2. Are the plaintiffs indebted to the defendant and, if so, in what amount? A. 'No.'

"3. Are the said causes of action, both by the plaintiffs and the defendant, barred by the statute of limitations? A. 'No.' "

From judgment thereon in favor of the plaintiffs, defendant appeals to the Supreme Court and assigns error.

Seawell & Seawell for plaintiffs, appellees.

J. H. Scott and W. R. Clegg for defendant, appellant.

WINBORNE, J. Careful consideration of each exceptive assignment on this appeal fails to reveal error.

Matters stressed by appellant in the main relate to controverted facts bearing on the question of the statute of limitations. Defendant contends that the mutual dealings between him and plaintiff closed on 2 January, 1934, and that no item in the account is within the three years next preceding 19 June, 1937, the date on which this action was instituted. In support of this contention, defendant contended below and offered evidence tending to show that on 2 January, 1934, individual plaintiffs took out certificate of incorporation in the name of "Hammond Brothers, Incorporated"; that they ceased to operate as a partner-

ship; and that a new account was opened by the corporation with defendant, which covered all subsequent transactions appearing as items in the statement of plaintiffs' claim.

On the other hand, plaintiffs contend and offered evidence tending to show that, while it is true that a certificate of corporation was issued by the Secretary of State to Hammond Brothers, Incorporated, on 2 January, 1934, the corporation did not take over the partnership business until 1 July, 1934; and that the last item in the mutual account was on 21 June, 1934, and within the period of three years next preceding the institution of this action. C. S., 421 and 441.

This presented a factual controversy for decision by the jury. It was fairly presented in the charge.

Defendant stresses specifically exceptions to the ruling of the court in sustaining objection to these questions:

"Q. I will ask you if that is not a statement you sent Mr. Williams after you were incorporated in 1934 for material he purchased from you?

"Q. Mr. Hammond, I will ask you what that is? A. 'A check in connection with the corporation.' "

The record is silent as to what the answer would have been to the first question. Likewise the record fails to show the date of the check or other *indicia* relating thereto from which to determine its materiality. Under these circumstances, if the rulings of the court be erroneous, we cannot say that they are prejudicial.

Defendant excepts to this portion of the charge: "Now, gentlemen, the court instructs you that the mere fact that a person incorporates and files incorporation papers in the office of the clerk of the Superior Court and otherwise complies with the statutory laws of North Carolina does not mean, does not necessarily mean he must operate as to that particular corporation, and therefore it does not necessarily mean that because these papers were recorded they were operating as a corporation."

The challenge is not well taken. While the statute, C. S., 1116, provides that the incorporators become a body corporate from the date the certificate of incorporation is filed in the office of the Secretary of State, *Britt v. Howell,* 210 N. C., 475, 187 S. E., 566, there is no presumption that the corporation is organized and doing business as such from that time. These are questions of fact which are subject to be, and may be proved as any other fact.

While not excepting to the form of the third issue, defendant excepts to various parts of the charge in which the court quoted the issue and declared the burden of proof thereon. It is assumed that the issue was so framed because the respective claims admittedly relate to the balance

due on mutual, open and current account. We do not approve the form, but perusal of the charge fails to disclose error prejudicial to defendant. The court plainly charged the jury that the burden of proof on this issue was upon the plaintiff. With this defendant cannot complain.

Reference to other assignments is deemed unnecessary.

In the judgment below we find

No error.

STATE v. CLEVELAND JONES.

(Filed 24 May, 1939.)

Arson § 3: Criminal Law § 32b—Circumstantial evidence of defendant's guilt of arson held insufficient to be submitted to the jury.

Evidence that fresh footprints made by defendant were found about the dwelling house in question the morning after it caught fire and burned to the ground, that the night it caught fire it was occupied by the owner and his family, and that bad feeling existed between the defendant and the owner of the house, *is held* insufficient to be submitted to the jury as to defendant's guilt of arson in the absence of evidence that the fire was of incendiary origin, or that, even conceding that it was of incendiary origin, that it was set fire by defendant, the mere showing of the motive and the presence and opportunity of defendant to commit the offense being insufficient to exclude all reasonable hypothesis of innocence.

APPEAL by defendant from *Burney, J.*, at January Term, 1939, of HOKE. Reversed.

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

H. W. B. Whitley for defendant.

SCHENCK, J. This is an appeal from a judgment of death upon conviction of arson.

When the State had produced its evidence and rested its case the defendant moved to dismiss the action and for judgment of nonsuit and upon the refusal of his motion preserved exception, and after all the evidence in the case was concluded the defendant moved again for judgment of nonsuit and preserved exception to the refusal to grant his motion. C. S., 4643.

The evidence produced at the trial was sufficient to prove that during the night of 9 November or early morning of 10 November, 1938, the dwelling house of one Quincy Smith, while occupied by him and his

wife and children and a brother, caught fire and was burned to the ground; that Smith and his family and brother went to bed about 10 o'clock p.m., that there was a hard rain about 10:30 o'clock p.m., that between the hours of 2 and 3 o'clock a.m., Smith was awakened and found that his house was on fire, and that by quick action and "hollering and whooping" he got his family "roused up" and "got them out"; that when Smith discovered the fire "the west side of the kitchen was burnt plumb down"; that in the early morning of 10 November, when Quincy Smith went to feed his stock he observed fresh human tracks, made since the rain of the night before, near his barn and on a path leading from where the defendant was living to Smith's house; that it was subsequently demonstrated that these tracks were made by the defendant; and that some bad feeling existed between the defendant and Smith.

There was sufficient evidence to be submitted to the jury upon the issue of the defendant's being at the house on the night it was burned, and also of a motive for the defendant to set fire to the house; but even if it be conceded that the evidence established that the defendant had an opportunity to commit the crime and had a motive to commit the crime, in the absence of any evidence that the fire was of an incendiary origin, or even if it be further conceded that the fire was of incendiary origin, there is no evidence that this defendant set fire to the house. No one saw the defendant at the house at the time it was set fire, if it was set fire.

As was said by *Merrimon, C. J.,* in *S. v. Goodson,* 107 N. C., 798: "This full summary of the incriminating facts, taken in the strongest view of them adverse to the prisoner, excite suspicion in the just mind that he is guilty, but such view is far from excluding the rational conclusion that some other unknown person may be the guilty party. The mind is not simply left in a state of hesitancy and anxious doubt—it refuses to reach a conclusion."

"It is the accepted rule of law, at least in felonies and capital cases, that where the State relies for a conviction upon circumstantial evidence alone, the facts established or adduced on the hearing must be of such a nature and so related to each other as to point unerringly to the defendant's guilt and exclude every rational hypothesis of innocence. *S. v. Brackville,* 106 N. C., 710; *S. v. Goodson,* 107 N. C., 798; *S. v. Wilcox,* 132 N. C., 1139; 23 C. J., 49; 8 R. C. L., 225; *Rippey v. Miller,* 46 N. C., 479." *Stacy, J.,* in partially concurring opinion in *S. v. Melton,* 187 N. C., 481, 483.

We think the evidence simply raises a strong suspicion of the defendant's guilt, but that it does not in any reasonable view prove his guilt. Taking the strongest view of the evidence adverse to the defendant, it leaves the mind in a state of doubt and uncertainty as to his guilt. The

facts of which there is sufficient evidence, whether taken severally or collectively and in their combined force, are not necessarily inconsistent with the defendant's innocence, and do not exclude the rational conclusion that the origin of the fire may have been other than set by the defendant.

Tested by the rule enunciated by this court we are of the opinion that the evidence adduced was insufficient to be submitted to the jury upon the issue of the defendant's guilt of the felony of which he stood charged, and that the judgment of the Superior Court should be reversed. It is so ordered.

Reversed.

MRS. EMMA J. EDWARDS v. MRS. R. J. (MARY L.) HAIR.

(Filed 24 May, 1939.)

1. Limitation of Actions § 16: Mortgages § 32e—Party asserting that power of sale was barred at time of foreclosure has burden of proof.

Plaintiff mortgagor instituted this action to set aside foreclosure and recover possession of the land upon her contention that at the date of sale the power of sale was barred by C. S., 2589. *Held:* An instruction that the burden was on defendant, the purchaser at the sale, to prove that the power of sale was not barred at the time of foreclosure, is error, the burden being upon plaintiff to prove that the foreclosure deed, attacked by her, was inoperative. The cases in which plaintiff, upon the plea of the statute of limitations by defendant, must prove that he has brought a live claim into court, distinguished.

2. Mortgages § 32a—

There is a presumption of law in favor of regularity in the exercise of the power of sale in a mortgage or deed of trust.

3. Mortgages § 32e—

A foreclosure deed executed pursuant to a sale held after the power of sale is barred by C. S., 2589, is voidable and not void.

4. Limitation of Actions § 1: Mortgages § 32e—

The fact that the notes secured by the instrument are not under seal and are barred does not in itself render the right of foreclosure inoperative under C. S., 2589, since the bar of the statute affects the remedy but not the right.

5. Limitation of Actions § 12a: Mortgages § 32e—

Payment on the notes secured by the instrument by a maker repeals the bar of the statute of limitations as to a comaker of the notes and the mortgage so that an action to foreclose the mortgage within ten years from such payment is not barred as to such comaker by C. S., 2589.

APPEAL by defendant from *Sinclair, J.*, at October Term, 1938, of ROBESON. New trial.

EDWARDS *v.* HAIR.

Civil action to remove cloud from title of real property owned by the plaintiff, and to recover possession of said property.

The plaintiff and her husband, J. F. Edwards, being the owners of certain lands in Robeson County, on 3 March, 1920, executed a mortgage deed on said land to R. J. Hair to secure the payment of four notes totaling $2,040, the last of which matured 3 March, 1924. Both plaintiff and her husband signed said notes as makers. Thereafter, J. F. Edwards conveyed his interest in said lands to his wife, Emma J. Edwards. R. J. Hair died, leaving a last will and testament in which he devised the note and mortgage of plaintiff and her husband to his wife, the defendant. Thereafter, H. S. Averitt, executor under the will of R. J. Hair, deceased, foreclosed said mortgage and executed a deed of foreclosure 2 April, 1936, to the defendant. Whereupon the defendant took possession of the premises so conveyed.

The plaintiff brings this action, alleging that at the time of the foreclosure of said mortgage the power of foreclosure therein contained was inoperative and had become null and void by reason of the fact that more than ten years had elapsed since the last payment upon the note secured thereby.

The plaintiff alleged and offered evidence tending to show that no payments were made on the note secured by the mortgage after the year 1925. The defendant offered evidence tending to show that a payment was made thereon 27 October, 1933.

The issue: "1. Was the mortgage executed by J. F. Edwards and wife to R. J. Hair barred by the statute of limitation at the time of the foreclosure?" was answered "Yes," From judgment thereon the defendant appealed.

George T. Deans and F. D. Hackett for plaintiff, appellee.
John D. Canady and McLean & Stacy for defendant, appellant.

BARNHILL, J. In her action the plaintiff seeks also to have declared void and cancelled as a cloud on her title a tax deed from Robeson County to the plaintiff. No question in respect to this feature of plaintiff's case is at issue on this appeal.

On the issue submitted the court charged the jury: "The burden is upon the defendant upon that issue, gentlemen, to satisfy you from the evidence and by the greater weight of the evidence, that the mortgage was not barred by the statute of limitations." In this there was error. The case at bar is not one in which it is alleged by the defendant that the plaintiff has brought a stale cause of action into court. The cases which hold that under such circumstances the burden is on him who asserts the claim to show that it is not barred by the statute of limitations pleaded have no application.

There is a presumption of law in favor of regularity in the exercise of the power of sale in a mortgage or deed of trust. *Jenkins v. Griffin,* 175 N. C., 184, 95 S. E., 166; *Berry v. Boomer,* 180 N. C., 67. Plaintiff's action is bottomed upon the allegation that at the time of the execution of the foreclosure deed the power of sale contained in the mortgage had become inoperative under the provisions of C. S., 2589, and that, therefore, the foreclosure deed executed by the mortgagee, or his personal representative, is null and void and vests no title to the premises thus attempted to be conveyed to the grantee in the foreclosure deed. The foreclosure deed is voidable only and not void. *Berry v. Boomer, supra.* The plaintiff, in her action in attacking the deed, has assumed and must carry the laboring oar.

The notes as copied in the record indicate that they are not under seal. The fact that an action on the debt may be barred does not necessarily mean that the right of foreclosure has become inoperative under the provision of C. S., 2589. "It is well settled that an action upon the debt may be barred without affecting the right to maintain an action to foreclose a mortgage to secure it. *Capehart v. Dettrick,* 91 N. C., 344. This is because the bar of the statute affects only the remedy and not the right." *Menzel v. Hinton,* 132 N. C., 660, 44 S. E., 385; *Jenkins v. Griffin, supra.* If the note is not under seal it may be barred in three years, and yet the mortgage securing it might not be barred in less than 10 years. *Jenkins v. Griffin, supra.*

Plaintiff's contention that the payment of 27 October, 1933, if made at all, was made by J. F. Edwards and not by the plaintiff, and that, therefore, it does not repel the statute of limitations as to her, cannot be sustained. At the time of the execution of the mortgage title to the premises was in the plaintiff and her husband, J. F. Edwards. He is a comaker of the notes and of the mortgage. It is well settled in this State that a payment by one of two or more principals before the bar of the statute repels the statute of limitations as to all persons in the same class. As between comakers and makers and sureties there is a community of interest and a common obligation such as to make a payment by one repel the statute as to all. *Dillard v. Mercantile Co.,* 190 N. C., 225, 129 S. E., 598, and cases there cited. If a payment was made in 1933, as contended by the defendant, then at that time the power of sale was not barred and the payment served to stop the running of the statute of limitations as to all those who were principals in the execution of the mortgage.

The charge of the court upon the issue submitted was prejudicial error entitling the defendant to a

New trial.

MERIDEN NATIONAL BANK v. M. H. TURNER AND WIFE, FANNIE H. TURNER.

(Filed 24 May, 1939.)

Pledges § 3—Where sale of securities at less than their face value is established, burden is on pledgee to show due diligence.

Plaintiff instituted this action to recover balance due on a note secured by a deed of trust and to foreclose the instrument. Defendants contended that they had deposited with plaintiff securities worth more than the amount of the mortgage debt, and plaintiff admitted the receipt of the securities and that it had sold same at private sale for less than face value and for less than defendants' mortgage notes. *Held:* While ordinarily the burden is upon the debtor to prove the affirmative defense of payment in whole or in part, where a pledgee admits the sale of the securities at private sale at a substantial loss, the burden is upon the pledgee to show reasonable diligence and good faith in the sale of the securities and the proper application of the proceeds, and an instruction that the burden was upon the pledgor to show that the pledgee failed to exercise reasonable diligence and good faith, is error.

APPEAL by defendants from *Bivens, J.*, at September Term, 1938, of MOORE. New trial.

The plaintiff instituted this action to recover the balance due on two certain notes executed by defendants and to foreclose a deed of trust on real property given to secure the same. The defendants admitted execution of the notes and deed of trust, and alleged further that they deposited with plaintiff a large amount of stocks and bonds as collateral security therefor, together with deed and deed of trust conveying certain real property in Meriden, Connecticut; that the value of said property was largely in excess of any indebtedness due plaintiff, and that plaintiff has disposed of all of said property and has failed to account for the personal property so placed in its hands, or for the proceeds of sales of defendants' real and personal property which should have more than discharged defendants' debt.

Upon the trial, issues were submitted to the jury to determine (1) the amount of the indebtedness of defendants on the notes sued on, and (2) whether in making disposition and sale of defendants' property the plaintiff exercised reasonable diligence and good faith with respect thereto. The jury answered both issues in favor of the plaintiff, and from judgment on the verdict, defendants appealed.

Seawell & Seawell for plaintiff.

Johnson & McLeur, J. C. B. Ehringhaus, and Charles Aycock Poe for defendants.

DEVIN, J. Appellants' principal assignment of error relates to the judge's charge to the jury on the second issue with respect to the burden of proof. The trial judge charged the jury upon that issue that the burden of proof was upon the defendants to satisfy the jury by the greater weight of the testimony that the plaintiff bank did not exercise reasonable diligence and good faith in the disposition of the described property. In this we think there was error entitling the defendants to a new trial.

The plaintiff having admitted the receipt of the property as collateral security for the defendants' notes, it occupied a fiduciary relationship in connection therewith, and when it was testified by the president of plaintiff bank that all of this property, real and personal, had been disposed of at private sale for much less than its face value and for less than defendants' notes, the duty was imposed upon the plaintiff to show that it acted with reasonable diligence and good faith in the disposition of said property and in the application of the proceeds to the discharge of defendants' notes. *Cook v. Guirkin,* 119 N. C., 13, 25 S. E., 715; 49 C. J., 992.

Ordinarily, when a defendant sets up an affirmative defense or pleads payment in whole or in part, the onus of establishing such affirmative defense rests upon the defendant. *Wilson v. Casualty Co.,* 210 N. C., 585, 188 S. E., 102; *Davis v. Dockery,* 209 N. C., 272, 183 S. E., 396. But where a debtor deposits property with a creditor as security for a debt, to be applied to the discharge of the obligation, and subsequently that property is disposed of by the creditor at private sale and at a substantial loss, and these facts are admitted or established by proof in a suit by the creditor upon the debt, the law casts upon the pledgee the burden of showing reasonable diligence and good faith in the disposition of the property and the proper application of the proceeds. The reasonableness of this rule finds additional support where the essential facts are within the peculiar knowledge of the creditor. *Cook v. Guirkin, supra; Meredith v. R. R.,* 137 N. C., 478, 50 S. E., 1; *Walker v. Parker,* 169 N. C., 150, 85 S. E., 306; *Hunt v. Eure,* 189 N. C., 482 (490), 129 S. E., 593.

In *Bank v. Knox,* 187 N. C., 565, 122 S. E., 304, where a draft was placed in the hands of a bank by a debtor, the proceeds of the draft to be applied as a credit on the debtor's note to the bank, it was said: "The burden was on the bank to show due diligence and care, that is such diligence and care as a man of ordinary prudence would exercise in the same or similar circumstances in collecting and enforcing the aforesaid draft."

In *Bright v. Hood, Commissioner of Banks,* 214 N. C., 410, it was held that where bonds were placed with a bank as a special deposit, a

duty was imposed upon the bank with respect thereto, and where there was failure to return the bonds the burden was on the bank to account for them. This court said: "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." 119 A. L. R., 820.

As the case goes back for a new trial, we deem it unnecessary to discuss other matters debated in the briefs and on the argument.

New trial.

H. G. POOL, TRADING AS MODEL LAUNDRY, v. PINEHURST, INCORPORATED.

(Filed 24 May, 1939.)

1. Trial § 22b—

Upon demurrer, the evidence must be considered in the light most favorable to the plaintiff.

2. Sales § 25—Evidence held sufficient for jury on issue of worthlessness of article for purpose for which it was sold.

Plaintiff's evidence tended to show that he purchased a boiler for use in his laundry, that defendant had knowledge of the purpose for which it was bought, that the boiler leaked before the stream pressure reached the necessary level, and that it was condemned and its use prohibited by the State authorities. *Held:* If the article was worthless for the use for which it was intended, and if defendant had knowledge of the purpose for which it was bought, plaintiff would be entitled to recover the purchase price paid and the notes given for the balance of the purchase price on the ground of failure of consideration, irrespective of any warranty, and the evidence, considered in the light most favorable to plaintiff, was sufficient to be submitted to the jury upon the issue.

APPEAL by plaintiff from *Phillips, J.*, at February Term, 1939, of MOORE. Reversed.

The pleadings are susceptible to such interpretation as to make this an action to recover $200 paid and a note for $200 given by the plaintiff to the defendant for a boiler sold and delivered to plaintiff by the defendant, wherein it is alleged in effect that soon after the delivery of the boiler to the plaintiff it was condemned by the State authorities and its use prohibited, and therefore could not be used for the purpose for which the defendant was informed it was being purchased, or for any other useful purpose, and that said boiler was absolutely worthless when sold and delivered.

When the plaintiff had introduced his evidence and rested his case the defendant moved to dismiss the action and for a judgment as in case of nonsuit, C. S., 567, which motion was allowed. From judgment accordant with the motion the plaintiff appealed, assigning error.

Seawell & Seawell for plaintiff, appellant.
U. L. Spence for defendant, appellee.

SCHENCK, J. The evidence when considered in the light most favorable to plaintiff, as it must be upon a demurrer thereto, tends to show that a boiler was sold to the plaintiff by the defendant for an agreed price of $400, $200 to be paid upon delivery and $200 to be evidenced by note; that the payment was made and the note delivered; that the boiler was turned over to the plaintiff at the defendant's place of business in Pinehurst, and hauled by the plaintiff 12 miles to his place of business in Carthage; that as soon as the boiler was set up and fired at plaintiff's place of business, discovery was made that it leaked at a patched place thereon before it reached a pressure of one hundred pounds; that the boiler was condemned and its use prohibited by the State authorities; that it was never used by the plaintiff and was incapable of being put to any useful purpose, and was worthless. The evidence further tends to show that the plaintiff disclosed to the defendant, which operated a laundry in Pinehurst, that he intended to use the boiler in his laundry in Carthage.

If an article "purchased by the plaintiff were so defective that it was not reasonably fit for use for which it was intended, then the plaintiff would be entitled to recover of the seller for want of consideration. . . . It is believed that a covenant, however expressed, must be regarded as *nude pact*, and not binding in law, if founded solely upon considerations which the law holds altogether insufficient to create a legal obligation. . . . If it (the article sold) be of no value to either party, it of course cannot be the basis of a sale. . . . The refusal to warrant against worthlessness would fall with the balance of the supposed contract for want of consideration." *Williams v. Chevrolet Co.*, 209 N. C., 31, and cases there cited.

We are of the opinion, and so hold, that there was sufficient evidence adduced by the plaintiff to be submitted to the jury upon an issue as to whether the boiler sold was worthless to the extent that it was not reasonably fit for the purpose for which the defendant had knowledge that it was being purchased by the plaintiff, and for this reason the judgment below is

Reversed.

BANK OF PINEHURST v. R. A. DERBY.

(Filed 24 May, 1939.)

Appearance § 1: Judgments § 11—Defendant making a special appearance and moving to dismiss is entitled to final determination of his motion prior to hearing of plaintiff's motion for judgment by default.

Defendant made a special appearance and moved to dismiss the action for want of proper service. Later plaintiff moved to dismiss defendant's motion and for judgment by default. The clerk heard both the motions together; denied defendant's motion and granted plaintiff's motion; and upon appeal the Superior Court affirmed the judgment of the clerk as a whole. *Held:* Defendant was entitled to appeal from an adverse ruling by the clerk and to a final determination of his motion prior to the hearing of plaintiff's motion for judgment by default, since he could not resist plaintiff's motion without making a general appearance, and since he is entitled to answer or demur within 30 days after the final determination of his motion to dismiss upon a special appearance, C. S., 509, and the cause is remanded by the Supreme Court for further proceedings according to law.

APPEAL by defendant from *Bivens, J.*, at December Term, 1938, of MOORE.

Civil action to recover deficiency arising from stock assessment levied under the provisions of Michie's Code (1935), sec. 219 (f).

The plaintiff is a resident corporation; the defendant a nonresident of the State, owning real estate in Richmond County.

An order that service be made by publication and attachment was signed by the clerk on 11 April, 1934. The sheriff made his return on 17 April following. On 18 June, 1934, an alias summons was ordered to issue against the defendant.

Thereafter, on 18 July, 1934, the defendant entered a special appearance and moved "to dissolve and dismiss warrant of attachment" for want of proper service or for want of jurisdiction.

Nearly four years later, to wit, on 23 June, 1938, the plaintiff filed a motion to dismiss the defendant's motion made upon special appearance and for judgment by default.

These two motions were heard together on 20 July, 1938, and resulted in judgment by the clerk denying the defendant's motion and allowing the plaintiff's motion. On appeal to the Superior Court, the judgment of the clerk was sustained and the appeal of the defendant dismissed.

From this ruling the defendant appeals, assigning error.

U. L. Spence for plaintiff, appellee.
Hoyle & Edwards for defendant, appellant.

STACY, C. J. By hearing the two motions together the defendant was apparently disadvantaged, for he could not resist the plaintiff's motion in its entirety or that part asking for judgment by default, without waving his special appearance. *Scott v. Life Assn.*, 137 N. C., 515, 50 S. E., 221. Nor could he ask for time to plead to the merits without making a general appearance. *Abbitt v. Gregory,* 195 N. C., 203, 141 S. E., 587; *Currie v. Mining Co.,* 157 N. C., 209, 72 S. E., 980. He gave notice of appeal from the denial of his motion, which was his right. *Denton v. Vassiliades,* 212 N. C., 513, 193 S. E., 737. *Cf., Johnson v. Ins. Co., ante,* 120. He still has thirty days "after the final determination of a motion to dismiss upon a special appearance," C. S., 509, within which to file demurrer or answer to the complaint.

The special appearance of the defendant, if it is to be preserved, precludes separate consideration on appeal of the dual rulings made by the clerk. The judgment of the Superior Court is *in solido.*

The judgment will be vacated and the cause remanded for further proceedings as to justice appertains and the rights of the parties may require.

Error and remanded.

STATE v. ALFRED CAPER.

(Filed 24 May, 1939.)

1. Criminal Law §§ 59, 81a—

A motion to set aside the verdict as being against the weight of the evidence is addressed to the discretion of the trial court and his refusal to grant the motion is not reviewable on appeal.

2. Homicide §§ 25, 30: Criminal Law § 59—

The proper procedure to test the sufficiency of the evidence to support a verdict of guilty of first degree murder is by motions to nonsuit aptly made, or by a motion for a directed verdict on the capital charge with apt exception if overruled, and a motion to set aside the verdict as against the weight of the evidence does not properly present the question for review upon appeal.

3. Homicide § 25—

Evidence that defendant borrowed a rifle in the afternoon, went to the home of the deceased about 8:00 p.m., called him to the porch of his house and shot him, and returned the rifle to the owner before daylight the following morning, *is held* sufficient to show premeditation and deliberation and to support a verdict of guilty of murder in the first degree.

APPEAL by defendant from *Burney, J.,* at January Term, 1939, of ROBESON.

STATE *v.* CAPER.

Criminal prosecution tried upon indictment charging the defendant and another with the murder of one J. C. McNeill.

Verdict: Guilty of murder in the first degree.

Judgment: Death by asphyxiation.

The prisoner appeals, assigning errors.

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

J. E. Carpenter for defendant.

STACY, C. J. The record discloses that on the night of 23 November, 1938, about the hour of 8:00 p.m., the defendant went to the home of the deceased, called him to the porch of his house, and shot him. It is in evidence that the defendant borrowed a rifle on the afternoon of the killing, bought some cartridges, and returned the rifle to the owner before daylight on the following morning. It is also in evidence that the bullet taken from the body of the deceased was fired from this rifle.

The only exception urged for error is the one addressed to the refusal of the court to set aside the verdict as against the weight of the evidence, which is a discretionary matter and not reviewable on appeal. *S. v. Merrick,* 172 N. C., 870, 90 S. E., 257; *S. v. Johnson,* 161 N. C., 264, 76 S. E., 679; *S. v. Hancock,* 151 N. C., 699, 66 S. E., 137. Under this assignment, the defendant argues the absence of motive and contends that premeditation and deliberation have not been established by the evidence. Speaking to a similar situation in *S. v. Bittings,* 206 N. C., 798, 175 S. E., 299, it was said: "In the present case, for instance, if the defendant wished to challenge the sufficiency of the evidence to show premeditation and deliberation beyond a reasonable doubt, as indicated on the argument, motion to nonsuit under C. S., 4643, on the capital charge, should have been lodged at the close of the State's case, exception noted, if overruled, and the motion renewed at the close of all the evidence, exception again noted, if overruled; and, in preparing the statement of case on appeal, an assignment of error should have been made based upon this second exception. *S. v. Lawrence,* 196 N. C., 562, 146 S. E., 395; *S. v. Sigmon,* 190 N. C., 687, 130 S. E., 854; *S. v. Killian,* 173 N. C., 792, 92 S. E., 499; *Nowell v. Basnight,* 185 N. C., 142, 116 S. E., 87; *Batson v. Laundry,* 202 N. C., 560, 163 S. E., 600; *Nash v. Royster,* 189 N. C., 408, 127 S. E., 356. But no such exception and assignment of error appear on the record. In lieu of this, the defendant might have moved for a directed verdict on the capital charge, noted an exception, if overruled, and predicated an assignment of error upon this exception. But the record contains no such exception and assignment of error. The question therefore is not properly presented."

Nevertheless, if we overlook the inadequacy of the assignment, it is quite apparent from a perusal of the record that the evidence is amply sufficient to support a verdict of murder in the first degree. *S. v. Satterfield,* 207 N. C., 118, 176 S. E., 466; *S. v. Coffey,* 210 N. C., 561, 187 S. E., 754; *S. v. Evans,* 198 N. C., 82, 150 S. E., 678. There was no error in overruling the defendant's motion.

The verdict and judgment will be upheld.

No error.

C. UTLEY PRIDGEN v. NETTIE INMAN LYNCH.

(Filed 24 May, 1939.)

1. Courts § 2d—

A judgment of a justice of the peace is vacated by appeal, and thereupon the action is pending in the Superior Court for trial *de novo.* C. S., 660.

2. Judgments § 33c—

Where, upon appeal from a justice of the peace, the Superior Court dismisses the action, but not the appeal, by consent of the parties and without prejudice to their rights, such judgment will not bar a subsequent action between the parties involving the same subject matter.

APPEAL by plaintiff from *Cranmer, J.,* at November Term, 1938, of COLUMBUS. Reversed.

E. M. Toon and R. G. Grady for plaintiff.
Lyon & Lyon for defendant.

DEVIN, J. This was an action by a farm tenant to recover damages from his landlord for wrongful interference with his crop, and also for malicious abuse of process in procuring his removal from the land. The defendant pleaded estoppel by judgment. The court below held the plaintiff estopped by the judgment rendered in a summary ejectment proceeding which had been instituted against him by the present defendant, and thereupon dismissed the action. The plaintiff appealed to this court, assigning error in the judgment predicated upon this ruling.

The facts relative to the former suit, as disclosed by the record, may be summarized as follows: In January, 1936, the plaintiff Pridgen, pursuant to contract, moved upon defendant's land and began the cultivation of a crop thereon. May 18, 1936, defendant Lynch instituted before a justice of the peace summary ejectment proceedings against him, alleging failure to perform his rental contract. Judgment was rendered by the justice of the peace in favor of the defendant herein and against Pridgen. The plaintiff Pridgen gave notice of appeal and

the appeal was duly docketed in the Superior Court of Columbus County. The plaintiff Pridgen, however, being unable to give bond in that case, was dispossessed. Subsequently at November Term, 1937, of the Superior Court, in the summary ejectment case entitled "Nettie Inman Lynch *v.* Utley Pridgen," then pending, the judge entered judgment dismissing the action. The pertinent portion of the judgment was in these words: "Thereupon, by consent of the parties, and without prejudice to the rights of the plaintiff or the defendant, it is considered, ordered and adjudged that this action be and the same is hereby dismissed."

It is apparent that this judgment is insufficient to support the plea of *res judicata,* and that the court below was in error in holding the plaintiff estopped thereby to maintain this action. The judgment of the justice of the peace was vacated by the appeal, and the action was pending in the Superior Court for trial *de novo.* C. S., 660, *Bagging Co. v. R. R.,* 184 N. C., 73, 113 S. E., 595. The Superior Court dismissed the action—not the appeal—without prejudice to the rights of the parties. In these respects the facts here are unlike those upon which the decision in *Savage v. McGlawhorn,* 199 N. C., 427, 154 S. E., 673, was based.

We conclude that the judgment of the court below sustaining the plea of *res judicata* and dismissing the action, must be reversed.

Reversed.

MRS. MARY MAUNEY v. LUZIER'S, INCORPORATED.

(Filed 24 May, 1939.)

Sales § 27—Evidence held insufficient to show any damages proximately resulting from breach of warranty, express or implied.

Plaintiff's evidence tended to show that she purchased from defendant a cosmetic sold for the purpose of clearing up pustules (blackheads), that after using the preparation her facial condition became worse, later requiring the attention of a physician. There was no evidence as to the cause or nature of the condition of the skin of plaintiff's face after she had used the preparation. *Held:* The evidence fails to show any damages proximately resulting from breach of warranty, express or implied, and defendant's motion as of nonsuit was properly granted.

APPEAL by plaintiff from *Phillips, J.,* at October-November Term, 1938, of GUILFORD. Affirmed.

This is a civil action to recover damages for breach of warranty in the sale by defendant to the plaintiff of certain preparations manufactured by the defendant.

Plaintiff alleges that at the solicitation of defendant's agent she purchased certain cosmetics manufactured by the defendant and marketed for the purpose of curing, preserving and restoring a normal, healthy condition of the skin; that at the time of the purchase she discussed with said agent the plaintiff's facial condition and that the agent selected the preparations to be purchased by the plaintiff for the purpose of clearing up and curing her facial condition; that said preparations were used pursuant to instructions given and represented to be a complete "Acne Service"; that after the plaintiff had used the preparations her face began to break out; that she communicated with the agent who directed her to continue to use said preparations as the condition so created was to be expected from the use of same in accordance with the directions given plaintiff and that upon continuing to use the preparations her facial condition became such that she had to undergo treatment by a doctor over a period of several weeks.

The plaintiff testified that at the time of the purchase she had no abnormal skin condition of the face other than a few pustules (blackheads), and that she received from the defendant's agent upon her first visit a booklet which contained, among other things, the following: "Luzier's Acne Service is neither a treatment nor a cure in the medical sense of those terms. The cause of acne is usually systemic, occasioned by poor health or faulty diet—both of which require professional advice. Luzier's Acne Service is to aid in clearing up the external condition, those unsightly pustules (pimples) that mar the countenances of most persons afflicted with acne."

At the conclusion of plaintiff's evidence there was a judgment of nonsuit. The plaintiff excepted and appealed.

King & King for plaintiff, appellant.
Sapp & Sapp for defendant, appellee.

PER CURIAM. The plaintiff relied solely upon her own testimony. The physician who attended her did not testify. Therefore, it does not appear what the nature of the condition of the skin of her face was after she used preparations purchased from the defendant. Neither does the cause thereof appear. There is a total absence of evidence of any damage proximately resulting from the breach of any warranty, either express or implied. While this is not an action for malpractice by a physician, what is said in *Lippard v. Johnson, ante,* 384, is in point.

The judgment below is

Affirmed.

JOSEPH T. CARRUTHERS, JR., ADMINISTRATOR OF HERBERT L. BURROUGHS, v. ATLANTIC & YADKIN RAILWAY COMPANY.

and

JOSEPH T. CARRUTHERS, JR., ADMINISTRATOR OF LUTHER BURROUGHS, v. ATLANTIC & YADKIN RAILWAY COMPANY.

(Filed 31 May, 1939.)

1. Trial § 31: Negligence § 20—Charge held for error as containing an expression of opinion by the court that plaintiff had established his causes of action.

In these actions to recover for the death of plaintiff's intestates, alleged to have been caused by the negligence of defendant, the form of the charge of the court *is held* for error as amounting to an expression of opinion by the court in repeatedly charging the duties owed by defendant to plaintiff's intestates and the circumstances under which the jury should answer the first issues in the affirmative without charging upon what conditions the issues should be answered in the negative.

2. Trial § 29b—

The failure of the court to explain the law arising on the evidence favorable to defendant is error, and mere silence of counsel upon the statement of the court after charging the law arising upon plaintiff's evidence that it would not recapitulate the evidence is not a waiver of the substantial rights conferred by C. S., 564.

3. Railroads § 9: Negligence § 10—Instruction on the doctrine of last clear chance held erroneous.

In these actions to recover for the deaths of plaintiff's intestates, killed in an accident at a railroad crossing, the charge of the court upon the doctrine of the last clear chance *is held* for error in that the facts recited in the charge has a basis for the application of the doctrine disclosed negligence on the part of the driver of the car continuing until the moment of impact, and in that the charge on this question conflicted with instructions theretofore given.

4. Trial § 29b: Automobiles § 22—Charge held for error as presenting question of law not supported by the evidence.

In actions to recover for the deaths of plaintiff's intestates, killed in an accident at a railroad crossing while riding as guests in an automobile, an instruction as to the law applicable if the jury should find that the driver of the car used his faculties to determine whether a train was approaching, although usually germane in such actions, will be held for error when there is no evidence upon the whole record to support such charge.

5. Railroads § 9: Evidence § 56—

The rule governing the competency and admissibility of negative evidence tending to show the failure of an engineer to give proper signals of the train's approach to a grade crossing, as laid down in *Johnson v. R. R.*, 214 N. C., 484, approved.

6. Appeal and Error § 41—

Where new trial is awarded for error in the charge, other exceptions, relating to matters which may not arise upon the subsequent hearing, need not be considered.

APPEAL by defendant from *Phillips, J.*, at October 31 Term, 1938, of GUILFORD. New trial.

Civil actions, consolidated for the purpose of trial, in which plaintiff as administrator in each case seeks to recover damages for the alleged wrongful death of his two intestates.

The two intestates, Herbert L. Burroughs and Luther Burroughs, were on 16 October, 1936, passengers on a Ford automobile being driven by one Winifred McNeil on North Carolina Highway No. 61. When the automobile reached the point where said highway crosses the track of defendant's railroad near Climax it was struck by one of defendant's trains and all of the occupants of the car were killed.

There was evidence that the crossing was a "blind" crossing and that a person traveling on an automobile could not see an approaching train until the automobile was within a few feet of the track; that it was a crossing at which the view was partially obstructed; and that it was a crossing at which a person on the highway had an unobstructed view of an approaching train for a considerable distance before reaching the track. There was evidence of one witness on the part of the plaintiff that he was within about 500 feet of the crossing at the time the train approached and he heard no signal given by the train crew. There was evidence on behalf of the defendant that as the train approached the crossing the bell was ringing and the whistle was blown.

Issues were submitted to and answered by the jury in favor of the plaintiff in each case. From judgments thereon the defendant appealed.

Frazier & Frazier and Z. I. Walser for plaintiff, appellee.
Hobgood & Ward and Charles M. Ivey, Jr., for defendant, appellant.

BARNHILL, J. There are numerous assignments of error contained in the record. They relate both to the introduction and rejection of testimony and to portions of the charge of the court. One of the assignments principally relied upon by the defendant is that the court failed to comply with the provisions of C. S., 564, in that: (1) In giving the charge the court by undue emphasis expressed an opinion that facts favorable to the plaintiff were fully and sufficiently proven, and (2) that in giving his charge the court failed to state in a plain and correct manner the evidence in the case and declare and explain the law arising thereon. This assignment of error must be sustained.

The plaintiff relied upon the evidence tending to show that no sufficient and timely warning was given by the train crew as the train approached the crossing, and evidence tending to show that the view of the driver of the automobile as he approached the track was obstructed. He further relied upon the law of concurrent negligence, contending that even if the driver of the automobile was negligent, his negligence concurred with that of the defendant in proximately causing the death of his intestates.

The defendant relied upon evidence tending to show that the view at the crossing was unobstructed; that a reasonable and timely warning was given by the defendant's employees as the train approached the crossing; and that the agents of the defendant were keeping a proper lookout. It contended that upon all the evidence the negligence of the driver of the automobile was the sole proximate cause of the injury and death of plaintiff's intestates.

In charging the jury on the first issue in each case, not including references thereto in the statement of the contentions, the court charged the jury in respect to the duty of the railroad company to give a reasonable and timely warning of the approach of its train ten times. Although there was no evidence of a failure to keep a proper lookout the court charged the jury four times as to the duty of the railroad company in respect thereto. It repeatedly charged the jury that the negligence of the driver of the automobile was not imputable to plaintiff's intestates, and that if the driver of the automobile and the defendant were jointly and concurrently negligent, and such joint and concurrent negligence constituted the proximate cause of the injury and death of plaintiff's intestates, they should answer the first issues "Yes." At no time did the court instruct the jury that upon a failure of proof by the plaintiff of the alleged negligence by the greater weight of the evidence, or upon a finding of no negligence on the part of the defendant, or that if the negligence of the driver of the automobile was the sole proximate cause of the death of plaintiff's intestates, or upon a finding that the defendant had kept a proper lookout and had given a timely warning of the approach of its train, they should answer the first issues "No." Its charge on the first issues dealt exclusively with the law of the case favorable to the plaintiff, except that there were a few abstract statements of the law bearing upon the contentions of the defendant without any application thereof to the evidence. In the statement of the contentions of the defendant the court at one time stated that the defendant contends that the jury should answer the first issues "No." At another time it inadvertently stated that the defendant contended that the jury should answer the first issues "Yes." This one reference in the statement of the contentions of the defendant is the only time the court made

any reference to the fact that it was possible for the jury to answer either of the first issues "No."

The comparatively extensive statement of the law of the case in favor of the plaintiff and the repetitions as to the duty of the defendant were due perhaps to the fact that the plaintiff tendered written instructions which were given by the court. Many of the repetitions are therein contained. It is understandable, likewise, that this may have led the trial court into overlooking its duty to state the law favorable to the defendant and to apply it to the evidence in the case. However this may be, the undue emphasis placed upon the duty of the defendant and the repetition of the circumstances under which the jury would answer the first issues "Yes," when considered in the light of the fact that the jury was at no time instructed upon what conditions it would be its duty to answer the first issues "No," amounted in fact to the expression of an opinion that the plaintiff had fully and sufficiently established his cause of action.

"The judge may indicate to a jury what impression the testimony or evidence has made on his mind, or what deductions he thinks should be made therefrom, without expressly stating his opinion in so many words. This may be done by his manner or peculiar emphasis or by his so arraying and presenting the evidence as to give to one of the parties an undue advantage over the other; or, again, the same result may follow the use of language, or form of expression calculated to impair the credit which might otherwise and under normal conditions be given by the jury to the testimony of one of the parties. *Speed v. Perry,* 167 N. C., 122, 83 S. E., 176; *S. v. Dancy,* 78 N. C., 437. It can make no difference in what way or when the opinion of the judge is conveyed to the jury, whether directly or indirectly, or by the general tone and tenor of the trial. The statute forbids an intimation of his opinion in any form whatever, it being the intent of the law to insure to each and every litigant a fair and impartial trial before the jury. 'Every suitor is entitled by the law to have his cause considered with the "cold neutrality of the impartial judge" and the equally unbiased mind of a properly instructed jury.' *Withers v. Lane,* 144 N. C., 192, 56 S. E., 855." *Stacy, C. J.,* in *S. v. Rhinehart,* 209 N. C., 150.

The failure of the court in the manner heretofore indicated to charge the jury as to the law arising on the evidence favorable to the defendant likewise violates that part of sec. 564 which requires that the court shall state in a plain and correct manner the evidence given in the case and declare and explain the law arising thereon. The mere silence of counsel upon the statement by the court in its charge that "without objection the court will not attempt to recapitulate the evidence, word by word,

of each and every witness, as offered by the plaintiff and by the defendant in each of these cases," is not a waiver of this substantial right conferred by C. S., 564.

In the major portion of its charge the court made the right of the plaintiff to recover to depend upon the establishment, in one or more respects, of the negligence alleged by the plaintiff. In the concluding portion thereof it instructed the jury as follows:

"The question is, whether, after the plaintiff's intestate was in a position of peril, he was seen or could have been seen by defendant's employees, and whether, by the exercise of reasonable and ordinary care the engine could have been stopped or slackened to such an extent that injury could have been averted.

"On that question, the plaintiff insists and contends that according to the evidence of the defendant, that defendant's agents or servants saw the car approaching the railway track or crossing at a distance of 125 feet or more, and that at that time the train was 100 or 150 feet away, and that the train was coming at a rate of speed that it could have been stopped prior to reaching the crossing, if the engineer had used ordinary care in applying his brakes after being warned of the approach of the car and that the car was traveling at a rate of speed that, according to the evidence of the defendant, so the plaintiff insists and contends, that it could not have been stopped, and that it was the duty then of the engineer to stop his train in order to avoid the collision, and that he failed to do so, so plaintiff insists and contends."

Exception was duly entered to these instructions. Upon the facts recited in the statement of the foregoing contention of plaintiff it would not seem that the doctrine of the last clear chance is applicable. In any event, the quoted instruction conflicts with those theretofore given and had a tendency to leave the matter in a state of confusion in the minds of the jury.

All of the occupants of the car were killed. There was no eye witness to the approach of the automobile to the track, living at the time of the trial, except members of the train crew. Their testimony is to the effect that the car was being driven at about 45 miles per hour and did not stop or slacken its speed until it was struck by the train. There is, therefore, no evidence that the driver or the occupants of the car stopped, looked or listened, or in anywise used their faculties to ascertain whether a train was approaching. There was a highway warning sign and a railroad crossing sign and the railroad track was visible. There is no evidence as to whether they saw these signs of danger and disregarded them, or carelessly and negligently failed to see. Therefore, the portions of the charge of the court as to the law predicated

upon a finding by the jury that in approaching the track the driver of the car used a reasonable degree of care to ascertain whether a train was approaching are, under the circumstances in this case, erroneous and misleading.

The respective duties of a traveler upon the highway in approaching a railroad track at grade crossing and of the defendant railroad company in operating its trains in approaching such crossings are clearly and concisely stated by *Stacy, C. J.*, in *Quinn v. R. R.*, 213 N. C., 48, 195 S. E., 85. If there has been any apprehension that there are conflicting statements in the opinions of this Court in respect to the law in such cases such apprehension should be put at rest by what is said in that opinion.

The competency and admissibility of the evidence of the witness Dunn to the effect that he heard no whistle blown may be determined by what is said in *Johnson v. R. R.*, 214 N. C., 484.

While there are numerous other exceptions in the record the questions presented thereby may not again arise upon a retrial. What is here said is sufficient to require a

New trial.

MOZELLE STEELE v. KEITH M. BEATY AND CHARLIE HAWORTH.

(Filed 31 May, 1939.)

1. Judgments § 33c—Judgment held one upon a retraxit, which constitutes a bar to subsequent action.

The judgment pleaded as a bar to the present suit recited that the plaintiff therein did not care to further prosecute the action and had agreed that the same be dismissed, and upon motion and agreement it was ordered that the action be dismissed and that the summons and complaint be withdrawn from the records. The judgment was consented to in writing by plaintiff personally, and it further appeared by uncontradicted evidence that the judgment was signed in consequence of a release theretofore executed by plaintiff and upon a consideration paid to her at the very time of the entry of the judgment. *Held:* The judgment was one upon a *retraxit*, which constitutes a bar to a subsequent action on the same subject matter between the parties, and defendants' motion to nonsuit the second action should have been granted. The distinction between judgments upon a *retraxit*, which are usually based upon a settlement out of court and are entered upon consent of both parties, and judgments of nonsuit, *non pros*, and of *nolle pros*, which do not determine the merits and cannot support a plea of *res judicata*, pointed out.

2. Clerks of Court § 3—

Clerks of the Superior Court have jurisdiction to enter a judgment upon a *retraxit*.

3. Judgments § 35—

If, upon the plea of estoppel by judgment, the nature of the judgment does not clearly appear upon its face, the court may hear evidence to determine whether the judgment is one of nonsuit or one upon a *retraxit*, which determines the cause upon its merits and constitutes a bar to a subsequent action.

4. Judgments § 22b—

A judgment upon a *retraxit* is a complete bar to a subsequent action between the same parties upon the same subject matter so long as it remains in full force and effect, and it can be attacked on the grounds of mental incapacity only by motion in the cause.

CLARKSON and SCHENCK, JJ., dissenting.

APPEAL by defendants from *Hamilton, Special Judge,* at October Extra Term, 1938, of MECKLENBURG. Reversed.

This is an action to recover damages for personal injuries alleged to have been caused by an assault by the defendants in attempting to perform an abortion upon plaintiff.

The defendants denied the allegation contained in plaintiff's complaint, charging them with an attempt to produce an abortion. In further defense they pleaded two certain releases from any further claims or rights of action against them executed by the plaintiff. They likewise pleaded a judgment in a former action based on the same cause of action entitled as in this case, entered in the Superior Court of Mecklenburg County in words as follows:

"The plaintiff in the above entitled action does not care to further prosecute said action, and has agreed that the same may be dismissed.

"Upon motion and by consent it is agreed that said action be, and the same is hereby dismissed, and it is ordered that the summons and complaint in said action be, and the same is hereby withdrawn from the records."

The judgment was signed 4 October, 1937, by the clerk of the Superior Court of Mecklenburg County and was consented to by the plaintiff in person and by her counsel, which consent was endorsed upon the judgment.

The plaintiff admitted the execution of the releases (or some paper writings) but alleged that at the time of their execution she did not have sufficient mental capacity to understand the nature and effect of her action and that the execution of the same was obtained by fraud. She likewise made categorical denial of the entry of the judgment pleaded in bar by the defendants.

The jury, by answering the issues submitted, found that the defendants committed an assault upon the plaintiff, as alleged; that at the time of the execution of the releases the plaintiff was not of sufficient

mental capacity to understand the nature and effect of her action; that the releases were not procured by fraud; and assessed damages, both compensatory and punitive. The eighth issue as follows: "8. Is the plaintiff's cause of action barred by the judgment of October 4, 1937, entered in that action entitled, 'Mozelle Steele v. K. M. Beaty and Charlie Haworth,' as alleged in the answer?" was answered by the court, "No," as a matter of law upon the theory that nothing was finally and definitely concluded by that judgment. To the action of the court in answering the eighth issue "No" as a matter of law and to its instruction to the jury in respect thereto, the defendants duly excepted.

There was a judgment for the plaintiff upon the verdict. The defendants excepted and appealed.

Jake F. Newell, B. F. Wellons and Jno. A. McRae for plaintiff, appellee.

H. L. Taylor and J. Laurence Jones for defendants, appellants.

BARNHILL, J. While the plaintiff in her reply categorically denied the entry of the judgment pleaded in bar, in her testimony she admitted the entry of this judgment and her signature consenting thereto. She further admitted that she, with her attorneys, went to the office of the clerk of the Superior Court at the time of the entry of the judgment and was there and then paid over the desk of the clerk a sum of money, denying, however, that she received the amount the defendants claim was paid. She further admitted that she appeared at the clerk's office and this judgment was entered shortly after the execution of the second release which the defendants plead in bar. If the court was in error in concluding as a matter of law that this judgment is not a bar then we need not consider any of the other numerous exceptions entered and relied upon by the defendants.

At common law a judgment against the plaintiff was upon a *retraxit, non pros,* nonsuit, *nolle prosequi,* discontinuance or a judgment on an issue found by the jury in favor of the defendant, or upon demurrer. 7 Bacon's Abridgement, 214; *Bond v. McNider,* 25 N. C., 440; *Grimes v. Andrews,* 170 N. C., 515, 87 S. E., 341.

A judgment of discontinuance is one of dismissal of plaintiff's action based on the interruption in proceedings occasioned by the failure of the plaintiff to continue the suit regularly from time to time as he ought. 3 Bl. Comm., 296, Enc. Law Dic., 2nd Ed.

A *nolle prosequi* is an entry made on the record by which the plaintiff declares that he will proceed no further. This type of judgment is now superseded by judgments of voluntary nonsuit.

A *non pros* is a judgment entered when the plaintiff at any stage of the proceedings fails to prosecute his action, or any part of it, in due time. The judgment is entered at the instance of defendant who obtains costs against the plaintiff. This type of judgment is now in the form of a judgment of involuntary nonsuit.

A *retraxit* is the act by which the plaintiff withdraws his suit. It differs from a nonsuit—the former being the act of the plaintiff himself, for it cannot even be entered by attorney, and it must be after declaration filed. Callaghan & Co., Cyc. Law Dic., 2nd Ed. The one is negative and the other is positive; the nonsuit is a mere default and neglect of the plaintiff, and therefore he is allowed to begin his suit again upon the payment of the costs; but a *retraxit* is an open and voluntary renunciation of his suit in court. *Bond v. McNider, supra; Grimes v. Andrews, supra;* 3 Bl. Comm., 296; *Thomason v. Odom,* 68 Am. Dec., 159.

Judgment of nonsuit, of *non pros,* of *nolle pros,* of dismissal, are exceptions to the general rule that when the pleadings, the court, and the parties are such as to permit of a trial on the merits, the judgment will be considered as final and conclusive of all matters which could have been so tried. A dismissal or nonsuit not determining the rights of the parties cannot support the plea of *res judicata. Grimes v. Andrews, supra.*

A *retraxit,* like a judgment on the merits, is a bar and estops the plaintiff from again proceeding in another suit on the same cause of action. Enc. Law Dic., 2nd Ed., McIntosh Prac. & Proc., p. 699; 2 Arch Practice, 250; 7 Bacon's Abridgement, 215; *State Medical Examining Board v. Stewart,* 13 Ann. Cases, 653; *Crossman v. Davis,* 79 Calif., 603; *Commonwealth Bank v. Hopkins,* 2 Dana (Ky.), 395; *United States v. Parker,* 120 U. S., 89, 29 L. Ed., 60; *Bond v. McNider, supra; Grimes v. Andrews, supra; Thomason v. Odom, supra;* 9 R. C. L., 192, 202, sec. 17.

A judgment in *retraxit* is usually based upon and follows a settlement out of court. Where the parties to an action have settled their dispute and agreed to a dismissal such dismissal is a *retraxit* and amounts to a decision upon the merits. *State Medical Examining Board v. Stewart, supra; Crossman v. Davis, supra; Commonwealth Bank v. Hopkins, supra; United States v. Parker, supra; Meyer v. Fenner,* 204 N. C., 802; *Cason v. Shute,* 211 N. C., 195, 189 S. E., 494. The rule seems to be universal that a judgment of dismissal entered by agreement of the parties pursuant to a compromise and settlement of the controversy is a judgment on the merits barring any other action for the same cause. 34 C. J., 787, 2 Freeman on Judgments (5th Ed.), 1596; *State ex rel. Wilson v. Young,* 81 A. L. R., 114. The legal effect

of an order dismissing a suit agreed is to bar any other suit between the same parties on the original cause of action thus adjusted by them and merged in the judgment of the court, rendered at their instance, and in consequence of the agreement. *Jarboe v. Smith,* 52 Am. Dec., 541, (Ky.); *Hoover v. Mitchell,* 25 Gratt (Va.), 387. It is virtually an acknowledgment by the plaintiff in open court as in *retraxit* that the plaintiff has no cause of action, or rather no further cause of action. It is not merely an abandonment of his suit by the plaintiff as in a nonsuit; it is the concurrent action of both parties; it is a representation by the plaintiff to the court that the suit has been agreed, which is assented to by the defendant, and thereupon the suit is dismissed agreed by the judgment of the court. *Hoover v. Mitchell, supra; Cason v. Shute, supra.*

If the judgment is in such form as to leave any doubt whether it is a judgment of nonsuit, in *retraxit,* or upon the merits, testimony in respect thereto is admissible. *Justice v. Justice,* 25 N. C., 58; *Massey v. Lemon,* 27 N. C., 557; *Meyer v. Fenner, supra;* 2 Freeman on Judgments, 5th Ed., page 1597.

To hold that a judgment of dismissal by consent is not a bar would deny any effect whatever to the agreement of the parties and would treat the judgment of dismissal merely as a voluntary act of the plaintiff. *Doan v. Bush,* 130 Ark., 566. The legal deduction to be drawn from a judgment dismissing a suit by agreement of the parties is that the parties had by their agreement adjusted the subject matter of the controversy in that suit; and the legal effect of such a judgment is, therefore, that it will operate as a bar to any other suit between the same parties on the identical cause of action then adjusted by them and merged in the judgment therein rendered at their instance and in consequence of their agreement.

"If in the former action plaintiff was sane and capable of consenting to the judgment he is bound by his consent evidenced by his signature and by that of his attorneys. *Cason v. Shute, supra.*" *Gibson v. Gordon,* 213 N. C., 666, 197 S. E., 135.

It appears upon the face of the judgment pleaded by the defendants in bar of plaintiff's present action that it is more than an ordinary judgment of voluntary nonsuit or dismissal. The plaintiff announced in open court before the clerk, who had authority to enter judgment, that she did not care to further prosecute said action and *has agreed that the same may be dismissed.* The judgment further recites that "by consent it is agreed that said action be, and the same is, hereby dismissed." The judgment likewise provided for withdrawal of the summons and complaint from the record. It was consented to in writing

by the plaintiff and her counsel. These recitals in the judgment and the written consent of the plaintiff are not ordinary provisions of a judgment of voluntary nonsuit. They are *indicia* of a judgment in *retraxit* based on an agreement of the parties and indicate a settlement out of court. This view is supported by the uncontradicted testimony in the record that the judgment was signed in consequence of a release theretofore executed by the plaintiff and upon a consideration paid to her at the very time of the entry of the judgment. Even if it be conceded that the judgment upon its face does not clearly indicate a judgment in *retraxit,* we are of the opinion that when considered in the light of the uncontradicted testimony it must be so interpreted, and certainly it is a judgment by consent that the plaintiff shall not further prosecute her action. So long as it remains in full force and effect it is a complete bar to plaintiff's present action.

It can be attacked on the grounds of mental incapacity of the plaintiff only by motion in the cause. *Gibson v. Gordon, supra.*

The motion for judgment as of nonsuit at the conclusion of all of the evidence should have been allowed.

Reversed.

CLARKSON and SCHENCK, JJ., do not concur in the opinion of the Court, and think that the defendants are entitled to only a new trial.

FRED G. WOODRUFF v. BERT NICHOLS WOODRUFF.

(Filed 31 May, 1939.)

1. Judgments § 22b—

A motion in the cause is the proper remedy to attack a judgment for intrinsic fraud.

2. Divorce § 2a—Definition of separation constituting ground for divorce.

The word "separation" as used in C. S., 1659 (4), as amended, means a voluntary separation by mutual agreement with the intent on the part of at least one of the parties to discontinue all the marital privileges and responsibilities, or a separation under judicial decree, or a separation caused by the abandonment or wrongful act of the party sued.

3. Same—

A physical separation caused by the commitment of one of the parties for insanity is not a "separation" constituting ground for divorce, nor may the party committed consent to a separation during the continuance of the mental incapacity.

4. Same—

Where, after physical separation the husband continues to contribute to the support of the wife, the making of such contributions negatives an intention on his part to terminate the marital privileges and responsibilities necessary to a separation within the meaning of C. S., 1659 (4), as amended.

5. Divorce § 4—

The statutory affidavit in an action for divorce is jurisdictional, and a false affidavit knowingly made will not support a decree.

6. Judgments § 22f—Cause remanded for specific findings relating to fraud in affidavit and evidence of separation in this action for divorce.

Defendant wife in this action for divorce on the ground of two years separation made this motion in the cause to set aside the divorce decree on the ground of fraud, and offered evidence that at the time plaintiff alleged in his affidavit that the parties had agreed to a separation she was mentally incompetent and confined to a sanatorium. *Held:* The court's finding that there was no evidence of fraud in obtaining the divorce decree is error, and the cause is remanded for specific findings as to the mental status of defendant at the time plaintiff alleged the legal separation had taken place and as to whether plaintiff had knowledge of the facts at the time of making the statutory affidavit and at the time he offered evidence of a legal separation.

7. Same—

The fact that subsequent to a decree of divorce the plaintiff remarries does not preclude defendant from attacking the decree for fraud, since defendant is no less innocent than the person whom plaintiff subsequently married.

APPEAL by defendant from *Sink, J.*, at March Term, 1939, of GUILFORD. Error and remanded.

Motion in the cause made by defendant to set aside a decree of divorce entered at the November, 1937, Term of Superior Court of Guilford County, for that the plaintiff was guilty of a fraud and imposition upon the court in alleging that there had been a separation for two years by mutual consent, and in offering evidence in support thereof, and in making statutory affidavit to the complaint, when he well knew at the time that during the first of the alleged two years of separation the defendant was insane and was represented by guardian, and that the purported judgment was procured by perjured testimony.

Plaintiff instituted his action for divorce 23 August, 1937. In his complaint he alleges that the plaintiff and defendant became separated by mutual agreement on or about 1 August, 1935, and have continued to live separate and apart since that date. Summons was served by publication, the defendant being at the time in Washington, D. C. At the November Term, 1937, appropriate issues were submitted to and answered by a jury in favor of the plaintiff. A judgment decreeing an

absolute divorce and dissolving the bonds of matrimony between the plaintiff and defendant was thereupon entered.

On 13 January, 1939, defendant filed her petition and motion in the cause, in which it is alleged that the defendant was insane from 26 October, 1931, to 21 February, 1936; that she was confined in an institution; and that a guardian who lived in the city of the residence of the plaintiff had been appointed, all to the knowledge of the plaintiff.

The plaintiff in his answer to the petition asserts under oath that "he has provided and paid $25.00 per month for her (defendant's) support and maintenance, in addition to that contributed by the government, since the separation on 1 August, 1935, to and including November, 1937." He alleges further, however, that the defendant was restored to sanity on or about 1 August, 1935, the time he alleges the separation took place.

The defendant filed an affidavit in which it is stated that she did not obtain any knowledge of the entry of the decree of divorce until about 15 September, 1938, and that, considering her physical condition, she acted with reasonable promptness thereafter. The defendant also offered documentary evidence tending to show that she was adjudged mentally incompetent 9 October, 1931; that she was adjudged mentally competent 3 January, 1936; and that she was duly adjudged to be competent and her guardian was discharged by order of the Superior Court of Guilford County dated 21 February, 1936.

When the cause came on to be heard the court below found certain facts, including the following: "3. That there is no evidence that plaintiff has practiced any fraud either upon this court or the defendant." It was thereupon adjudged that the divorce proceeding was in all respects regular, that the decree of divorce is binding upon the parties thereto, and that the motion of the defendant be overruled and her petition dismissed. The defendant excepted and appealed.

R. Parker Waynick and Frazier & Frazier for plaintiff, appellee.
O. W. Duke for defendant, appellant.

BARNHILL, J. As the defendant alleges intrinsic fraud motion in the cause is her proper remedy. *Horne v. Edwards, ante,* 622, and cases there cited.

Plaintiff's original action was instituted under the provisions of C. S., 1659 (4) as amended. Except where the separation is in consequence of a criminal act committed by the defendant prior to such divorce proceedings, "a separation of husband and wife" as used in the statute means more than merely living apart. Business and other necessities sometimes require the husband to live at one place and the

wife at another. This does not mean necessarily that there has been a separation within the meaning of the statute. The statute, express in terms and plain of meaning, is broad enough to include, and clearly does include, any kind of separation by which the marital association is severed, and which may be made the subject of further judicial investigation. It means the living asunder of a man and wife. It is a voluntary act, except in case of imprisonment for crime, and the separation must be with intent on the part of at least one of the parties to discontinue all of the marital privileges and responsibilities, or it must be due to the wrongful act of at least one of the parties, or by judicial decree. *Cooke v. Cooke,* 164 N. C., 272, 80 S. E., 178.

The word "separation" is thus defined in Black's Law Dictionary, 1073: "In Matrimonial Law it means a cessation of cohabitation by husband and wife by mutual agreement," or in case of judicial separation "under decree of court." To these our statute contemplates the addition of "separation" caused by desertion or abandonment or other wrongful act of the party sued. *Lee v. Lee,* 182 N. C., 61, 108 S. E., 352.

It certainly was not intended that this statute should apply to cases where the separation was without fault on either side and involuntary (except in case of imprisonment for crime) as in cases of incarceration in an asylum for the insane. It cannot be contended that the years spent by the wife in the hospital for the insane was desertion or a separation by mutual consent, or even voluntary, much less a wrongful act on her part. *Brown v. Brown,* 182 N. C., 42, 108 S. E., 380; *Lee v. Lee, supra; Sitterson v. Sitterson,* 191 N. C., 319, 131 S. E., 641.

The court below was in error in finding that there was no evidence that plaintiff has practiced any fraud either upon the court or upon the defendant. If, as her testimony tends to show, the defendant was on 1 August, 1935 (the day of the alleged separation) and for more than twelve months thereafter *non compos* there has been no two-year separation between the plaintiff and the defendant within the meaning of the statute. Under these conditions she was incapable of forming an intent to discontinue the marital privileges and responsibilities or of voluntarily assenting to a separation.

If, as the defendant admits in his affidavit, he has recognized his marital responsibilities and voluntarily contributed to the support of the defendant during the full period he alleges that he and his wife were living apart, his conduct in so doing indicates that he recognized his responsibilities as husband and tends to refute the suggestion of an intention on his part to voluntarily assent to a legal separation. It follows that if he, with knowledge that at the beginning and during the major portion of the period he alleges that he and his wife were living

separate and apart, she was *non compos* and had a guardian duly appointed by the court, offered testimony that there had been a voluntary separation, or a separation due to the wrong of the defendant, for a period of two years next prior to the institution of the action, this constituted a fraud and imposition upon the court and the defendant. The same conclusion follows if during said period he, by contributing to her support, continued the relationship of husband and wife.

Furthermore, it is well established in this Court that the affidavit the statute requires in connection with a complaint for divorce is jurisdictional. *Holloman v. Holloman,* 127 N. C., 15, 37 S. E., 68; *Nichols v. Nichols,* 128 N. C., 108, 38 S. E., 296. A complaint in a divorce action accompanied by a false statutory affidavit, knowingly made, is as fatal as a complaint without the affidavit.

There should be specific findings of fact made as to the mental status of the defendant at the beginning and during the earlier part of the two years plaintiff alleges he and his wife lived separate and apart, and as to whether the plaintiff knowingly made a false affidavit in respect thereto, or knowingly offered false testimony as to the legal separation of plaintiff and defendant. This would include a finding as to whether in fact she had been adjudged insane, and as to whether plaintiff had knowledge of such fact at the time he made the statutory affidavit, and at the time he offered evidence to support the third issue submitted to the jury. Adjudication of the rights of the parties upon defendant's motion should be made after consideration of the facts thus found.

It was suggested here that the plaintiff has remarried and that the rights of his second wife, an innocent party, have intervened. If the facts are as alleged by the defendant she is equally innocent. One must suffer. The facts as they are finally made to appear must determine which one of the two, if either, is to be the victim. We could not hold that a first wife, who is innocent of any wrongdoing and who, due to mental incapacity, has not voluntarily assented to a separation, against whom a decree of divorce has been entered through the wrong of the husband, is any less innocent than the second wife who entered into the contract of marriage believing the divorce decree to be valid.

The cause is remanded for further proceedings in accord with this opinion.

Error and remanded.

B. A. HOFT, SUCCESSOR TO E. H. AND J. A. MEADOWS COMPANY, A CORPORATION, v. COASTWISE SHIPPING & LIGHTERAGE COMPANY OF DELAWARE, INC., A CORPORATION ORGANIZED UNDER THE LAWS OF THE STATE OF DELAWARE.

(Filed 31 May, 1939.)

Attachment § 24—Summary judgment against surety on defendant's bond in attachment proceeding to which surety was not a party, held error.

Plaintiff attached property of defendant and defendant gave a surety bond conditioned upon the "return of the property" . . . "and if return of the property cannot be had, then defendant will pay to the plaintiff the value of said property and all costs and damages that may be awarded," the form of the bond being substantially as prescribed by C. S., 813, rather than as prescribed by 815 for discharge of the attachment. Thereafter judgment was obtained in the action against the defendant, the surety not being a party thereto. *Held:* Summary judgment against the surety, without notice, is error, the remedy being purely statutory and there being no statutory provision for summary judgment on the undertaking.

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

APPEAL by plaintiff from *Frizzelle, J.*, at May 9 Term, 1939, of CRAVEN. Affirmed.

The plaintiff appealed from judgment of the judge below affirming judgment of the clerk of the Superior Court of Craven County, vacating a summary judgment theretofore rendered by him against the United States Fidelity & Guaranty Company, surety on the forthcoming bond in attachment of the defendant Coastwise Shipping & Lighterage Company of Delaware, Inc.

The proceedings leading up to the judgment appealed from may be summarized as follows: E. H. & J. A. Meadows Company (hereinafter referred to as the Meadows Company), a North Carolina corporation, instituted action against Coastwise Shipping & Lighterage Company of Delaware, Inc. (hereinafter referred to as the Shipping Company), to recover damages for the breach of a contract of affreightment and caused attachment to be levied upon a barge, the property of the Shipping Company. The Shipping Company executed bond for the release of the attached property with the United States Fidelity & Guaranty Company as surety. This bond in the sum of $2,000 was conditioned for the "return of the property to the sheriff of Craven County if return thereof be adjudged by the court, and to pay all costs that may be awarded against it, and if return of said property cannot be had, then defendant will pay to the plaintiff the value of said property and all costs and damages that may be awarded."

Thereafter the Shipping Company instituted proceedings in admiralty against the Meadows Company in the District Court of the United States for the limitation of the liability of the barge owner, and also sued out libel *in personam* against the Meadows Company for the recovery of the freight on the cargo. Restraining order issued to restrain the Meadows Company from prosecuting its action in the Superior Court of Craven County. The proceedings in the United States District Court were consolidated. Upon plea entered by the Meadows Company setting up the original jurisdiction of the state court, after hearing, the judge of the United States District Court entered judgment denying petition for limitation of liability, vacating the restraining order and decreeing that the plaintiff Hoft (who had succeeded to the rights of the Meadows Company and been made party plaintiff) recover of the Shipping Company $1,000. It was also decreed that plaintiff Hoft recover on the bond executed by the United States Fidelity & Guaranty Company the penalty of the bond to be discharged on payment of $1,000 and costs. Thereafter the decree of the United States District Court was modified by eliminating therefrom the adjudged recovery against the United States Fidelity & Guaranty Company, surety on the bond of the Shipping Company in attachment, without prejudice to the rights of the parties to proceed as they might be advised in the Superior Court of Craven County. The judgment of the United States District Court was duly certified to the Superior Court of Craven County and docketed.

On 30 December, 1938, plaintiff Hoft filed an amended complaint setting out the material facts and the judgment of the United States District Court, and asking recovery of defendant Shipping Company and the surety on its bond in the sum of $1,000, together with interest and costs. April 17, 1939, the clerk of the Superior Court of Craven County rendered judgment by default against the Shipping Company and the United States Fidelity & Guaranty Company as prayed.

The United States Fidelity & Guaranty Company was not made party to any of those proceedings and no process against it was issued or served. Learning of the judgment against it, the United States Fidelity & Guaranty Company entered special appearance and moved to vacate the judgment against it on the ground that no notice having been given it, the court was without jurisdiction to adjudge recovery against it on the forthcoming bond executed by it for the defendant Shipping Company, and that plaintiff was not entitled to a summary judgment against it. The clerk of the Superior Court thereupon (under authority of *Bizzell v. Mitchell,* 195 N. C., 484, 142 S. E., 706), vacated the judgment against the United States Fidelity & Guaranty Company, without

prejudice, however, to the right of plaintiff to institute action against it upon the bond in attachment.

Upon appeal to the judge of the Superior Court, the judgment of the clerk was affirmed, and the plaintiff appealed to the Supreme Court.

W. B. R. Guion for plaintiff.

R. M. Cann and R. Clarence Dozier for United States Fidelity & Guaranty Co., Surety.

DEVIN, J. The appeal challenges the correctness of the ruling of the court below that the plaintiff was not entitled to a summary judgment against the surety on the bond of the defendant executed for the return of property attached. The appellant contends that, being entitled to recover against the principal, at the same time and in the same action, he was entitled to judgment, without notice or hearing, against the surety on the principal's forthcoming bond given for the release of property lawfully attached.

An examination of the record of the various proceedings in this case, which extended over a period of several years, leads us to the conclusion that summary judgment, without notice, against the surety on the bond of the defendant in attachment, conditioned for the return to the sheriff of Craven County of the property attached, if return thereof be adjudged by the court, may not be entered as a matter of course upon ascertaining the amount due plaintiff by the defendant.

The form of the bond in suit is substantially that prescribed by C. S., 813, rather than that authorized by C. S., 815 when application is made by defendant for the discharge of the attachment. While the rule is that a plaintiff in claim and delivery proceedings, upon recovery, is entitled to a summary judgment against the sureties on the defendant's replevin bond (*Trust Co. v. Hayes,* 191 N. C., 542, 132 S. E., 466), the proper form of the judgment in that case is first for the possession of the property claimed, and, in case delivery cannot be had, for recovery against the defendant and the sureties on the replevin bond. However, the rules of procedure applicable to the different ancillary remedies prescribed in the code of civil procedure are not in all respects the same. These remedies are purely statutory and rights thereunder are governed by the provisions of the statutes relating thereto. *Mahoney v. Tyler,* 136 N. C., 40, 48 S. E., 549; *Williams v. Perkins,* 192 N. C., 175, 134 S. E., 417. The procedural question relative to the judgment in attachment, presented by this appeal, seems to have been settled by the decision of this Court in *Bizzell v. Mitchell, supra,* where it was said: "It may be noted that no statute in attachment makes provision for summary judgment on the undertaking. The statute, C. S., 815, *supra,*

says: 'That the surety will, on demand, pay to the plaintiff,' etc. See *Mahoney v. Tyler,* 136 N. C., 40; *Williams case, supra.* No summary judgment against the surety, H. L. Bizzell, on the undertaking in this attachment could be rendered in this action. The judgment tendered by plaintiff, appellant, against the surety was properly denied. Of course, by consent, a surety on an undertaking on attachment can come in and the matter be determined in the one action, otherwise a separate action must be brought on the undertaking." This rule of procedure finds support in 5 Am. Jur., 157, where it is said: "The usual practice in the enforcement of a bond to dissolve an attachment or garnishment or to release attached or garnished property is by an action on such bond."

The cases of *Thompson v. Dillingham,* 183 N. C., 566, 112 S. E., 321, and *Martin v. McBryde,* 182 N. C., 175, 108 S. E., 739, cited by plaintiff, may not be held controlling under the facts of this case. In *Thompson v. Dillingham, supra,* the bond was given for the discharge of the attachment and was conditioned to pay to the plaintiff any and all sums the plaintiff should recover in the action. It was there held that the judgment against the principal, unassailed and unexcepted to, was not open to objection by the surety who must conform to his obligation. In *Martin v. McBryde, supra,* the bond, substituted upon release of attached property, was for the payment of the recovery which should be adjudged. The other cases cited by plaintiff are not in point.

The judgment of the court below is

Affirmed.

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

GROVER MANHEIM, BY HIS NEXT FRIEND, L. W. MANHEIM, v. VIRGINIA SURETY COMPANY, INC., AND R. H. GARLAND AND W. C. HONEYCUTT.

(Filed 31 May, 1939.)

Insurance § 43—Indemnity bond for taxi corporation held not to cover liability for injuries inflicted prior to the execution of the bond.

This action was instituted against the guarantors on an indemnity bond guaranteeing payment of any final judgment for any personal injury rendered against the principal, plaintiff having obtained judgment against the principal and execution having been returned unsatisfied. It appeared that plaintiff sustained personal injuries occurring prior to the execution and delivery of the bond but that the judgment against the principal was rendered subsequent to that date. It further appeared that prior to the execution of the indemnity bond the taxi corporation had filed with the

city a liability insurance policy which was canceled on the date the indemnity bond was executed and delivered. *Held:* Construing the entire bond in the light of the circumstances and the provision of the ordinance and statute pursuant to which it was given, C. S., 2787 (36), providing that the filing of the bond or an insurance policy should be a condition precedent to the operation of any taxicab within the city, the bond does not cover the judgment for personal injuries which were sustained prior to its execution and delivery, and plaintiff may not hold the guarantors liable.

APPEAL by plaintiff from *Sink, J.*, at February Term, 1939, of GUILFORD. No error.

L. Herbin and Frazier & Frazier for plaintiff, appellant.

James MacClamrock and A. C. Davis for Virginia Surety Company, appellee.

H. R. Stanley and R. M. Robinson for R. H. Garland and W. C. Honeycutt, appellees.

SCHENCK, J. This is an action upon a policy of liability insurance issued by the Virginia Surety Company and an indemnity bond whereon R. H. Garland and W. C. Honeycutt are guarantors, held by the city of Greensboro, guaranteeing the payment of judgments obtained against the Bluebird Transportation Corporation by reason of the operations of taxicabs in said city.

The policy of liability insurance was issued by the corporate defendant on 20 May, 1937, was canceled as of 12:01 o'clock a.m., 24 November, 1937, and was in the sum of $2,500.

The bond, upon which the defendants Garland and Honeycutt were guarantors, became effective at 12:01 o'clock a.m., 24 November, 1937, and was of a continuing nature, and was in the sum of $10,000.

The plaintiff, Grover Manheim, received personal injuries due to the negligent operation of a taxicab of the Bluebird Transportation Corporation in the city of Greensboro on 19 June, 1937, and instituted suit to recover damages for said injuries against said transportation corporation on 17 September, 1937, and procured final judgment therefor in the sum of $8,500 at the March Term, 1938, of Guilford County Superior Court, and on 25 May, 1938, caused an execution to issue against said transportation corporation, which was returned unsatisfied.

This action was instituted while appeal from the judgment procured at the March Term, 1938, was pending, and came on for hearing at the February Term, 1939, after said judgment had been affirmed, when the trial judge instructed the jury that if they found the facts to be as shown by all of the evidence to answer the issue as to the indebtedness

of the defendant surety company to the plaintiff in the sum of $2,500, and the issue as to the indebtedness of the defendants Garland and Honeycutt to the plaintiff, "Nothing."

The jury returned a verdict accordant with the court's instruction, and from judgment predicated on the verdict the plaintiff appealed, assigning error.

The assignments of error relied upon by the plaintiff are to the court's instructing the jury that if they found the facts to be as shown by all the evidence to answer the issue as to the indebtedness of the individual defendants, "Nothing," and to the refusal of the court to give instructions, asked in apt time, to the effect that if they found the facts to be as shown by all the evidence, to answer the issue as to the individual defendants' indebtedness, "$6,000."

It will be noted that the accident which caused the injury for which the plaintiff received judgment against the Bluebird Transportation Corporation occurred on 19 June, 1937, that suit was instituted to recover damages caused thereby on 17 September, 1937, and judgment obtained in March, 1938, while the bond in suit, upon which the defendants Garland and Honeycutt were guarantors, was not executed and delivered until 23 November, 1937. It is contended by the appellant that since the judgment was obtained subsequent to the delivery of the bond the judgment is covered by the bond. It is the contention of the appellees Garland and Honeycutt that since the accident occurred prior to the delivery of the bond, the judgment is not covered thereby.

In the portion of the bond relied upon by the appellant the guarantors agree within thirty days after the rendition thereof, "To pay any final judgment that may be taken against said Bluebird Transportation Corporation of Greensboro, North Carolina, for any personal injury or property damage for which the said Bluebird Transportation Corporation may be held liable at the instance of all persons; . . ."

The bond in suit was filed in compliance with C. S., 2787 (36) and the ordinance of the city of Greensboro enacted 27 July, 1937, under authority of the statute. Sec. 1, chap. 279, Public Laws 1935, which permits the filing of surety bonds as well as policies of insurance, provides that said bonds may be filed "as a *condition precedent* to the operation of any . . . taxicab . . . over the streets of such city or town." Manifestly a bond filed on 23 November, 1937, could not have been filed as a condition precedent to the operation of a taxicab on 19 June, 1937, the date the accident occurred, and could have had no relation to judgments for damages arising out of injuries caused by such accident. The contention that the words "to pay *any* final judgment that may be taken against" the principal "for *any* personal injury" for which "it may be held liable at the instance of all persons,"

extends the coverage to judgments for injuries caused by accidents occurring prior to the delivery of the bond, but taken subsequently, thereto is, we think, untenable. The words are not to be considered isolatedly and alone, but contextually with the other provisions of the bond and the statute and ordinance under which it was given. *In verbis, non verba, sed res et ratio, quærenda est.* In the construction of words, not the mere words, but the thing and the meaning, are to be inquired after.

In construing the entire bond in the light of the circumstances of its execution and delivery, the statute and the ordinance pursuant to which it was issued and accepted, we think it is clear that it was the intention of the parties that the indemnity bond should cover any judgment taken against the assured for injuries occurring subsequently to its delivery and acceptance, judgments for injuries occurring prior to that time being covered by the policy of insurance which was canceled as of the time the indemnity bond became effective, namely, at 12:01 o'clock a.m., 24 November, 1937, and that his Honor was correct in holding that the bond on which the defendants Garland and Honeycutt were guarantors did not cover a judgment for damages caused by injuries inflicted by an accident occurring prior to the time it became effective.

There are no assignments of error discussed in the appellant's brief in so far as the judgment relates to the defendant Virginia Surety Company.

In the trial of the case below there was

No error.

R. B. JONES, ADMINISTRATOR DE BONIS NON OF LEE NORA MOORE, DECEASED; AND W. P. ODOM AND OTHERS, HEIRS AT LAW OF JOHN W. ODOM, DECEASED, v. FANNIE DRYE ODOM PALMER AND THE BANK OF WADESBORO, ADMINISTRATORS OF JOHN W. ODOM, DECEASED.

(Filed 31 May, 1939.)

1. Executors and Administrators § 4—Judgment affirming clerk's order denying removal of administrator affirmed upon facts of this case.

Petitioners sought the removal of respondents as administrators for failure to file inventory as required by law, failure to file promptly the required reports, and delay in closing estate without explanation or formal extension of time, being dilatory in collecting assets and in repaying money borrowed until accrual of large amounts of interest. The evidence was insufficient to show diversion of funds or waste. It appeared that administration was practically complete at the time of the institution of the proceedings and that therefore whether the installation

of a new administration would be beneficial to the remaining creditors and distributees was conjectural. *Held:* The judgment affirming the discretionary order of the clerk refusing to remove the administrators is upheld upon the particular facts appearing of record.

2. Same—Petition for removal of administrators is addressed to the discretion of the clerk.

The clerk of the Superior Court is not compelled to remove an administrator for failure to file promptly the required inventory and accounts, nor for delay in winding up the estate, and a petition for removal is addressed to his discretion, since the statute makes removal mandatory only when, upon a hearing, the objections are found valid, which implies a finding of their sufficiency to justify the removal as endangering the estate or disclosing a refusal to obey promptly the supervisory orders of the clerk.

3. Same: Court's § 2c—

Since an appeal from a discretionary order of the clerk as probate judge denying a petition for the removal of an administrator is heard upon matters of law or legal inference, the failure of the Superior Court to find the facts will not be held material when there is no evidence from which a finding of abuse of discretion by the probate judge could be predicated.

APPEAL by petitioners from *Bivens, J.*, at November Term, 1938, of ANSON. Affirmed.

The petitioners sought the removal of the respondents as administrators of the estate of John W. Odom, deceased, setting up, upon the demand of the respondents and the order of the clerk, a bill of particulars containing specific charges of alleged misconduct in the management of the estate.

Included in the charges were: A failure to file inventory; payment of claims barred by the statute of limitations; retention as commissions of a greater sum than that allowed by law; delay in collection of assets for long periods of time; acceptance of bids at auction sales contrary to law; failure to close up sales promptly, and loss of money through this source; failure to report sales of property made at private sale; failure to collect money from commissioners who had made sales of land to create assets; unnecessary delay in payment of debts, causing loss because of accrued interest; the unauthorized payment of attorneys' fees; and long delay in closing the administration, with attendant detriment and loss to the estate. In view of the decision reached, it is unnecessary to analyze the voluminous evidence presented to the court in support of these contentions.

Upon the hearing before the clerk of the Superior Court, the petition was denied and petitioners appealed to the Superior Court, where, before Bivens, Judge, a like result followed, and petitioners appealed.

Fred J. Coxe and J. C. Sedberry for petitioners, appellants.

R. L. Smith & Sons and Rowland S. Pruette for respondents, appellees.

SEAWELL, J. We are constrained to affirm the judgment of the court below in declining to remove the administrators on practical considerations which we think must have controlled the clerk, and the judge on appeal, in their action.

The evidence and record show that the estate is practically administered, and we seriously doubt whether remaining creditors or the petitioning distributees will be put in a more favorable position to assert any rights they may have or redress any wrongs they may have received at the hands of the present incumbents by installing a new administration. Such action is usually instigated by the necessity of presently preserving the estate, rather than for punishment or correction of personal representatives.

We wish, however, to make it clear that this decision is not an approval of the management of the estate as disclosed in the record, or of the acts and omissions of the respondents for which removal is sought; and we do not intend to establish any precedent that the failure to comply with statutory or common law requirements in the conduct of administration and needless delay in winding up the estate, are not valid grounds for removal. Had the respondents been removed from office, we would have felt bound upon this record to sustain it.

The respondents failed to file inventories required by law—one of the most vital requirements in aid of supervision; they did not file reports and accounts promptly; and they delayed closing the estate, without sufficient explanation or formal extension of time. They were dilatory in collecting assets in the hands of the commissioners, borrowed money and delayed repayment until the interest grew into large sums. On the other hand, there is no apparent diversion of funds, and charges of waste must depend on more substantial evidence than appears in the record. What the outcome of the estate might have been under expeditious administration is more or less a matter of speculation.

It is strongly argued by petitioners that neither the clerk of the Superior Court nor the judge hearing the appeal had any discretion in the matter of removal on the evidence developed in this case, in view of the peremptory phrasing of the statute, C. S., 31, under which this proceeding is brought. With this view we cannot agree. The exigencies of administration require the exercise of sound judgment, and this necessarily implies discretion in its supervision. This statute provides for the revocation of letters of administration and the removal of administrators from office upon complaint that the person to whom the

letters were issued "has been guilty of default or misconduct in the due execution of his office." If, upon a hearing, "the objections are found valid, the letters issued to such person must be revoked and superseded and his authority shall thereupon cease."

"Must" denotes imperative action, indeed, but the action becomes imperative only when the conditions upon which it shall be taken are clear and compelling. Before taking action, the clerk must determine the validity of the charges brought against the administrators, and this, we apprehend, includes a finding of their sufficiency to justify removal, in determining which he must exercise his good judgment under the guidance of law and precedent. *In re Battle,* 158 N. C., 388, 74 S. E., 23. While strict supervision is demanded, no matter within the guardianship of the law calls more strongly for the application of sound business principles. Rules do not think; ministerially applied they are manifestly inadequate.

The clerk is not compelled to remove an administrator for failing promptly to file an inventory when in his judgment the estate has received no damage; C. S., 48, 49; nor for failure to file account; C. S., 106; nor for delay in winding up an administration. Instead of removal, the performance of all these duties may be enforced by appropriate proceeding. *Atkinson v. Ricks,* 140 N. C., 418, 53 S. E., 230; *Barnes v. Brown,* 79 N. C., 401. But he may remove an executor or administrator for such failure, and must do so when he finds the omission of duty is sufficiently grave to materially injure or endanger the estate, or if compliance with the orders of the court in the supervision and correction of the administration are not promptly obeyed.

The appeal from the judge of the Superior Court is heard upon matters of law and legal inference. *Wright v. Ball,* 200 N. C., 620, 158 S. E., 192; *In re Will of Gulley,* 186 N. C., 78, 118 S. E., 839. We do not regard the failure of the court below to find facts as material, since upon such facts as might be found from the evidence we cannot find an abuse of discretion.

In sustaining the conclusion reached by the court below denying the petition to revoke the letters of administration or remove the administrators, this Court does not intend to make the findings of fact and conclusions of the clerk of the Superior Court or the judge reviewing them on appeal effective for any other purpose. They are confined to a consideration of that question alone and do not constitute *res judicata* in any other proceeding between the parties which the petitioners may be entitled to pursue, and are not to be taken to the prejudice of either party therein.

For the reasons stated the judgment is

Affirmed.

H. T. AYDLETT v. CAROLINA BY-PRODUCTS COMPANY, INCORPORATED.

(Filed 31 May, 1939.)

1. Nuisance § 5—

In an action to recover damages resulting to plaintiff's land from the emanation of odors from a permanent, private manufacturing plant in the locality, the parties may agree to the assessment of permanent damages entitling defendant to an easement.

2. Nuisance § 3—Evidence held sufficient for jury on issue of nuisance resulting from the emanation of odors from defendant's manufacturing plant.

Plaintiff's evidence tending to show that his land, used for residential purposes, was damaged by the emanation of noxious odors from defendant's animal by-products manufacturing plant, *is held* sufficient to take the issue to the jury, notwithstanding defendant's evidence tending to show proper handling of its raw material and the absence of offensive odors, or that, if odors escaped occasionally, they were due to causes beyond defendant's control and were of short duration.

3. Trial § 22b—

On a motion for nonsuit, plaintiff's evidence will be considered in the light most favorable to him.

4. Appeal and Error § 39d—

The exclusion of evidence cannot be held prejudicial when the record fails to show what the testimony of the witnesses would have been.

5. Same: Evidence § 51—

The exclusion of expert opinion testimony cannot be held for error when appellant fails to show that the witnesses were qualified to testify upon the matter.

6. Nuisance § 3—

In an action to recover damages to land resulting from noxious odors emanating from defendant's manufacturing plant, testimony of witnesses living near the plant, but not in the immediate locality of plaintiff's property, is competent to show that the noxious odors were in fact produced by defendant's operations and that they contaminated the air throughout the surrounding territory, in corroboration of plaintiff's testimony.

7. Same—

In an action to recover damages to land resulting from noxious odors emanating from defendant's animal by-products plant, testimony of decomposing carcasses and animal matter exposed about or near the plant is competent as tending to show the origin of the odors complained of.

APPEAL by defendant from *Sink, J.*, at January Term, 1939, of GUILFORD. No error.

H. R. Stanley for plaintiff.
Louis Denit and Stern & Stern for defendant.

DEVIN, J. This was an action to recover permanent damages for injuries to plaintiff's real property by reason of noxious odors and other substantial annoyances caused by the operation of defendant's factory engaged in the manufacture of animal by-products.

Plaintiff alleged and offered evidence tending to show that he is the owner of certain real property, near the corporate limits of the city of Greensboro, on which property there are three dwelling houses; that defendant has constructed or recently greatly increased the size and production of its plant outside the city limits and in the neighborhood of plaintiff's property; that defendant's plant is used for the production of tallow, poultry food and other by-products derived from the dead bodies of animals and from the refuse animal matter obtained from slaughter houses, stock pens, butcher shops, hotels, etc., and that the accumulation and utilization of these materials give rise to the offensive and sickening odors of putrefaction, and to noxious gases which are discharged in great volume from defendant's plant and carried to plaintiff's premises, producing substantial annoyance to the occupants and causing material dimunition in the market value of plaintiff's real property, chiefly valuable for the purpose of residence.

The defendant admitted the erection and maintenance of its permanent plant for the manufacture of all kinds of animal by-products, but denied that, as conducted, and in the location where it was situated, it constituted a nuisance, and alleged and offered evidence tending to show that the installation and use of proper machinery, appliances and methods of deodorization rendered impossible the annoyances complained of save on infrequent occasions, and that the value of plaintiff's property has not been thereby lessened.

Issues were submitted to the jury for the determination of the questions whether plaintiff's land had been substantially damaged from the operations of defendant's plant, and as to the amount of damages recoverable for wrongful usage of defendant's property. The issues were answered in favor of plaintiff and his damages assessed at $1,000. Judgment was rendered in accord with the verdict, and it was provided therein that upon satisfaction of the judgment a permanent easement was granted defendant to maintain over and upon the lands of plaintiff such odors as emanate from defendant's plant operations under present conditions. Defendant excepted and appealed.

While a plaintiff, alleging a nuisance causing damage to his property, as the result of the manufacturing operations of a private corporation, may not be permitted, at his election, to maintain an action for per-

manent damages with resultant easement to the defendant, rather than for damages for continuing or recurrent wrong (*Webb v. Chemical Co.*, 170 N. C., 662, 87 S. E., 633; *Morrow v. Mills*, 181 N. C., 423, 107 S. E., 445), it seems now well settled that the submission of issues of permanent damages, when this is done by consent of the parties, will be upheld. *Langley v. Hosiery Mills*, 194 N. C., 644, 140 S. E., 440; *Wagner v. Conover*, 200 N. C., 82, 156 S. E., 167; *Teseneer v. Mills Co.*, 209 N. C., 615 (623), 184 S. E., 535. Where one erects substantial buildings of a permanent character on his own land and by his operations carried on therein creates a nuisance or trespass on the land of another, causing substantial injury to the value thereof, the parties may elect to determine, at once and for all time, the issue of the entire damage, treating the nuisance as a feature of permanency and as amounting to the taking of complainant's property.

In *Brown v. Chemical Co.*, 162 N. C., 83, 77 S. E., 1102, it was said: "Where, as in this case, the parties elect to treat the action as one for permanent damages, the suit then amounts to the partial taking of another's property and it becomes in effect proceedings to condemn on complainant's land an easement to operate the plant for all time in the specified way."

In the instant case plaintiff brought his action specifically and solely to recover permanent damages, and the case was tried below on that theory. The defendant tendered issues in conformity with that view, and both plaintiff and defendant agree that the provisions in the judgment for the recovery of permanent damages, with consequent acquisition by defendant of a permanent easement, is in that respect proper. While the issues submitted did not as distinctly present the question of permanent damages as those tendered by defendant, yet, taken in connection with the judge's charge (to which no exception was noted), it is apparent that the issues which were tried by the consent of the parties with the concurrence of the court were those of permanent damages. In the conduct of the trial in this respect there was no error.

The defendant, however, contends that its motion for judgment of nonsuit should have been allowed, or that a new trial should be granted for errors assigned in the trial.

Was defendant entitled to the allowance of its motion for judgment of nonsuit? While plaintiff's evidence was contradicted and the defendant offered evidence to show proper handling of its raw material and the absence of offensive odors, or, if odors escaped occasionally, that they were due to causes beyond its control and of short duration, the probative value and the weight of the testimony were matters for the jury. Considering the plaintiff's evidence in the light most favorable for him, as we are required to do on a motion for nonsuit, we find

no error in the ruling of the trial judge in denying the motion. There was competent evidence to support the allegations of the complaint.

Was error committed in the exclusion or admission of testimony over defendant's objection? A careful examination of the defendant's assignments of error as to the rulings of the court below, in regard to the evidence offered, leads us to the conclusion that the defendant has no just ground of complaint. Defendant excepted to the refusal of the court to permit the witnesses Dr. Hudson and John Bonitz to answer questions whether defendant's plant was modern and well equipped, but it does not appear what answer the witnesses would have given, nor that either witness was qualified to testify on that point. For the same reason the exception to the refusal of the court to permit Dr. Hudson to answer the question whether the complaints he had received as to defendant's plant were due to inadequate water facilities, cannot be sustained.

Defendant also excepted to the admission of testimony from several witnesses who did not live in the immediate locality of the plaintiff's property, or who lived in different directions from defendant's plant, as to the effect upon them of the offensive odors. This was competent to show that such substantial annoyances as were alleged by plaintiff, and about which he and other witnesses testified, were in fact produced by defendant's operations, and that they contaminated the air throughout the surrounding territory, in corroboration of plaintiff's testimony. Evidence of decomposing carcasses and animal matter exposed about and near the plant tended to show the origin of the odors complained of.

For the reasons stated, we conclude that in the trial there was

No error.

MARY L. BLAKE v. HOSPITAL CARE ASSOCIATION.

(Filed 31 May, 1939.)

1. Insurance § 38—Cause remanded for findings sufficient to determine claim that insurer waived provision excluding hospitalization for maternity care.

The agreed statement of facts disclosed that the defendant issued a policy of hospital insurance with optional right to renew same at the end of any term period, that the policy included hospitalization for maternity care after the first year but that when the policy was sent to defendant to change the name of insured from her maiden to her married name, defendant added a rider excluding maternity care, that plaintiff protested, and that defendant's agent promised to take the matter up, but that no report was ever made to plaintiff, and that plaintiff thereafter

continued to pay the premiums required. This suit was instituted to recover expenses of hospitalization for maternity care incurred after plaintiff had paid several premiums on the policy after the rider had been attached, plaintiff contending that defendant could not alter the terms of the policy upon renewal and that defendant had waived the provisions of the rider by its silence after her protest. Defendant claimed that plaintiff, by paying premiums after the attachment of the rider, had acquiesced in its provisions. *Held:* The facts agreed are insufficient for a determination of plaintiff's claim of waiver and defendant's claim of acquiescence, and the cause is remanded for further proceedings.

2. Appeal and Error § 40—

Where the agreed statement of facts is insufficient to enable the court to proceed to judgment, it is error for the court to dismiss the action, and upon appeal the judgment of dismissal will be vacated and the cause remanded for further proceedings according to law.

APPEAL by plaintiff from *Grady, Emergency Judge,* at Chambers in NEW BERN, 2 March, 1939. From GUILFORD.

Civil action to recover on certificate of hospitalization.

The facts are these: On 10 February, 1936, Miss Mary E. Langley applied for membership in the defendant association and was issued a certificate of hospitalization. She paid her dues quarterly up to and including the quarter ending 10 August, 1938.

On 8 December, 1937, the plaintiff requested that her name be changed to Mrs. Mary L. Blake and sent in her certificate for this purpose. The defendant returned the certificate with the following endorsement:

"Endorsement Made A Part Of Certificate RXA 8023.

"This endorsement will acknowledge the change in name of the holder of this certificate from Miss Mary E. Langley to Mrs. Mary L. Blake.

"Effective on the tenth day of February, 1938, the Association shall not be liable for any hospitalization for obstetrical care, including prenatal care and/or complications arising therefrom."

Objection was made to this endorsement and defendant's district manager promised to take the matter up with the home office and report, but no report was ever made.

On 30 July, 1938, plaintiff entered the Piedmont Memorial Hospital, Inc., Greensboro, N. C., for obstetrical care and remained there a period of nine days, incurring a bill of $58.50, for which this suit is brought.

The certificate contains the following provisions:

1. "This certificate with endorsements, if any, is issued in consideration of and a reliance upon the truth and completeness of the statement of facts made in the application therefor, and payment in advance of the registration fee of $2.00 and the required dues of $3.00 for the period beginning at 12 o'clock noon, standard time at the residence of the certificate holder on the 10th day of February, 1936, and ending at

such standard time on the 10th day of May, 1936, and may be renewed upon consent of the Association."

2. "Beginning one year from the date of this certificate, if then in force, the service hereunder shall include maternity cases, but shall be limited to ten days of hospital care during any one certificate year for each respective certificate holder or adult member requiring such care, anything herein contained to the contrary notwithstanding."

From judgment dismissing the action upon the facts agreed, plaintiff appeals, assigning error.

Adam Younce for plaintiff, appellant.
John T. Manning for defendant, appellee.

STACY, C. J. The question for decision is whether plaintiff's hospitalization is covered by the certificate in suit. It is conceded that the certificate contains a provision including her case and an endorsement excluding it.

The optional right of the association to renew the certificate at the expiration of any term period is not presently controverted. Plaintiff says, however, that the defendant may not renew the certificate and at the same time delete it of its essential features. To do so is not to "renew," but to issue a different certificate. Having issued the certificate with provision covering plaintiff's case, followed by numerous elections to renew it, plaintiff says the endorsement ought not to be permitted to destroy the certificate so far as she is concerned. Defendant answers by saying, "You paid dues for two quarterly periods after the rider or endorsement had been placed on the certificate and with knowledge of it." "Quite true," says the plaintiff, "but I protested and you promised to give me some reply, which you never did. You accepted my dues knowing that I was relying upon the provision in the body of the certificate at variance with the endorsement, and you thereby lulled me into a sense of security. To insist upon the endorsement now would partake of the nature of imposition and amount to a species of fraud. You have waived it by your conduct." *Dibbrell v. Ins. Co.*, 110 N. C., 193, 14 S. E., 783.

The plaintiff had been a member of the association for two years, and it is admitted that her quarterly dues were paid regularly. The certificate in terms excludes maternity cases during the first year and includes them thereafter, if then in force. Plaintiff was induced to continue her membership in the association by reason of this provision, and the endorsement undertaking to eliminate it at the end of the second year came as a surprise. She protested. Defendant promised to act upon her protest, and did so only by silence. In the meantime, plaintiff

continued to pay her dues as required by her membership in the association, and the defendant accepted them.

The plaintiff invokes the doctrine of waiver and what she terms the greater merit. *Underwood v. Ins. Co.*, 185 N. C., 538, 117 S. E., 790. The defendant relies upon the letter of the endorsement and what it calls the stronger position. *Allen v. Ins. Co.*, 215 N. C., 70; 14 R. C. L., 933.

As between the claims of waiver on the one side and acquiescence on the other, the facts agreed are not determinative of the issue, and, hence, are insufficient to warrant the court in proceeding to judgment. *Roebuck v. Trustees*, 184 N. C., 611, 113 S. E., 927.

The judgment will be vacated and the cause remanded for further proceedings as to justice appertains and the rights of the parties may require.

Error and remanded.

T. J. HARRINGTON AND D. B. HARRINGTON, PARTNERS TRADING AS HARRINGTON & HARRINGTON, v. H. W. LOWRIE, SR.

(Filed 31 May, 1939.)

1. Money Received § 3—Complaint held sufficient to state cause of action for money received.

The complaint alleged in substance that plaintiff cotton broker paid for cotton by a cotton ticket showing the weight and number of bales and the amount due therefor, which ticket was paid by the bank under arrangement made by plaintiff with it, that defendant's tenant obtained a ticket for cotton sold which he took to the bank and had credited to defendant's account, that thereafter he obtained another ticket for the same cotton which plaintiff failed to mark "duplicate," which the tenant took to the bank for transmission to defendant in order to show the amount of cotton sold, and which through inadvertence the bank also credited to defendant and charged to plaintiff's account. *Held:* Defendant's demurrer to the complaint was properly overruled, since the facts alleged disclosed unjust enrichment of defendant at the expense of plaintiffs, and that in equity the money obtained on the second cotton ticket belonged to plaintiffs.

2. Pleadings § 20—

Upon a demurrer to the complaint, the facts alleged must be taken as true.

APPEAL by defendant from *Bivens, J.*, at November Term, 1938, of ANSON. Affirmed.

Robinson, Pruette & Caudle for plaintiffs.

B. M. Covington for defendant.

DEVIN, J. This case comes to us upon appeal from a judgment overruling defendant's demurrer to the complaint. It is contended that facts sufficient to constitute a cause of action are not therein stated.

An examination of the complaint shows that the following material facts were alleged, upon which recovery from the defendant is sought. Plaintiffs are cotton buyers on the market in Ansonville. Their method of doing business was to give the seller of the cotton purchased a cotton ticket showing bale number, weight, price and total amount due, and by arrangement with the Bank of Anson this amount was paid to the seller by the bank and charged to plaintiffs' account. In accordance with this method plaintiffs purchased from a tenant on defendant's land eleven bales of cotton and plaintiffs' agent issued cotton ticket therefor in amount of $475.07, which was paid by the bank and charged to plaintiffs' account. The tenant retained for himself the price of one bale, $46.95, and had the bank credit the account of defendant with proceeds of ten bales, $428.12. Later on the same day the tenant requested from plaintiffs' agent a duplicate cotton ticket for the ten bales so that it might be sent the defendant for his information as to number and weight of the bales. This request was complied with, but plaintiffs' representative failed to mark the ticket "duplicate." The tenant took the second cotton ticket to the bank so that it might be sent to defendant for his information, but the bank by mistake and inadvertence, and without the knowledge of plaintiffs, credited defendant's account again with $428.12, and charged same to plaintiffs' account. Before discovery of the error this money was paid to the defendant by the bank, with exception of $75.00, which was later credited to plaintiffs, leaving $353.12 as the amount which it is alleged has been by mistake paid out of plaintiffs' fund to the unjust enrichment of the defendant. The defendant refuses to return the money.

We think the demurrer was properly overruled. Stripped of immaterial details, the bare fact stands out that by an inadvertence on the part of the bank a sum of money has been taken from the plaintiffs and put into the pockets of the defendant, money which justly belongs to the plaintiffs and to which the defendant is in no way entitled. The money does not belong to the defendant but does belong to the plaintiffs. Defendant's refusal to correct the error and return the money reveals him in an inequitable position.

By answer the defendant may be able to avoid the implication based on the facts alleged in the complaint and may throw a different light on the transaction, but on demurrer the facts alleged are taken to be true.

In *Bahnsen v. Clemmons,* 79 N. C., 556, where money was twice paid for the same services, it was said: "It is as inequitable for the one to

receive and retain the double payment as it is wrong that the other who has twice paid his money should lose it and be without remedy," and the following language was quoted from 2 Greenleaf on Evidence, sec. 104: "When the defendant is proved to have in his hands the money of the plaintiff, which *ex equo et bono* he ought to refund, the law conclusively presumes that he has promised so to do."

In *Wilson v. Lee,* 211 N. C., 434, 190 S. E., 742, *Connor, J.,* writing the opinion for the Court, quoted with approval from 41 C. J., 28, 42, as follows: "The action may, in general, be maintained whenever the defendant has money in his hands which belongs to the plaintiff, and which in equity and good conscience he ought to pay to the plaintiff . . . The plaintiff is entitled to recover when it appears that the money in question belongs to the plaintiff and was secured by the defendant without the consent of the plaintiff, or if with his consent, without consideration."

In the latest case on the subject, *Sparrow v. Morrell, ante,* 452, *Schenck, J.,* quotes this language from *Morgan v. Spruill,* 214 N. C., 255: "An action to recover money paid under 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." See also *Simms v. Vick,* 151 N. C., 78, 65 S. E., 621; *Pool v. Allen,* 29 N. C., 120.

The exception to the ruling of the court below in allowing, in its discretion, motion of the Bank of Anson to become party plaintiff is without merit.

Judgment affirmed.

TOWN OF WADESBORO v. FRED J. COXE AND WIFE, ELIZABETH D. COXE, AND JAMES A. HARDISON AND WIFE, LILLIAN H. HARDISON.

(Filed 31 May, 1939.)

Municipal Corporations § 34: Pleadings § 29—Held: Motion to strike should have been allowed, the matter complained of being irrelevant and immaterial.

An action by a municipality to collect assessments against property for improvements is a proceeding *in rem* and there is no personal liability on the part of the owners of the land or their grantees, and therefore allegations that in the sale of the land the grantees retained the amount of the unpaid assessments out of the purchase price, and that the grantors after petitioning for the improvements sought to defeat the payment of the assessments by failing and refusing to permit their grantees to pay the

municipality the amount retained, is properly stricken out, C. S., 506, since such matter is irrelevant and immaterial, and evidence in support thereof would be incompetent, and since defendants might be prejudiced if it were allowed to remain.

APPEAL from *Phillips, J.*, at March Term, 1939, of ANSON. Reversed.

Robinson, Pruette & Caudle for plaintiff, appellee.
B. M. Covington for defendants, appellants.

SCHENCK, J. This is an appeal by the defendants from a denial of their motion to strike from the complaint paragraphs 8 and 9 for that the allegations therein are irrelevant and immaterial to the plaintiff's alleged cause of action, said motion having been made in apt time under C. S., 537.

The complaint alleges that the defendants Fred J. Coxe and wife, Elizabeth D. Coxe, were property owners within the town of Wadesboro, and were two of the majority of property owners who petitioned the town to improve certain lots of land with frontage on Lee Avenue, and that pursuant to the petition, and in accord with chapter 56, article 9, of Consolidated Statutes and amendments thereto, the town effected the improvements petitioned for, the cost of which became a lien on the land so improved; and that said Coxe and wife paid several installments of the assessment against their land on Lee Avenue, and thereafter conveyed said land to the defendants James A. Hardison and wife, Lillian H. Hardison, subject to the portion of the assessment lien still unpaid; and that the defendants, the said Coxe and wife and the said Hardison and wife, decline to pay the remaining assessments now due and unpaid. The prayer of the complaint is that the plaintiff recover the amount of the unpaid assessment against the land, and that said land be condemned and sold for the satisfaction of the assessment lien.

The complaint contains the further allegations of paragraphs 8 and 9, which the defendants moved to strike out, as follows:

"8. This plaintiff is further informed, believes and so alleges, that at the time the property was sold to the defendants James A. Hardison and wife, Lillian H. Hardison, two of the said defendants, they had the title to said property examined and were informed that there was an unpaid assessment lien affecting said property in the sum of $758.42, with interest thereon as prescribed by the statute; and that when the sale of said property was made by the defendants Fred J. Coxe and wife, Elizabeth D. Coxe, to the said James A. Hardison and wife, Lillian H. Hardison, the amount of the assessment lien was not paid to the defendants Fred J. Coxe and wife, Elizabeth D. Coxe, but was

retained, and as this plaintiff is informed and believes, is still in the possession of the said James A. Hardison and wife, Lillian H. Hardison.

"9. That the defendants Fred J. Coxe and wife, Elizabeth D. Coxe, after having encouraged, petitioned and urged the plaintiff to make the local improvements affecting their property above-described, which local improvements were made according to their wishes and as prescribed by the statute, this plaintiff is informed and believes that the said defendants, Fred J. Coxe and wife, Elizabeth D. Coxe, are now seeking to defeat the payment of said assessment lien by failing and refusing to permit the purchasers of said property to pay over to the town of Wadesboro the amount of the assessment lien which is retained in the possession of the defendants James A. Hardison and wife, Lillian H. Hardison."

It was necessary for the plaintiff, in stating its cause of action, to allege only the facts with reference to the making of the improvements, the levying of the assessment for such improvements, that some part of the assessments remain due and unpaid; and that the statutory procedure had been complied with. The allegations of paragraphs 8 and 9 of the complaint are not relevant nor material to the plaintiff's cause of action, and might be prejudicial to the defendants if allowed to remain therein.

This action is strictly a proceeding *in rem* and there is no personal liability against the owners of the land for the assessments levied against it. *Carawan v. Barnett,* 197 N. C., 511.

"A party to an action is entitled as a matter of right to put into his pleadings 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 plea, especially 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." *Patterson v. R. R.,* 214 N. C., 38.

It is manifest that upon the trial of the plaintiff's alleged cause of action, evidence of the facts alleged in paragraphs 8 and 9 of the complaint would be incompetent and inadmissible because irrelevant and immaterial, and therefore upon motion duly made should have been stricken from the complaint. "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." *Duke v. Children's Com.*, 214 N. C., 570.

The order of the Superior Court denying the motion of the defendants is

Reversed.

C. M. SHEETS AND NORA J. SHEETS v. JAMES T. WALSH.

(Filed 31 May, 1939.)

1. Dedication § 5—It is necessary to a withdrawal of a dedication of land from public use that the declaration of the withdrawal be registered.

When certain streets and alleys have been dedicated to the public by the registration of a plat, it is necessary to a withdrawal of the dedication under the provisions of ch. 174 of Public Laws of 1921, as amended by ch. 406, Public Laws of 1939, among other requirements, that the declaration of such withdrawal should be recorded; and when the facts agreed in an action involving the validity of an alleged withdrawal fail to disclose whether the declaration of the withdrawal had been recorded and to show plaintiffs to be claimants of title under dedicators who filed the plats, they are insufficient to enable the court to determine the question.

2. Appeal and Error § 40a—

Where the facts agreed are insufficient to enable the court to proceed to judgment, judgment entered thereon is erroneous and the case will be remanded for further proceedings.

APPEAL by defendant from *Clement, J.*, at April Term, 1939, of FORSYTH.

Civil action for specific performance of contract relating to real property.

Plaintiffs allege that on 18 April, 1939, being the owners of certain specifically described real property in Winston-Salem, North Carolina, they contracted to sell and convey same to defendant by "a good merchantable title in fee" at an agreed price; that defendant agreed to buy and to pay for same on these terms; that plaintiffs are ready, able and willing to comply with their contract; and that defendant refuses to accept the deed tendered by plaintiffs pursuant thereto, and to pay the purchase price.

Defendant, answering, denies that plaintiffs are the owners of the property, and avers that they cannot furnish "a good merchantable title in fee" to the same for the reasons that two certain plats representing a boundary of land, including the property in question, and

showing the same divided into blocks with streets and alleys, have been caused to be registered in the office of the register of deeds of Forsyth County, North Carolina, thereby effecting a dedication of the streets and alleys to public or private use.

Plaintiffs, replying, admit the registration of the plats, but deny the conclusion that, for the reasons averred, they are prevented from conveying such title as they contracted to convey for that they have complied with the provisions of ch. 174 of Public Laws 1921 as amended by H. B. 1167 (ch. 406), enacted by the 1939 session of the General Assembly, thereby withdrawing the streets and alleys from public or private use.

The case was heard below upon an agreed statement of facts in which these facts, among others, appear: The land in question is part of a boundary of property shown on two certain plats, duly registered, one in 1892 at instance of Winston-Salem Land & Investment Company, showing subdivision into blocks and streets, and another in 1898 at instance of the New York and New Jersey Land & Development Company, showing a different lay-out of streets, blocks and even numbered lots. From each of the plats lots, not within the boundary involved in this action, were sold off to various owners. The dedicating corporations no longer exist. Plaintiffs, proceeding under ch. 174 of Public Laws 1921, as amended, have filed in office of register of deeds of Forsyth County, North Carolina, a declaration of withdrawal of the land in question from public or private use.

It does not appear from the statement of facts that the declaration filed by plaintiffs has been "recorded," nor do facts appear showing plaintiffs to be claimants under the dedicators.

The court below, being of opinion that plaintiffs can convey title as agreed, entered judgment for specific performance as prayed by plaintiffs.

Defendant appeals therefrom to the Supreme Court and assigns error.

Spruill Thornton for plaintiffs, appellees.
Buford T. Henderson for defendant, appellant.

WINBORNE, J. A careful reading of the agreed statement of facts discloses the absence of findings of fact essential to a proper determination of the question involved.

Chapter 174, Public Laws 1921, provides, in pertinent part, that every strip, piece, or parcel of land which has been dedicated to public use as a road, highway, street, avenue, or for any other purpose whatsoever, by "deed, grant, map, plat, or other means" and "shall not have been actually opened and used by the public within twenty years after

the dedication," an abandonment thereof by the public for the purpose for which same shall have been dedicated shall be "conclusively presumed": "Provided that no abandonment of any such public or private right or easement shall be presumed until the dedicator *or those claiming under him* shall file and cause *to be recorded* (italics ours) in the register's office of the county where the land lies a declaration withdrawing such strip, piece, or parcel of land from the public or private use to which it shall have been dedicated in the manner aforesaid."

Patently there are no findings of fact with respect to the registration of the declaration, and showing plaintiffs to be claimants of title under the dedicators who filed the plats. Without these, error in the judgment below is manifest. Therefore, further consideration of the questions involved is now futile.

The case will be remanded for further proceedings in accordance with this opinion.

Error and remanded.

STATE v. ED ALSTON.

(Filed 31 May, 1939.)

1. Criminal Law § 5b—

In this prosecution of defendant for murder committed in the perpetration of a robbery, defendant's contention that at the time he was too drunk to premeditate or deliberate or to form a fixed intent to kill or rob *is held* conclusively determined adversely to the defendant by the verdict of the jury upon the evidence.

2. Homicide § 4d—

Where murder is committed in the perpetration of a robbery from the person, it is murder in the first degree, C. S., 4200, irrespective of premeditation or deliberation or malice aforethought.

3. Criminal Law § 33—

The competency of an alleged confession is for the determination of the court upon the preliminary hearing, and when the State's evidence tends to show that the confession was voluntary and defendant introduces no evidence upon the question, the ruling of the court upon the competent evidence is not reviewable.

4. Same—

Where, upon preliminary hearing to determine the competency of an alleged confession, defendant fails and refuses to offer evidence to show that the confession was involuntary, although given ample opportunity to do so, he waives his right and his testimony thereafter given on the trial tending to show the confession involuntary, is too late to be considered upon the question.

5. Homicide § 30—

Where the evidence would justify the court in confining the jury's inquiry to the question of murder in the first degree or acquittal, any error in the charge on the issue of manslaughter would seem to be harmless.

APPEAL by defendant from *Ervin, Jr., Special Judge,* at October Special Term, 1938, of DURHAM.

Criminal prosecution tried upon indictment charging the defendant with the murder of one Janie Wilkerson.

Verdict: Guilty of murder in the first degree.

Judgment: Death by asphyxiation.

The defendant appeals, assigning errors.

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

Sigmund Meyer and C. W. Hall for defendant.

STACY, C. J. The record discloses that on 23 December, 1937, the defendant struck the deceased over the head with a stick of wood, robbed her, and left her to die, which she did as a result of the blow inflicted by the defendant.

The deceased was a Negro woman 103 years of age. She lived in Durham with two of her grandchildren. The defendant had been living in the house for about two weeks. He knew the deceased carried money on her person. After the grandchildren had gone to work, the defendant went to the room of the deceased, hit her over the head with a stick, and robbed her of $12.00 in currency which she had in a little bag tied to her dress. The defendant then went to the home of his mother, changed his clothes, got a hair cut at a barber shop, and never returned to his room in the house of the deceased. He told the officers that he robbed the deceased and struck her for that purpose, but did not intend to kill her. He further testified that he was too drunk to know what he was doing at the time.

The jury was evidently not impressed with the defendant's plea of irresponsibility. *S. v. Walker,* 193 N. C., 489, 137 S. E., 429; *S. v. English,* 164 N. C., 497, 80 S. E., 72. He showed too much sprightliness in and about the robbery, and thereafter departing, for one who had been drinking to drunkeness. *S. v. Myrick,* 203 N. C., 8, 164 S. E., 328; *S. v. Ross,* 193 N. C., 25, 136 S. E., 193. He knew what he was doing. *S. v. Murphy,* 157 N. C., 614, 72 S. E., 1075.

Moreover, it appears that the murder was committed in the perpetration of a robbery. *S. v. Lane,* 166 N. C., 333, 81 S. E., 620; *S. v.*

Logan, 161 N. C., 235, 76 S. E., 1. It is provided by C. S., 4200 that a murder "which shall be committed in the perpetration or attempt to perpetrate any . . . robbery . . . or other felony, shall be deemed to be murder in the first degree." *S. v. Gosnell,* 208 N. C., 401, 181 S. E., 323; *S. v. Donnell,* 202 N. C., 782, 164 S. E., 352; *S. v. Miller,* 197 N. C., 445, 149 S. E., 590. The question of premeditation and deliberation or the defendant's malice aforethought in murdering the deceased, therefore, was not perforce material to the inquiry. *S. v. Logan, supra.* The defendant slew the deceased while perpetrating a robbery from her person. This is pronounced by the statute as murder in the first degree. *S. v. Stefanoff,* 206 N. C., 443, 174 S. E., 411. *S. v. Myers,* 202 N. C., 351, 162 S. E., 764; *S. v. Donnell,* 202 N. C., 782, 164 S. E., 352.

The defendant's principal exception, or the one chiefly urged on argument and in brief, relates to the admission in evidence of an alleged confession or statements made by the defendant to the officers while in their custody. *S. v. Exum,* 213 N. C., 16, 195 S. E., 7; *S. v. Gray,* 192 N. C., 594, 135 S. E., 555. The voluntariness of the confession was the subject of a preliminary inquiry in the absence of the jury. After hearing the State's witnesses, who fully supported the solicitor's contention, the court inquired of the defendant whether he wished to be heard on the competency of the alleged confession. *S. v. Smith,* 213 N. C., 299, 195 S. E., 819. "Whereupon counsel for defendant stated to the court that they did not desire to offer testimony upon the preliminary question before the court as to whether or not said statements were free and voluntary or otherwise." (R., p. 30.) The court thereupon adjudged the statements to be admissible in evidence. The defendant noted an exception. The court again stated to the defendant that he was entitled to be heard on the preliminary inquiry touching the voluntariness of the alleged confession. "Counsel for defendant stated that they did not desire to offer such testimony before the court at this time." (R., p. 30.) The exception is unavailing. *S. v. Stefanoff, supra.* The competency of the confession was a preliminary question for the trial court, *S. v. Andrew,* 61 N. C., 205, to be determined in the manner pointed out in *S. v. Whitener,* 191 N. C., 659, 132 S. E., 603, and the court's ruling thereon is not subject to review, if supported by any competent evidence. *S. v. Moore,* 210 N. C., 686, 188 S. E., 421. The defendant waived his right to offer evidence on the preliminary inquiry. *S. v. Hartsfield,* 188 N. C., 357, 124 S. E., 629. He is in no position now to complain at the admission in evidence of the confession. *S. v. Smith, supra.* The court's ruling is supported by ample evidence.

It is true, the defendant later testified to matters which, if believed, would have rendered the confession involuntary and inadmissible. *S. v.*

Stevenson, 212 N. C., 648, 194 S. E., 81. But this was too late. He should have offered his evidence on the preliminary inquiry when the court was seeking to determine its competency. The case is not like *S. v. Anderson,* 208 N. C., 771, 182 S. E., 643, where the involuntariness of the confession subsequently appeared from the testimony of a State's witness. Here, the voluntariness of the confession is fully supported by the State's evidence.

The remaining exceptions are addressed to portions of the charge. The defendant thinks the court expressed an opinion, confused the jury in respect of manslaughter, and omitted 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. None of these exceptions can be sustained. They are all settled by previous decisions. It would only be a matter of repetition to consider them *seriatim.* Any error in the charge on the issue of manslaughter would seem to be harmless, as under the evidence the court might well have limited the jury to a consideration of the capital offense or an acquittal. *S. v. Linney,* 212 N. C., 739, 194 S. E., 470.

As no reversible error has been made to appear, the verdict and judgment will be upheld.

No error.

STATE v. YOUNG COLEMAN.

(Filed 31 May, 1939.)

1. Criminal Law § 81c—

The ruling of the court sustaining objections to questions propounded by defendant on cross-examination of the State's witnesses cannot be held prejudicial when it appears that in most instances the questions were substantially answered and that in others the questions were but reduplications of inquiries in a different form, calculated to bring out matter which the witnesses had already negatived.

2. Criminal Law § 41b—

The scope of the cross-examination must rest largely in the discretion of the trial court, even though the purpose of the cross-examination is to discredit the witness.

APPEAL by defendant from *Clement, J.,* at April Term, 1939, of FORSYTH. No error.

Charge: Robbery.

Verdict: Guilty.

Sentence: 12 years on the public roads.

Attorney-General McMullan and Assistant Attorneys-General Bruton and Wettach for the State, appellee.

Winfield Blackwell, John C. Wallace, and Gilbert Shermer for defendant, appellant.

SEAWELL, J. The substantial evidence in the case is as follows:

On the night of 6 January, 1939, Woodrow K. Parrish, a taxi driver, was hailed by three colored men and, at their direction, carried them to a deserted spot on the outskirts of the city of Winston-Salem. There, at the point of a pistol, they took $7.00 from his person. They carried him to a still more deserted locality, put him out, and drove away.

Upon reaching the nearest telephone Parrish immediately got in contact with the police force and informed them of the occurrence. Sometime later his cab was found parked in the city.

From time to time thereafter, covering a period of about two months, Parrish was called upon to see suspects whom the police had picked up, on the possibility that he might identify one or more of them as his assailants.

When he was finally brought to view this defendant, he immediately identified him as one of the men who had robbed him.

There is evidence to the effect that other employees of the Blue Bird Taxi Company had been interested in the apprehension of the persons who had attacked Parrish; and it is further in evidence that some of them had shot this defendant in the leg the night before his identification by Parrish, and that on the occasion of such identification he was limping. On the trial of the case the defense sought to impeach the witness Parrish, who had identified the defendant, by showing a personal and business connection between him and the other persons, whom they allege had an animosity against the witness, by showing that he had a knowledge of the arrest and wounding of defendant by such persons on the night before, and by developing the theory that this witness was biased in his testimony through a desire to aid such persons.

Examining the exceptions pointed out by defendant's counsel in their brief, the record shows the following questions propounded to the witness Parrish on cross-examination: Question: "You had never seen him from January 6th until after Mr. Gray Thompson and J. T. Thompson, Jr., who works for the Blue Bird, and Mr. White, who also works for the Blue Bird, had been to his home and shot him and had him down there?" Although the record is marked: "Objection sustained and the defendant excepted, Exception No. 1," it shows that, notwithstanding such ruling, the answer was actually admitted as follows: "I don't know whether he was shot at the time I was sent for in the police court." This was fol-

lowed by the question: "Didn't you find that out?" This was excluded. During the further progress of the cross-examination this witness, in response to a question, answered that J. T. Thompson, Jr., was not down there when the identification was made, and that the witness was down there when the defendant had his trial. Question: "What was J. T. Thompson, Jr., indicted for?" To this, objection was sustained and the defendant excepted. Question: "Was he tried there that morning?" The record states: "Objection overruled and defendant excepted." Probably the objection was sustained.

On further cross-examination the witness was asked: "Didn't he come out limping like you saw him walk into the courtroom?" (The reference is to the defendant.) The record shows that objection was sustained and defendant excepted; but it also shows that despite this fact the witness answered: "I saw him come in limping a minute ago. I saw him limping down in police court. I didn't know he had been shot the night before." Question: "You hadn't discussed it down there with J. T. Thompson, Jr.?" Objection was sustained and defendant excepted.

From the foregoing it will appear that the questions propounded by defense counsel were in most instances substantially answered and in others were but reduplications of inquiry in a different form, calculated to bring out matter which the witness had already negatived. *S. v. Edmonds,* 185 N. C., 721, 117 S. E., 23; *S. v. Jestes,* 185 N. C., 735, 117 S. E., 385. That the purpose of counsel was to establish interest and bias on the part of the witness does not perforce abrogate the rule that the scope of the cross-examination must rest largely in the discretion of the trial court. *S. v. Beal,* 199 N. C., 278 (298), 154 S. E., 604; Wigmore on Evidence (2d ed.), sec. 944, *et seq.*, 28 R. C. L., 445. There does not appear to be any abuse of discretion on the part of the trial judge. *S. v. Buck,* 191 N. C., 528, 132 S. E., 151; *S. v. Cobb,* 164 N. C., 418, 79 S. E., 419.

After all, in the absence of more specific evidence, which the defendant might have introduced if available, the theory upon which the defense attempts to predicate bias and prejudice on the part of the witness Parrish seems to us too remote to serve him in this case.

Other exceptions are without merit.

In the trial there is

No error.

ESTELLE COLLINS AND HUSBAND, D. G. COLLINS; MARY LAMB BRITT AND HUSBAND, J. D. BRITT; ANDREW LAMB AND WIFE, LILLIAN LAMB; ANNIE BELLE MARTIN AND HUSBAND, I. M. MARTIN; HILBERT LAMB AND WIFE, MICA GRACE LAMB; AND RUBY D. KINLAW, MINOR, BY HER NEXT FRIEND, HILBERT LAMB (ORIGINAL PARTIES PLAINTIFF); AND MRS. CATTIE LAMB, WIDOW OF E. F. (ZEBEDEE) LAMB (ADDITIONAL PARTY PLAINTIFF), *v.* HENRY LAMB.

(Filed 31 May, 1939.)

1. Evidence § 32—

C. S., 1795, does not preclude a witness from testifying to independent facts and circumstances within her observation and knowledge or from giving evidence of what she saw or heard take place between the deceased and another or others, not involving personal transactions between herself and the deceased.

2. Appeal and Error § 38—

The burden is upon appellant not only to show error but also that the rulings complained of were prejudicial.

3. Appeal and Error § 39a—

A new trial will not be awarded for error unless the error is prejudicial and probably influenced the jury in rendering the verdict.

BARNHILL, J., dissents.

APPEAL by defendant from *Sinclair, J.*, at October Term, 1938, of ROBESON. No error.

E. J. & L. J. Britt and McLean & Stacy for plaintiffs.
Varser, McIntyre & Henry for defendant.

DEVIN, J. This was an action to set aside two deeds executed by Zebedee Lamb and his wife, Cattie C. Lamb, to the defendant Henry Lamb, which it is alleged were never delivered by the grantors. Zebedee Lamb is dead, and the plaintiffs and the defendant are his children and heirs at law. Cattie C. Lamb, his widow, survives and is a party plaintiff.

Upon issues submitted the jury found (1) that the deeds had been placed by the grantor in the keeping of Cattie C. Lamb under agreement that they be retained and not recorded during his life time, and (2) that defendant wrongfully and against remonstrance of Cattie C. Lamb and in violation of the agreement obtained possession of the deeds and had same recorded, and (3) that upon demand by the grantor the defendant refused to restore the deeds or reconvey the lands. Defendant appealed from judgment rendered in accord with the verdict.

Appellant's principal assignments of error relate to the rulings of the trial judge in the admission of evidence which he contends was prohibited by C. S., 1795. The restriction upon the admission of testimony contained in this section has been recently considered by this Court, and numerous decisions thereunder collected and cited in *Wilder v. Medlin, ante,* 542, and *Burton v. Styers,* 210 N. C., 230, 186 S. E., 248. The provisions of the statute are clear, but their application to particular cases frequently involves difficulty. In this case it appears that Cattie C. Lamb, a party plaintiff, testifying against the defendant, who derived his title from Zebedee Lamb, was rendered incompetent by the statute to give evidence concerning a personal transaction or communication between herself and the deceased. But she was not thereby precluded from testifying to independent facts and circumstances within her observation and knowledge, or from giving evidence of what she saw or heard take place between the deceased and another or others which did not involve a personal transaction or communication between herself and the deceased. She was competent to testify to transactions and communications between herself and the defendant which did not necessarily involve matter within the inhibition of the statute. A careful examination of the evidence of this witness, to which numerous exceptions were noted, leads us to the conclusion that while in several instances the trial judge permitted testimony which came within the prohibition of the statute, this ruling of the court was not sufficiently prejudicial to require a new trial. We cannot hold that the result was thereby affected, and the burden is on the appellant not only to show error but to enable the court to see that he was prejudiced or the verdict of the jury probably influenced thereby.

"Verdicts and judgments are not to be set aside for harmless error or for mere error and no more. To accomplish this result, it must be made to appear not only that the ruling complained of is erroneous, but also that it is material and prejudicial, amounting to a denial of some substantial right." *Wilson v. Lumber Co.,* 186 N. C., 56, 118 S. E., 797; *Rogers v. Freeman,* 211 N. C., 468, 190 S. E., 728; *Shelly v. Grainger,* 204 N. C., 488 (498), 168 S. E., 736; *Harvey v. Tull,* 192 N. C., 826, 135 S. E., 534; *In re Ross,* 182 N. C., 477, 109 S. E., 365; *In re Thorp,* 150 N. C., 487, 64 S. E., 379. There was ample competent evidence from this and other witnesses to support the allegations of the complaint and to justify the verdict of the jury. *Wolfe v. Smith, ante,* 286.

Other exceptions were noted by defendant to the ruling of the court below in the admission or exclusion of testimony, and to the form of the issues submitted, but upon examination we find these exceptions without

substantial merit. Exceptions were likewise noted to the judge's charge. Appellant complains that the trial judge did not declare and explain the law arising upon the facts in evidence, as required by C. S., 564. However, the case was one involving essentially issues of fact and these seem to have been fairly presented to the jury, with the burden of proof placed upon the plaintiffs throughout.

The record reveals the diligence of appellant's able counsel. Nothing has been overlooked that might help his cause. But the jury has accepted the view presented by the evidence of the plaintiffs, and rendered a verdict in accord with their contentions. Upon consideration of the entire record we reach the conclusion that the judgment below should be affirmed.

No error.

BARNHILL, J., dissents.

NORA LEE HEATH v. J. HICKS COREY.

(Filed 31 May, 1939.)

Deeds § 13a—Under the facts of this case, grantee had obtained interest of the only other contingent remainderman, and could convey indefeasible fee.

This deed was made to two of grantor's four children with provision that if one or both of the grantees died without issue her share should be equally divided among her surviving brothers and sisters. One of the grantees conveyed all her interest in the *locus in quo* to the other grantee and both the children of grantor who were not grantees in the deed predeceased the grantees. *Held:* In any event, the grantee to whom the other had conveyed her interest has an indefeasible fee in the property, since she alone would be entitled to the remainder over if the other grantee predeceased her without issue or if she predeceased the other grantee, such other grantee had already conveyed the contingent limitation over to her, the grantees in the deed being the only contingent remaindermen after the death of the other children of the grantor.

APPEAL from *Frizzelle, J.*, at September Term, 1938, of PITT. Affirmed.

This was a controversy without action relating to the title to land. Plaintiff has contracted to convey the land to the defendant, and has tendered deed which defendant declines to accept on the ground that the title is other than fee simple. From judgment for plaintiff holding that plaintiff's title is good, and that her deed conveys a fee simple, defendant appealed.

Arthur B. Corey for plaintiff.
Wm. J. Bundy for defendant.

DEVIN, J. The determination of the question of title to the described land, presented by this appeal, involves construction of the deed of D. H. Allen and wife, under which the plaintiff claims. This deed was executed in 1905, and conveyed the land to Nora Lee Allen (now Heath), the plaintiff, and to Mary A. Allen (now Edwards). The *habendum* clause of the deed is in these words: "To have and to hold unto the said Mary A. Allen and Nora Lee Allen, subject to the life estate of the said D. H. Allen and Mary P. Allen, which is hereby reserved, and with the further proviso that should the said Mary A. Allen and Nora Lee Allen, or either of them, die without issue, then the share of the one or both so dying shall be equally divided among their surviving brothers and sisters."

It is admitted that D. H. Allen and Mary P. Allen, his wife, are dead, and there were born to them four children, viz.: (1) J. W. Allen, who died in 1918, leaving issue; (2) Joseph James Allen, who died in 1934, leaving issue; (3) Mary A. Edwards, now surviving, with living issue, and (4) Nora Lee Heath, the plaintiff, who has living issue. In 1928, by deed, Mary A. Edwards and her husband conveyed to Nora Lee Heath, the plaintiff, all her right, title and interest, vested and contingent, in the land in controversy.

The conveyance in 1905 by D. H. Allen and wife to Mary A. and Nora Lee contained the provision that if either or both should die without issue, the share of one or both should be "equally divided among their surviving brothers and sisters." However, since both J. W. Allen and Joseph James Allen are dead in the life time of the grantees in the deed, Nora Lee and Mary A. are the only survivors, and the limitation over in case of death without issue can only apply to one or the other of the surviving sisters. Mary A. has conveyed to Nora Lee by deed. So that in any event the deed executed by Nora Lee Heath to the defendant, which she has tendered in accordance with her contract, would carry a good and indefeasible title to the land therein described. *Woody v. Cates,* 213 N. C., 792, 197 S. E., 561; *Williams v. R. R.,* 200 N. C., 771, 158 S. E., 473.

The judgment of the Superior Court is
Affirmed.

A. L. LONG AND WIFE, ETTA LONG, W. T. BOSEMAN AND MRS. W. T. BOSEMAN, AND OSCAR TOWNSEND v. W. F. TOWNSEND.

(Filed 31 May, 1939.)

Tender § 2—Tender held one made to obviate further litigation and was not an admission of indebtedness.

In this proceeding to acquire right to open or deepen a drainage ditch across defendant's land, petitioners tendered the amount awarded by the commissioners upon the calling of the case for trial *de novo* upon appeal to the Superior Court. *Held:* While not in the form of a tender of judgment under C. S., 896, the tender was offered by those seeking affirmative relief to obviate further litigation, and was not an admission of indebtedness to the extent of the tender, and therefore it was error for the court to adjudge that respondent recover the amount of tender notwithstanding the verdict of the jury finding that no damages had been sustained by respondent.

APPEAL by petitioners from *Sinclair, J.*, at December Term, 1938, of HOKE. Error and remanded.

G. B. Rowland and Downing & Downing for plaintiffs.
Bullard & Bullard for defendant.

DEVIN, J. This was a proceeding instituted by petitioners under ch. 94 of the Consolidated Statutes to acquire right to open or deepen a ditch across defendant's land for the purpose of draining a portion of the lands of petitioners.

The commissioners appointed by the clerk in accordance with the provisions of the statute reported that upon the petitioners' cleaning out a certain connecting ditch no damage would accrue to the defendant. The report was subsequently remanded to the commissioners with directions to assess an amount in money in lieu of the ditching required, and by a supplemental report the commissioners fixed the amount at $75.00. Exceptions were filed by the defendant, and in due course the cause was transferred to the civil issue docket for trial by jury, at term, on the issue of damages. Thereupon the petitioners tendered to defendant $75.00 plus $25.00 to be applied on costs, and placed same in the hands of the clerk. This tender was not accepted by the defendant. Subsequently when the case came on for trial *de novo* in the Superior Court the following issue was submitted to the jury: "What damage, if any, would defendant sustain by plaintiffs' digging the ditch referred to in the petition?" To this the jury for its verdict answered, "No damages."

Motion to set aside the verdict was denied by the trial judge, but in the judgment it was decreed that the defendant recover of petitioners

non obstante veredicto the sum of $75.00, and that petitioners be taxed with costs of action accrued up to the trial term, and that defendant pay the costs of the term, the court being of opinion that the tender constituted an unconditional admission of liability to that amount. Petitioners excepted and appealed.

We think there was error in the ruling of the court below and that judgment should have been rendered in accord with the verdict. We cannot hold that the tender made by petitioners was unconditional, or was intended or should be considered as a payment in any event to the defendant. While it was not in the form of a tender of judgment under C. S., 896, it was intended as an offer to comply with the terms of the commissioners' supplemental report, for the purpose of affecting subsequent interest and costs. This is not a case where a plea of tender by a defendant constitutes an admission of indebtedness to the extent of the tender, but where those seeking affirmative relief, before trial, make an offer for the purpose of obviating further litigation. The defendant declined to accept the tender and proceeded with the trial. He submitted his cause to the jury in the hope of obtaining a larger amount and must be content with the verdict rendered. Having appealed to a jury of his county, he must abide the result. *Ayden v. Lancaster,* 195 N. C., 297, 142 S. E., 18; *Durham v. Rigsbee,* 141 N. C., 128 (133), 53 S. E., 531; 26 R. C. L., 658.

The cause is remanded to the end that the judgment be modified by eliminating therefrom recovery of seventy-five dollars against the petitioners and striking out the order restraining the cutting of the ditch until that sum should be paid.

Error and remanded.

R. M. PORTER, EMPLOYEE, v. NOLAND COMPANY, INC., EMPLOYER, AND INDEMNITY INSURANCE COMPANY, CARRIER.

(Filed 31 May, 1939.)

1. Master and Servant § 40f—

Evidence that plaintiff, a traveling salesman, used his employer's car for a week-end trip and was injured in a wreck in returning *is held* to support the finding of the Industrial Commission that the accident did not arise out of and in the course of the employment, notwithstanding that the injured employee, at the destination of the trip, met and conversed with a representative of the employer without appointment or direction of the employer, primarily in regard to a personal matter.

2. Master and Servant § 55d—

Findings of fact of the Industrial Commission supported by competent evidence are conclusive on the courts.

APPEAL by plaintiff from *Olive, Special Judge,* at October Term, 1938, of FORSYTH. Affirmed.

This was a proceeding under the North Carolina Workmen's Compensation Act. The plaintiff, a traveling salesman with certain territory in North Carolina, had gone to Natural Bridge, Virginia, for the week-end, using employer's automobile. While there he conferred with a representative of Noland Company, without appointment or direction from employer, and principally concerning a matter of personal interest to the plaintiff. On his return he sustained injury due to wrecking of his automobile. The Industrial Commission found that his injury did not arise out of and in the course of his employment and denied compensation. Upon appeal to the Superior Court this ruling was affirmed, and plaintiff appealed to the Supreme Court.

H. H. Leake and Jno. C. Wallace for plaintiff.
Hutchins & Parker for defendants.

PER CURIAM. An examination of the record discloses that there was competent evidence to support the findings of the Industrial Commission. Therefore, in accord with the provisions of the act and the uniform decisions of this court, the findings of fact made by the Commission must be held conclusive on appeal and not subject to review. *Hildebrand v. Furniture Co.,* 212 N. C., 100, 193 S. E., 294; *Lockey v. Cohen, Goldman & Co.,* 213 N. C., 356, 196 S. E., 342; *Davis v. Mecklenburg County,* 214 N. C., 469; *Lassiter v. Telephone Co., ante,* 227.

Judgment affirmed.

E. A. MORGAN v. MARY JANE MORGAN ET AL.

(Filed 31 May, 1939.)

Guardian and Ward § 25: Pleadings § 16—

When the amounts due a ward are admitted or not controverted, the ward may maintain suit to follow the guardianship funds and to hold the bondsmen liable for any deficiency without making the personal representative of the insolvent deceased guardian a party, and defendants' demurrers for misjoinder of parties and causes for want of a necessary party are properly overruled.

APPEAL by defendants from *Bivens, J.,* at December Term, 1938, of MOORE.

Civil action to recover guardianship funds and to hold sureties liable for any deficiency.

Separate demurrers for alleged misjoinder of parties and causes of action were filed by the defendants.

From judgment overruling the demurrers, the defendants appeal, assigning errors.

Mosley G. Boyette for plaintiff, appellee.
W. R. Clegg for defendant Morgan, appellant.
J. H. Scott for defendant J. R. Brewer, appellant.

PER CURIAM. Absence of a *necessary* party may be taken advantage of by demurrer, *Geitner v. Jones,* 173 N. C., 591, 92 S. E., 493, but where amounts due are admitted or not controverted, the ward as against a demurrer for misjoinder of parties and causes may follow guardianship funds, *McNeill v. McBryde,* 112 N. C., 408, 16 S. E., 841, and hold bondsman liable for any deficiency, without making representative of insolvent deceased guardian party. *Humphrey v. Surety Co.,* 213 N. C., 651, 197 S. E., 137.

In case the amounts alleged to be due are controverted, see *Moses v. Moses,* 204 N. C., 657, 169 S. E., 273, and *McNeill v. Currie,* 117 N. C., 341, 23 S. E., 216.

The rulings upon the demurrers will be upheld.

Affirmed.

JAMES STROUD, BY HIS NEXT FRIEND, CHARLES B. CAUDIE; AND J. A. STROUD, v. SOUTHERN OIL TRANSPORTATION COMPANY.

(Filed 16 June, 1939.)

1. Negligence § 1—Duty to use due care does not necessarily arise out of any contractual relationship.

The duty to exercise due care to avoid injuring another does not necessarily arise out of a contractual relationship, such as master and servant, bailor and bailee, but such duty obtains whenever the circumstances are such that a man of ordinary prudence would apprehend that his failure to use ordinary care and skill would endanger the person or property of another.

2. Negligence § 3—

A person in control of machinery, appliances or equipment is under duty to exercise reasonable care not to expose another to danger in their invited or permitted use for his benefit.

3. Same: Negligence § 19a—Evidence held for jury as to whether truck driver knew or should have known of dangerous condition of tire he permitted filling station employee to service.

The evidence tended to show that the drivers of a truck with dual wheels permitted plaintiff, a filling station employee, to attempt to service the inside tire with air, that the circumstances were such that the plaintiff had to put his hand between the tires, and that the flange of the inside wheel flew loose mashing plaintiff's hand and causing the injury in suit. The evidence further tended to show that the inside tire had been driven slack for about twenty miles and that the flange of the inner tire might have been jarred loose from its proper assemblage by bumpings on the irregularities of the road, that this method of servicing the tire was made necessary by the fact that, although the tire had originally been equipped with a long valve stem, it was then equipped with a short valve stem, and the fact that the wheels had been improperly mounted in failing to have the spokes of the wheels opposite each other so as to give access to the valve of the inner tire through the opening between the spokes, and that defendant itself used an air hose with a long nozzle in servicing this type of wheel while plaintiff had to use the short nozzle hose in general use by service stations. *Held:* The evidence was sufficient to be submitted to the jury as to whether defendant's agents had created a dangerous situation and whether they knew, or should have known thereof, in the exercise of due care, and should have informed plaintiff before permitting him to service the tire.

WINBORNE, J., dissenting.

STACY, C. J., and BARNHILL, J., concur in dissent.

APPEAL by plaintiff from *Bivens, J.*, at November 14 Term, 1938, of ANSON. Reversed.

This is an action to recover for personal injuries sustained by reason of the alleged negligence of the defendant.

The evidence taken in the light most favorable to the plaintiff shows substantially that the plaintiff, a boy eighteen years old, was an employee at Bowman's Filling Station on 28 October, 1936, at the time of his injury. John L. McLeod and Lacy Henry, employees of the defendant and operating a truck for said defendant, came to the filling station for the purpose of inflating one of the tires of the truck, which they proceeded to undertake.

The inner tire of the left rear dual wheel had been partially deflated and had been driven in this condition for about twenty miles. The valve on this tire was a short stemmed valve and the outer wheel had been put on so that the valve stem of the inner tire was not readily accessible from outside, or through the spokes. The dual wheels were mounted so closely together that it was difficult to get the hand between them. The air hose belonging to the filling station, connected with the compressed air tank or pump, had a short nozzle or chuck such as was in common use in filling stations of that kind.

The plaintiff had been told by his employer to wait on customers wanting air when he was not otherwise employed. The compressed air apparatus was subject to the gratuitous use of automobilists who desired to use it.

After McLeod and Henry had been engaged sometime in inflating the tire, plaintiff tendered to them his services, which were accepted, and it was explained by Henry that they thought because of the fact that he had a smaller hand he might more easily insert it between the tires, that being the manner in which they were attempting to service the tire. Neither McLeod nor Henry gave the plaintiff notice of any defect about the tire or wheel or its assemblage, and gave him no warning of any danger that might be incurred in performing the service.

Because of the obstruction created by the mounting of the outside rear wheel and the fact that the valve stem was short, it was necessary for the plaintiff to insert one hand between the tires of the dual wheel and the other into and through the opening between the spokes of the outer wheel, so that proper contact might be made and maintained between the air hose nozzle and the valve stem. While engaged in this service the rim flange of the inner wheel flew loose and caught plaintiff's hands between the two tires of the wheel, causing the loss of two fingers on the left hand and badly injuring the thumbs on both hands.

The plaintiff introduced evidence tending to show that trucks of this make and type were originally furnished with a long valve stem, and that short valve stems were subsequently put into use by the defendant, and that these were not as safe. Further evidence was to the effect that the defendant itself, in inflating the tires on its own trucks, used a long air hose chuck, or nozzle, as a safety device.

The judge sustained a demurrer to the evidence, and plaintiff appealed.

E. A. Hightower for plaintiff, appellant.
J. Laurence Jones and J. L. DeLaney for defendant, appellee.

SEAWELL, J. Under the evidence taken in the light most favorable to plaintiff, did the defendant fail to perform any duty which it owed to the plaintiff?

Such a duty, if it exists, cannot be made to depend entirely upon either of the two relations which it is suggested might obtain between the parties, that is, the relation of bailor and bailee or master and servant, although either relation, if it existed, might present a special phase of the subject and conceivably might affect the application of the rule. Incidentally we find in the present record no evidence of bailment, since defendant's truck was at no time in the exclusive control of the plaintiff

or the filling station operator. Further, it is not necessary to consider the suggested relationship of master and servant, since the question we have asked ourselves may be solved from an independent point of view.

It is, of course, not necessary that a duty, the violation of which may constitute actionable negligence, should arise out of any contractual relation between the parties. There are other relations and situations or circumstances attending the occurrence or transaction connected with the injury which may give rise to such a duty. The defendant owed to this plaintiff the duty of refraining from subjecting him without warning to danger from a condition which was known to it, or could have been known by the exercise of due care, and "there is a general duty owing to others of not injuring them by any agency set in operation by one's act or omission." 45 C. J., p. 645; *Cashwell v. Bottling Works,* 174 N. C., 324, 93 S. E., 901. The latter case quotes, with approval, *Heaven v. Pender,* 11 L. R. (1882-'83), p. 503: "Whenever one person is by circumstances placed in such a position towards another that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances, he would cause danger of injury to the person or property of the other, duty arises to use ordinary care and skill to avoid such danger." *Lisle v. Anderson,* 61 Okla., 68, 71, 159 P., 278.

The defendant owed to the plaintiff the duty of exercising reasonable care not to expose him to danger in the invited or permitted use for its benefit of machinery, appliances, or equipment inherently dangerous or which had become dangerous while in its control, if the condition was known to it or could have been known to it by the exercise of due care. *Moreman Gin Co. v. Brown,* 291 S. W., 946, (injury caused by breaking of tackle which plaintiff was invited to use in unloading cotton); *Pennsylvania R. Co. v. Hummel,* 167 Fed., 89 (injury to plaintiff caused by furnishing his employer with defective car to be loaded); *Connor's v. Great Northern El. Co.,* 9 App. Div., 311, 323, 85 N. Y. S., 644 (injury from use of defective appliance when no contractual relation existed); *King v. National Oil Co.,* 81 Mo. Ap., 155 (injury caused plaintiff by dangerous condition of wagon he was repairing); *MacPherson v. Buick Motor Co.,* 217 N. Y., 382, 390, 111 N. E., 1050: "He who puts a thing in charge of another which he knows to be dangerous or to be possessed of characteristics which in the ordinary course of events are likely to produce injury owes a duty to such person to give reasonable warning or notice of such danger." *Kutchera v. Minneapolis etc. Railroad Co.,* 50 N. D., 597, 603, 197 N. W., 140.

The evidence taken in the light most favorable to the plaintiff tends to show that the truck was equipped with dual wheels, the dual wheels being assembled so closely together that the hand could be with difficulty

inserted between them; that the outer wheel was so mounted that the openings in it, referred to in the evidence as openings between the spokes, were not in proper correlation with the inner wheel so that the valve stem used for inflating the tire of that wheel could be easily accessible, which is declared by the witness Jantsch to be an improper mounting; that the truck had been originally equipped with tires or tubes carrying a long valve stem, which would render it unnecessary to insert the hand between the wheels in the process of inflation; that the truck had been driven eighteen or twenty miles with a slack tire on the inner wheel, and although presumably supported by the outer fully inflated tire, the supporting rim or flange of the inner tire may have been disarranged from its proper assemblage by bumping on irregularities in the road, this effect being more easily brought about on account of the increase of weight upon the inflated tire. It further tended to show that the long valve stem with which the truck had been originally equipped had been removed and a short valve stem substituted for it, and that this was less safe; that the defendant itself used a long chuck or nozzle upon the air hose as a safety device in inflating the tires.

The evidence tends to show that McLeod and Henry, in charge of the truck, had undertaken the inflation themselves and accepted the services of plaintiff during the job because his hand was smaller than theirs and could be more readily inserted between the wheels in order to keep the air hose in contact with the short valve stem during inflation.

Plaintiff received his injury from the rim flange of the inner wheel, which "flew loose," pinning his left hand between the wheels and injuring the thumb of his right hand, which hand he had thrust through an opening in the outer wheel to reach the short valve of the inner stem.

While McLeod and Henry disclaimed any knowledge of the danger, and one of them declared that he had never before seen a rim fly off that way, it is not denied that they drove the truck with a slack tire for eighteen or twenty miles, and under the circumstances of this case it is a question for the jury as to whether or not this may have involved the creation of a dangerous situation which was known to defendant's agents, or ought to have been known by the exercise of due care, and of which it was their duty to inform the plaintiff.

The judgment of nonsuit is

Reversed.

WINBORNE, J., dissenting. As I understand the majority opinion in this case, the decision is not made to rest upon any contractual relationship between the plaintiff and the defendant, but upon a general duty of defendant to warn plaintiff of a danger known to it or of which it should have known in the exercise of ordinary care, and which was unknown

to plaintiff or was undiscoverable by him in the exercise of ordinary care under the particular circumstances. I am unable to agree that the facts revealed by the evidence in this case, taken in the light most favorable to the plaintiff, bring the case within such rule. I think judgment as of nonsuit should be sustained.

In the first place, the evidence discloses that the plaintiff James Stroud was employed by the Bowman Oil Company at its filling station, where free service of air and water was tendered to motor vehicles stopping there, and that in his employment plaintiff was charged with the duty of rendering this service to any who might apply therefor. In the performance of that duty he was acting as the agent of the Bowman Oil Company, and using for the purpose appliances furnished by his employer, and he was in no sense the agent or servant of the person or party applying for the service.

"An automobile driver stopping at a filling station for gasoline has a right to act upon the assumption that the proprietor will provide proper and safe appliances with which to work, and careful servants." Headnote in the case *Fredericks v. Atlantic Refining Company,* 282 Pa., 8, 127 R. C. L., 615, 38 A. L. R., 666. This is said with reference to liability of the proprietor of the filling station to the automobile driver.

Stated conversely, an automobile driver stopping at a filling station to be served with free air there offered has a right to act upon the assumption that the proprietor will provide proper and safe appliances with which his employees are to work, and competent and careful servants to do the work, and is not liable for failure to provide either.

In the second place, the evidence for plaintiff shows that his injury was caused by a rim flange on the inner dual tire "jumping off," while he, in the line of his duty, was in the act of performing the free service given by the Bowman Oil Company. Plaintiff testified, "I guess the thing that caused my injury was the rim coming off." The evidence is silent as to what caused the flange rim to jump off. There is speculation that the inner tire being partially deflated while the truck was being driven along the highway may have permitted the flange to become loosened. However, the evidence is that the outside dual tire was inflated, and that the inner tire did not touch the pavement, but that it could have "hit a swell place across the road and worked off." Yet there is no evidence that it did hit such a place.

There is no evidence that John L. McLeod and Lacy Henry, employees of defendant, who had control of the truck at the time, knew that the rim flange was loose, or that in the exercise of ordinary care they should have known it. They, testifying for plaintiff, said that they had "never heard of those rim flanges jumping off before." Nor is there evidence that a rim flange had ever jumped off such a tire. All

that the evidence shows they knew about it is that the inner tube had been partially deflated while the truck traveled 18 or 20 miles. The plaintiff also knew that the tire was partially deflated and that the truck had been traveling while it was deflated. He testified that the tire carried ninety pounds of pressure and that after he had put some air in the tire there was only approximately twenty pounds in it when he was hurt. He knew that the truck had been traveling and had just driven up to the filling station. This evidence shows that he had as much information from which to know of the danger as did the operatives of the truck. Both he and they all swear that they did not think any danger existed. Speaking of putting hand between the tires, John L. McLeod testified: "Never thought about it being dangerous." Lacy Henry said: "I put one hand in through the two tires, the same way James Stroud did, and Mr. McLeod tried it the same way. . . . If I hadn't thought it was safe I wouldn't have put mine in there and wouldn't have let him . . . I didn't think it was dangerous." Plaintiff testified: "I didn't think it was anything dangerous about what I was doing." This evidence of plaintiff negatives any contention of a danger known to defendant and unknown to plaintiff.

If it be that the truck was originally equipped with a long stemmed valve and that a short one was substituted, the evidence fails to show that this was the real, the efficient, the proximate cause of the injury. Admittedly the rim flange "jumping off" was the cause of the injury to plaintiff.

"Foreseeable injury is requisite of proximate cause, and proximate cause is requisite of actionable negligence, and actionable negligence is requisite for recovery for personal injury negligently inflicted." *Osborne v. Ice & Coal Co.*, 207 N. C., 545, 177 S. E., 796.

"An event resulting from an unknown cause, or an unusual or unexpected event from a known cause; chance; casualty," is an accident. *Crutchfield v. R. R.*, 76 N. C., 322; *Martin v. Mfg. Co.*, 128 N. C., 264, 38 S. E., 876; *Simpson v. R. R.*, 154 N. C., 51, 69 S. E., 683; *Fore v. Geary*, 191 N. C., 90, 131 S. E., 387.

In *Martin v. Mfg. Co., supra,* it is said: "Injuries resulting from events taking place without one's foresight or expectation, or an event which proceeds from an unknown cause or is an unusual effect of a known cause, and, therefore, not expected, must be borne by the unfortunate sufferer." Such is this case as I view it.

STACY, C. J., and BARNHILL, J., concur in dissent.

MRS. MARIE M. TYER v. MRS. MARGARET S. MEADOWS, AS LIFE TENANT; MRS. MARGARET S. MEADOWS, J. RANDOLPH MEADOWS AND MRS. M. ROSELYN MEADOWS SEABOLT, BENEFICIARIES UNDER THE WILL OF JOSEPH F. MEADOWS, DECEASED.

(Filed 16 June, 1939.)

1. Wills § 31—

Ordinarily, a will will be construed as though executed immediately prior to testator's death, and it is only when the will describes a specific subject of gift with sufficient particularity to show that an object in existence at the date of the execution of the will was intended that the general rule is excluded. C. S., 4165.

2. Same—

The intention of the testator as gathered from the four corners of the instrument is the cardinal rule in construing a will.

3. Wills § 42—Bequest of policies of insurance held not adeemed by change of beneficiary to estate.

The will in question bequeathed two policies of insurance upon the life of testator to his daughter by his first marriage, the will reciting that she had been named beneficiary therein and that the bequest was made because testator, as tenant by the curtesy, and the legatee, as remainderman, had deeded property owned by testator's first wife to his second wife, and that this property would probably be devised by his second wife to the children of the second marriage. Subsequent to the execution of the will testator changed the beneficiary in the policies to his estate, and thereafter borrowed on the policies. *Held:* The bequest of the policies was not adeemed by the change of the beneficiary but was adeemed by the amount borrowed on the policies by testator, and the legatee is entitled to the net amount paid by the insurers to the estate, this result being consonant with the intent of the testator running throughout the will to provide for an equal division of his estate between the child by his first marriage and the children by his second marriage, after provision for his widow.

APPEAL by plaintiff from *Nimocks, Jr., Judge,* at February Term, 1939, of GRANVILLE. Reversed.

This is a submission of controversy without action, C. S., 626, upon an agreed statement of facts of some length. The facts succinctly are: On 22 March, 1937, Joseph F. Meadows, late of Granville County, North Carolina, executed his last will and testament, and for reasons stated in his will, and it is alleged by plaintiff that he bequeathed to her "$..... of the life insurance money" which he was carrying on his life and in which policies plaintiff was beneficiary, and directed that said "amount shall be paid, in full, to the said Marie M. Tyer as soon as same is collected" and directed that it should not be charged against plaintiff, appellant "in the final division of all other property." At the

time of the execution of said will, plaintiff was beneficiary in the following described life insurance policies: Policy #4084-S, issued 7 November, 1907, by the Southern Life Insurance Company, Fayetteville, N. C., later taken over by Jefferson Standard Life Insurance Company, Greensboro, N. C., it being ordinary life policy in the sum of $2,000.00. Policy #1446670, issued by the Mutual Life Insurance Company, 5 March 1904, on the life of Joseph F. Meadows, in the sum of $2,000.00. That subsequent to the execution of said will, the said Joseph F. Meadows, on 12 December, 1931, changed the beneficiary under policy #4084-S to insured's executors, administrators or assigns, and on 19 February, 1932, the said Joseph F. Meadows changed the beneficiary under policy #1446670 to insured's executors, administrators or assigns, and subsequent to said changes no other change was made as to the beneficiary under said policies. That subsequent to the execution of said will, said Joseph F. Meadows obtained a loan on policy #4084-S, carried by Jefferson Standard Life Insurance Company, Greensboro, N. C., and also obtained a loan on policy #1446670 carried by Mutual Life Insurance Company, and after his death there was paid to and collected by Mrs. Margaret S. Meadows, as executrix, the sum of $1,-165.49, on 3 November, 1933, on policy #4084-S, and the sum of $1,-165.63, on 29 December, 1933, on policy #1446670. That no part of the proceeds of said two life insurance policies has been paid to the plaintiff appellant. Plaintiff, appellant, was the only child of the said Joseph F. Meadows by his first marriage, his first wife being Mrs. Susie B. Meadows, who died intestate many years ago seized and possessed of a house and lot in the town of Oxford, N. C. That the said Mrs. Margaret S. Meadows was the second wife of said Joseph F. Meadows, and said J. Randolph Meadows and Mrs. M. Roselyn Meadows Seabolt are the children of the said Joseph F. Meadows by the said Mrs. Margaret S. Meadows. On 1 March, 1922, Joseph F. Meadows, as tenant by the curtesy, and Mrs. Marie Meadows Tyer, who owned said house and lot, subject to the life estate of her father, and her husband, William B. Tyer, executed a deed for said house and lot to the said Mrs. Margaret S. Meadows. That the testator, by way of explanation of his reasons for the alleged bequeathing said "life insurance money" in the second item of his will, mentions the fact that "the deed and title to the home where" he lived had been made to his wife, Margaret S. Meadows, and in the third item of said will, stated that he was right sure that the property mentioned in said second paragraph would be given to J. Randolph Meadows and M. Roselyn Meadows (Seabolt).

The judgment of the court below was as follows: "This cause coming on to be heard before the undersigned, judge presiding at the February Term, 1939, of the Superior Court of Granville County, upon an agreed

statement of facts submitted to the court for determination as a controversy without action, and upon said agreed statement of facts the court is of the opinion and so holds, as a matter of law, that the plaintiff is not entitled to the face amount of said policies Nos. 4084-S and 1446670, nor to the amounts collected on either of said policies by said executrix, nor to any part of either the face amounts of said policies or the amounts collected by said executrix. This judgment, by consent of plaintiff and defendants, signed by the undersigned out of term and out of the county of Granville, and out of the Tenth Judicial District of North Carolina. This April 8th, 1939. Q. K. Nimocks, Jr., Judge holding the courts 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. This and other necessary facts taken from the agreed statement of facts, will be set forth in the opinion.

T. G. Stem for plaintiff.
Royster & Royster for defendants.

CLARKSON, J. The questions involved: Under the will of Joseph F. Meadows, deceased, is plaintiff entitled to recover the face amounts of two life insurance policies, in which policies she was beneficiary at the time of the execution of said will, the deceased, prior to his death having changed the beneficiary to his estate, the proceeds of said life insurance money having been bequeathed to the plaintiff by said will; or is the plaintiff entitled to the actual amounts paid over to Mrs. Margaret S. Meadows, executrix, on account of said life insurance policies, the deceased, during his lifetime having obtained loans on each of said policies? We think the plaintiff entitled to the actual amounts paid over to the executrix with interest from the time paid her.

N. C. Code, 1935 (Michie), sec. 4165, is as follows: "Every will shall be construed, with reference to the real and personal estate comprised therein, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will."

This general rule seems to be established, that where a testator uses general terms, as "all of my estate" or "all of my lands or real estate," then the devise will speak at the date of the death; but, where he refers to a specific subject of gift, with sufficient particularity in the description of the specific subject of it, showing that an object in existence at the date of his will was intended, referring to the existing state of things at the date of the will and not at his death, then the operation of the general rule is excluded. The death is a prospective event, but the date of the will refers to actual conditions. *Hines v. Mercer,* 125 N. C., 71 (74).

The intention of the testator, taken from the four corners of the will, is the polar star to guide in the construction.

In *Edmondson v. Leigh,* 189 N. C., 196 (200), speaking to the subject, it is said: "It is settled law in this State that the intent of the testator, as expressed by the terms and language of the entire will, must be given effect unless in violation of law. 'Every tub stands upon its own bottom,' except as to the meaning of words and phrases of a settled legal purport. A will must be construed 'taking it by its four corners.' *Patterson v. McCormick,* 181 N. C., 313; *Smith v. Creech,* 186 N. C., 190; *Wells v. Williams,* 187 N. C., 138." *Wilmington Savings & Trust Co. v. Cowan,* 208 N. C., 236; *Heyer v. Bulluck,* 210 N. C., 321.

In *Walker v. Trollinger,* 192 N. C., 744 (746), it is written: "The cardinal principle or polar star is to gather the intent from the entire will. To determine this, we consider the setting—the surrounding circumstances of the testator when the will was executed; if possible reconcile and harmonize the different parts; to consider it as a whole and in all its parts." *Brown v. Brown,* 195 N. C., 315 (320).

The setting: The testator, Joseph F. Meadows, was married twice. Plaintiff, Marie M. Tyer, was the only child of the marriage by his first wife, Susan B. Meadows. He left surviving him his widow, Margaret S. Meadows, his second wife, and the following children by his second wife: the defendants J. Randolph Meadows and Mrs. M. Roselyn Meadows Seabolt.

Mrs. Susan B. Meadows, the mother of plaintiff, Marie M. Tyer, owned a valuable house and lot in the town of Oxford, N. C., which was the home-site. She left no will and on her death her husband became the owner of a life estate (tenant by the curtesy) and plaintiff the remainder in fee simple. On 1 March, 1922, Joseph F. Meadows and plaintiff and her husband conveyed the home-site and another lot belonging to Joseph F. Meadows to his second wife, Margaret S. Meadows. The deed recited "$10.00 and other valuable considerations." The actual amount paid plaintiff being $4,500. Joseph F. Meadows died 28 September, 1933, leaving a last will and testament appointing his second wife, Margaret S. Meadows, the executrix. The testator (in paragraph 2 of his will) mentions the fact that the home-site was his second wife's property and she could do with it as she chose, but he says in the third paragraph that he is sure that it will be given to (if living) his two children of that marriage—J. Randolph Meadows and M. Roselyn Meadows (Seabolt). Then the will says in the third paragraph: "It is hereby understood and you will find I have made $..... of the life insurance money I am carrying on my own life payable to my daughter, Mrs. Marie M. Tyer, *which amount shall be paid, in full,* to the said Marie M. Tyer as soon as same is collected & the above mentioned $..... dollars *shall not be charged against my daughter,* Mrs.

Marie M. Tyer in the final division of all other property, both real, personal & mixed and this I want done on account of the facts mentioned in said paragraph 2." Then in the fourth paragraph "further by way of explanation" he recites that he is carrying $4,000 life insurance to educate the two children by the second marriage—$2,000 for each. *"I do not want charged in the final division of all other property, both real and personal, between our three children."* "5th. After paragraphs 1, 2, 3, and 4 above written shall have been carried out" the balance of his property, real, personal and mixed, he leaves to his wife for life "& then to be divided equally, share for share alike, between our three children." He makes provision if any shall die "not leaving any heirs, his or her interest in said estate should revert to and become the property *equally divided* between those who are living at that time. If in the best judgment of my beloved wife, she should decide that it will be best to turn over to & to give any property, real or personal, to anyone of *our three children,* this will be in order, & she can do so, *provided the same and like amount* should be given over to each one of our children living at that time." That at the time of the execution of said last will and testament by the said Joseph F. Meadows, the said Marie M. Tyer was named as the beneficiary in the following described life insurance policies on the life of Joseph F. Meadows, to wit: (a) Policy #4084-S, issued 7 November, 1907, by the Southern Life Insurance Company, Fayetteville, N. C., later taken over by Jefferson Standard Life Insurance Company, Greensboro, N. C., it being ordinary life policy in the sum of $2,000.00. (b) Policy #1446670, issued by the Mutual Life Insurance Company, 5 March, 1904, on the life of Joseph F. Meadows, in the sum of $2,000.00. Subsequent to the will Joseph F. Meadows changed the beneficiary on these policies to "Assured's executors, administrators or assigns," and borrowed on the policies.

The executrix has collected the proceeds of the two policies less certain amounts which Joseph F. Meadows borrowed on same. There was another $2,000 policy in the name of plaintiff as beneficiary which was never changed and Joseph F. Meadows borrowed on that and the balance was paid plaintiff by the insurance company. "That subsequent to the death of the said Joseph F. Meadows, there was paid to his son, J. Randolph Meadows, the sum of $2,000.00, on account of the $2,000.00 life insurance policy, and there was paid to his daughter, M. Roselyn Meadows Seabolt, the sum of $2,000.00, on account of the $2,000.00 life insurance policy, both of said policies being referred to in the fourth item of his last will and testament."

The testator, Joseph F. Meadows, from the four corners of his will, wanted to make provision for the primary object of his bounty—his wife, and an equal share of his property to his three children. He states the reason why he specifically gives the certain insurance money to the

plaintiff. Then he says, after carrying out the provisions of the first four paragraphs of his will, all his property is given to his wife for life and then "to be divided equally, share for share alike, between our three children." The fact that Joseph F. Meadows became in need and borrowed on the policies of the plaintiff and made them to his estate did not show an intention to revoke this specific legacy to plaintiff. No doubt it was easier to borrow from the insurance company by changing them to his estate. He could have revoked the legacy, but this he did not do. He gave his wife power, upon certain contingencies and in her discretion, to do certain things *provided* the same and *like amount* should be given over to each *of our children.* The will is shot through with an intention of equality among his children—this should and must prevail.

In *King v. Sellers,* 194 N. C., 533 (535), it is said: "The legacy in controversy was a specific legacy. Ademption, in law, denotes the destruction, revocation or cancellation of a legacy in accordance with the intention of the testator and results either from express revocation or is implied from acts done by the testator in his lifetime, evincing an intention to revoke or cancel the legacy. The question was considered in *Starbuck v. Starbuck,* 93 N. C., 183, and the conclusion of the court thus stated: 'Specific legacies are said to be adeemed, when in the lifetime of the testator the particular thing bequeathed is lost, destroyed, or disposed of, or it is changed in substance or form, so that it does not remain at the time the will goes into effect *in specie,* to pass to the legatees. If the subject-matter of such legacies ceases to belong to the testator, or is so changed as that it cannot be identified as the same subject-matter, during his lifetime, then they are adeemed—gone and never become operative.' . . . The test of ademption is such a change in the subject-matter of the legacy as to destroy its identity. In applying the test it is well to bear in mind the wise utterance of *Pearson, C. J.,* in *Nooe v. Vannoy,* 59 N. C., 185: 'But it is unusual for a father to adeem, in this manner, legacies given to children and exclude them from his contemplated bounty when there has been no change of circumstances; and for this reason the Court is slow to adopt the conclusion that it is an ademption and will seek, anxiously, for some mode of explanation.'" *Grogan v. Ashe,* 156 N. C., 286, 94 A. L. R., 191.

From the facts and circumstances of this case, we think the loans made by the testator in his lifetime on the policies was an implied ademption of the legacy to that extent, and the executrix is liable for the amount received on the policies from the insurance companies and interest from that date.

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

Reversed.

J. I. WILLIAMS, MRS. G. A. WINDERS, MRS. R. L. WOODS, L. G. HOLLINGSWORTH, WALTER WILLIAMS, FRED WILLIAMS, MRS. CLAUDE HARRIS, MRS. CARY DANIELS, MRS. HOWARD WILLIAMS MOYE, MRS. HAZEL WILLIAMS JORDAN, WILLIAM WILLIAMS, H. B. WILLIAMS, JR., MRS. MARJORIE WILLIAMS DAVIS, MISS EDNA WILLIAMS, IN THEIR OWN BEHALF AND ALL OTHERS SIMILARLY SITUATED, *v.* JOHN E. WILLIAMS, PAUL J. SMITH, AND S. V. WILKINS, TRUSTEES OF THE UNIVERSALIST CONVENTION OF NORTH CAROLINA AND MISS ROSA WILLIAMS.

(Filed 16 June, 1939.)

1. Wills § 33h—

Charitable trusts are not subject to the rule against perpetuities, ch. 264, sec. 1, Public Laws of 1925, being merely declaratory of the existing law, and limitations over from one charity to another may be made to take effect after the period prescribed by the rule against perpetuities.

2. Same: Trusts § 1d—Limitation over after expiration of period prescribed held for charitable purposes and not subject to rule against perpetuities.

The will in question provided that the testator's property should be held in trust for the advancement of a religious denomination, defined the purposes which should be considered as embraced in this term, and provided that the trustees should be elected from the executive board of the three church organizations designated as beneficiaries. The will further provided that at the expiration of fifty years the *corpus* of the estate should vest in a church school if such school should be established in this State, otherwise the *corpus* should be disposed of by the trustees in such manner as they should deem best. *Held:* The limitation over in the event the school should not be established does not give the trustees the unrestricted power of disposition so that the property could vest at that time in individuals in violation of the rule against perpetuities, but the limitation over is upon the same conditions governing the disposition of the income, and is therefore a charitable trust not subject to the rule against perpetuities, and a court of equity would have jurisdiction to prevent any disposition of the property for purposes inconsistent with such charitable uses.

3. Same—Limitation over for charitable uses held not invalid as being too indefinite as to purpose and beneficiaries intended.

The will in question established a trust with provisions that the income from the property should be used for the advancement of a religious denomination and defined the purposes which should be considered as embraced within that term as being the teaching of the gospel according to the church convention, building and repairing churches and parsonages, making donations to educational institutions of that faith and helping young men or women who expressed a desire to enter the church university to obtain the preparatory education therefor. The will further provided, by a proper construction of the instrument, for a contingent limitation over of the *corpus* of the estate in accordance with

the provisions governing the uses of the income. *Held:* The contingent limitation over of the *corpus* of the estate is not void for uncertainty as to the purposes and beneficiaries intended, such purposes being sufficiently defined to be effective under the provisions of ch. 264, sec. 1, Public Laws of 1925 (Michie's N. C. Code, 4035 [a]).

APPEAL by plaintiffs from *Nimocks, Jr., Judge,* at March Term, 1939, of DURHAM. Affirmed.

R. O. Everett and Robt. Holleman for plaintiffs, appellants.
Brooks, McLendon & Holderness for defendants, appellees.

SEAWELL, J. W. H. Williams died 15 April, 1927, leaving a last will and testament, the pertinent provisions of which are as follows:

"This my last will and testament provides for the disposition of my estate in the following manner and after due and full consideration of same by myself and wife, that my wife, Susan Denmark Williams, provided she survive me, shall have full possession of my estate, real and personal and life insurance to use for her comfort and benefit during the remainder of her life, and at her death the estate shall be held in trust for a period of fifty years, the income, only, to be divided between the trustees of the Universalist General Convention, a corporation of the State of New York; The Woman's National Missionary Association, an auxiliary of the Universalist General Convention, and the North Carolina State Convention of the Universalist Church.

"The trustees of this estate shall be composed of nine members which shall be chosen from the Executive Boards of the three organizations, named above, three from each, they shall be elected to hold office for a term of two years, these elections to be made at the sessions of the General Convention after the first board shall have served until the next succeeding session of the said General Convention.

"These trustees shall have full control over the estate for the term for which they were elected and until their successors are duly installed in office. They shall also have at their disposal the income from the estate after the necessary expenses for upkeep, taxes, insurance and such other expenses as may become necessary from time to time to keep the property in a tenable condition, or for such improvements, in a permanent way, as may seem wise and desirable, shall have been paid from the gross income and before any division shall be made. The Executive Board of each of these three organizations named above shall have the power to designate the disposal of their prorate part of the income, provided, however, that it shall be used only for the advancement of Universalism in the State, the Nation and at large.

"Should there arise any question as to what may be considered the advancement of Universalism it is my will that it shall be interpreted to be the teaching of the gospel under the directions, and as prescribed by the above mentioned the Universalist General Convention Board. It may also be used for building and repairing of churches or parsonages, making donations to colleges or universities of the Universalist faith, helping worthy young men or women to secure a college education when it is their expressed purpose to enter the Universalist University after their education in such schools shall have fitted them for work.

"Realizing the value of higher education for the specific work of teaching and enlightening others in Spiritual truths, and the ever growing necessity for new and better institutions of learning it is my will that should the Universalist denomination at any time within this period of trust establish a school in the State of North Carolina, under the auspices of the North Carolina State Convention of Universalist Churches and the Universalist General Convention, for the education of the youth of our land for better citizenship, or for the preaching of the gospel of Universalism as interpreted by the trustees of the Universalist General Convention, that the whole of the income from this estate, after the above mentioned expenses shall have been paid, shall be applied to the running expenses of such school for the remaining years of the trust.

"At the expiration of the period of trust (fifty years) the estate, with such increase as may have been added, shall become the property of such school as an endowment.

"The Board of trustees of such institution of learning shall be the judges of how this endowment shall be continued, whether in property or to be converted into cash, but should there be no such school established at the expiration of the trust period the estate may be disposed of in such manner as seems best to the trustees of the three organizations named above."

There were no children surviving the testator, and his wife died on 29 March, 1933. The plaintiffs, the six brothers and sisters and representatives of deceased brothers and sisters, of the testator (with the exception of Miss Rosa Williams, a sister, who did not join), bring this action to declare the devise setting up the trust invalid upon the ground that it is void under the rule against perpetuities, and demand the possession of the estate as heirs-at-law of the decedent. The defendants maintain that the will creates a charitable trust inoffensive to the rule.

In this State charitable trusts are not subject to the rule against perpetuities. *Griffin v. Graham,* 8 N. C., 96; *S. v. Gerard,* 37 N. C., 210; *Keith v. Scales,* 124 N. C., 497, 32 S. E., 809; *Whitsett v. Clapp,* 200 N. C., 647, 158 S. E., 183. The Act of 1925, ch. 264, sec. 1, taking

such trusts out of the rule of perpetuities, is in this respect but declarative of existing law. Limitations to and over from one charity to another, or to trustees for a charitable use, are not too remote, although the limitation may take effect after the period prescribed in the rule against perpetuities. See 48 C. J., 974, note 16; *Hopkins v. Grimshaw*, 165 U. S., 342, 41 L. Ed., 739; *Roxbury, etc. Sav. Inst. v. Roxbury Home for Aged Women*, 244 Mass., 583, 139 N. E., 301; *Lennig's Estate*, 154 Pa., 209, 25 A., 1049.

All this the plaintiffs concede; and further admit that the provisions of the will under consideration would have no infirmity in that respect except for the provision contained in the last paragraph, intended to operate contingently in case of a failure to establish a school of the character described in the will during the fifty-year period of the trust. ". . . but should there be no such school established at the expiration of the trust period the estate may be disposed of in such manner as seems best to the trustees of the three organizations named above."

It is insisted that this breaks the continuity of the charitable trust, since, on failure of the contingent limitation to the school, the trustees of the three organizations named in the will have power to dispose of the trust property at their discretion without any limitation thereof, it is contended, to a further definite charitable use, the devise thus being subject to vest, by virtue of the provisions of the will itself, too remotely, that is, beyond the period contemplated in the statute against perpetuities, in some private holder. It is further insisted that if the testator might have intended that the trust estate should continue to be used for some charitable purpose, the devise is too uncertain, with respect to the purpose and beneficiaries intended, to be valid. They insist, therefore, that the whole devise is void *ab initio*, and that the plaintiffs, heirs-at-law of the testator, are now entitled to the estate. Gray Perpetuities, 201; *Moore v. Moore*, 59 N. C., 133; 48 C. J., 943.

Apart from the question of indefiniteness, the test of the validity of the devise, as assailed, is whether, presently considered, there is a possibility that the provisions of the will may vest the property in a private holder beyond the period limited in the rule against perpetuities. *Moore v. Moore, supra;* 48 C. J., 944. The will itself makes no provision for the establishment of a Universalist School in North Carolina, and, since it may or may not be established independently, the clause containing the limitation over may be considered as presently invoked.

The courts are not anxious to secure a technical result whereby the testamentary disposition of property for charitable purposes may be defeated. *St. James v. Bagley*, 138 N. C., 384, 50 S. E., 841. We think the will, considered as a whole, evidences the intent of the testator

to dedicate the property devised, after the termination of the life estate, to the advancement of Universalism in North Carolina; and in definition of that general purpose, should it be challenged, it is explained that it may be brought about by teaching the gospel, under the direction of the Universalist General Convention Board, building and repairing churches and parsonages of that denomination, making donations to churches and colleges of the Universalist faith, and enabling worthy young men and women to secure a college education when it is their express purpose to enter the Universalist University. In the event a Universalist school is not meantime established in the State, it is the apparent intention of the testator that his benevolence shall not be defeated, but that the property shall remain impressed with the character of the trust first mentioned, to be administered in the sound judgment of the trustees of the three organizations in the furtherance of the purposes described, or such as might be consistent with similar trusts to the same end already imposed upon them through their official connection with the organizations named. Had it been the intention of the testator to permit the property to pass out of the channel of charitable use to which he had committed it, he would hardly have named as agents for that purpose the trustees of the three organizations, with the expectation that it might be put to private use or uses inconsistent with the trust he intended to create. That the property was not put under their control for their own benefit, or for indiscriminate disposition as mere individuals, seems reasonably clear. "Trustees of the three organizations named above" is not a designation of individuals without relation to office. The power of disposition is made to trustees already charged with duties to these three charitable organizations, and is presumably made in that relation. *S. v. Gerard, supra.* In searching for the intent of the testator, it is not unreasonable to assume that he understood that their duties and their obligations to these organizations were *ejusdem generis* with those which he sought to impose, and that the objects and purposes of this devise would be included within functions already exercised by the trustees named, and that their power and authority over the devised property, as well as over the property already under their administration, would be circumscribed by the charitable nature of the trusts they were administering and their obligations thereto. *Whitsett v. Clapp,* 200 N. C., 647, 158 S. E., 183; *Woodcock v. Trust Co.,* 214 N. C., 224, 227, 199 S. E., 20.

If this view is correct, and we have no doubt it is, a Chancery Court would have jurisdiction to interfere with any attempt to devote the devised property to purposes inconsistent with such charitable uses. *Miller v. Atkinson,* 63 N. C., 537.

As to the reliance which a testator may place upon the obligation which insures a continuing charitable use of the property he desires to be devoted to a public charity without particularizing the details of its use, we may quote, as to a devise or bequest to a church, 10 Am. Jur., 626: "The very term 'church' imports an organization for religious purposes, and property given to it, *eo nomine,* in the absence of all declaration of trust or use must, by necessary implication, be intended to be given to promote the purposes for which a church is instituted, the most prominent of which is the public worship of God. It follows that the legitimate use by a church of property so given must result in its application for the benefit of those who attend upon, or are within the sphere of the influence of the services of the church by bringing them under the influence of religion." *Ladies Benevolent Society v. Orrell,* 195 N. C., 405, 142 S. E., 493; C. S., 3570.

Applying the rule that words and phrases used in a will are not necessarily used in their technical sense unless the occasion and manner of their use should require such a meaning to be given them, we are not impressed with the necessity of construing the expression "disposed of," as used in this clause of the will, as implying that authority is given to the trustees of these organizations to alienate the property in any manner they see fit without obligation to the nature of the trust imposed upon them by the organizations they already serve, and that implied in the donation made by this will. This term is just as appropriate to signify an orderly administration of the funds committed to them for charitable use, and the added qualification "as seems best to them" may be construed more consistently as indicating a sound discretion in their use than as implying an unrestricted power to alienate according to desire and caprice. It is used in the former sense in earlier provisions of the will. See *Page v. Covington,* 187 N. C., 621, 122 S. E., 481; *Grace Church v. Ange,* 161 N. C., 314, 77 S. E., 239; *Shannonhouse v. Wolfe,* 191 N. C., 769, 133 S. E., 93.

We do not find any indefiniteness in the devise that is not cured by the Act of 1925, Michie's Code, sec. 4035 (a), the applicable part of which reads as follows: "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."

The devise is a valid disposition of the property not objectionable for indefiniteness, and does not offend against the rule of perpetuities. *Hass v. Hass,* 195 N. C., 734, 143 S. E., 541; *Whitsett v. Clapp, supra; Woodcock v. Trust Co., supra.*

We do not find other contentions of the plaintiffs sufficiently meritorious to change the result.

The judgment is

Affirmed.

O. F. CLINARD AND WIFE, MILDRED CLINARD, v. TOWN OF KERNERSVILLE AND VANCE KNITTING COMPANY, INC.

(Filed 16 June, 1939.)

1. Nuisance § 3: Waters and Water Courses § 11—

In an action against a private corporation to recover damages resulting to plaintiffs' land by the corporation's pollution of a stream running across the land, plaintiffs may not demand permanent damages entitling the corporation to a permanent easement unless the parties consent to trial upon this theory.

2. Waters and Water Courses § 12—Evidence held to show that private corporation was not responsible for drainage of waste products on plaintiffs' land.

Plaintiffs' evidence tended to show that defendant private corporation emptied waste from its dyeing operations into a reservoir built by defendant municipality, that thereafter the municipality changed the drainage from the reservoir from one stream to the stream flowing over plaintiffs' land. *Held:* The evidence discloses that the private corporation had no direction of or control over the drainage of the waste dye products, and its motion to nonsuit should have been granted in plaintiffs' action to recover damages.

3. Municipal Corporations § 16: Eminent Domain § 2—Injury to land from pollution of stream by municipality constitutes a taking of property by eminent domain.

Where damages result to plaintiffs' land by reason of the discharge by a municipality of foul matter from its sewage disposal plant, plaintiffs may recover permanent damages sustained notwithstanding that they resulted from the exercise of a governmental function, and irrespective of any negligence in the operation of the sewage disposal plant, the continuing nuisance, to the degree that the value of the land is depreciated, constituting a taking of an easement by eminent domain, and the exigency of public necessity precluding an abatement of the nuisance.

4. Municipal Corporations § 16—Measure of damages recoverable against municipality for pollution of stream by sewage disposal plant.

In an action against a municipality to recover damages resulting to plaintiffs' lands from the pollution of a stream running across the land by discharge of matter from defendant's sewage disposal plant, the measure

of damages is the difference in the market value of plaintiffs' land before the municipality began to so use the stream and its market value immediately thereafter, the damages being assessed as compensation for a permanent easement entitling the municipality to the continued use of the stream for such purposes; and an instruction submitting for the jury's consideration the evidence of a single trespass in cutting underbrush along the stream, causing debris to be washed down and making the stream overflow on plaintiffs' lands more easily, evidence that mosquitoes had become more prevalent, without evidence of any causal relation between this condition and the municipality's use of the stream, evidence that plaintiffs had sold their cow, without evidence of any causal connection between this act and the acts complained of, must be held for reversible error.

5. Municipal Corporations § 13—

Evidence that WPA workers had cut brush along the stream upon plaintiffs' land is insufficient to hold defendant municipality responsible for the alleged trespass.

APPEAL by defendants from *Clement, J.*, at February Term, 1939, of FORSYTH.

Civil action to recover damage to real property caused by the pollution of a stream which crosses plaintiffs' land by emitting waste water from sewage disposal plant and dye water and waste from the Knitting Company plant, and for damages arising from other causes set out in the complaint.

The town of Kernersville erected a sewage disposal plant on Abbotts Creek, about 250 yards above the property of plaintiffs. The plant was completed and put in operation in the year 1937. Water from the plant flows into said creek, passing over and across the lands of the plaintiffs, and they allege that by reason thereof odors are emitted which materially affect the value of their property.

Vance Knitting Mill is a corporation having its plant located in the corporate limits of the town of Kernersville. The water used by it in connection with its dyeing process is discharged into a basin on its property which was constructed by the town of Kernersville. The town of Kernersville then disposes of the water through a ditch into Abbotts Creek and it then flows over and across plaintiffs' land. Plaintiffs allege that said dye water discolors and pollutes said stream and causes noxious odors to emanate, resulting in damage to their property. Plaintiffs also allege that while the sewage plant was being constructed by the defendant town, the town cut the timber, underbrush and shrubbery growing on either side of the banks of Abbotts Creek and caused the timber to become lodged in said creek, causing sand and debris to flow down and fill in the creek, which results in an overflow of said creek during rains, which overflow damages and injures their property.

The plaintiffs allege that the maintenance of the sewage disposal plant is permanent in its nature and character and by its construction plaintiffs have suffered permanent damage and their property has been practically confiscated without compensation, and that the defendant Vance Knitting Company is continually trespassing on the property of the plaintiffs and creating a nuisance thereon, thereby depriving the plaintiffs of the lawful use of their property without compensation.

Upon the trial below issues were submitted to and answered by the jury as follows:

"1. Are the plaintiffs the owners of the land described in the complaint? Answer: 'Yes.'

"2. Has the plaintiffs' land been damaged by the maintenance and operation of a sewage disposal plant by the town of Kernersville, as alleged in the complaint? Answer: 'Yes.'

"3. Has the plaintiffs' land been damaged by the defendant, Vance Knitting Company, Incorporated, polluting the stream that flows through the plaintiffs' premises, as alleged in the complaint? Answer: 'Yes.'

"4. What permanent damage, if any, are plaintiffs entitled to recover of the defendants? Answer: '$1,650.00.' "

From judgment on the verdict the defendants appealed.

Lovelace & Kirkman and Benbow & Hall for plaintiffs, appellees.

Manly, Hendren & Womble and I. E. Carlyle for defendants, appellants.

BARNHILL, J. The plaintiffs offered evidence tending to show that the Vance Knitting Company is engaged in the manufacture of hosiery of plain and varied colors and for that purpose owns and operates a plant located in the town of Kernersville; that under the direction and supervision of the town of Kernersville said Vance Knitting Company, during a portion of the time when it is in operation, emits water from its plant into a ditch which leads to Abbotts Creek and that this water is discolored. The defendants' evidence is to like effect as to the methods of disposal of the water from the Vance Knitting Company. It shows that the water from the Vance Knitting Company is discharged into a basin located on the property of said company, but constructed and maintained by the town; that the town then disposes of the water through a ditch emptying into Abbotts Creek; that prior to the construction of the plant on Abbotts Creek the town ran this water through a sewage disposal plant on Muddy Creek; that the outlet for the water was transferred to Abbotts Creek in order to increase its flow and was at first run through the sewage plant, but on advice from the Board of

Health it was diverted directly into Abbotts Creek without going through the disposal plant.

A plaintiff may not as a matter of right have permanent damages for the maintenance of a nuisance assessed against a private corporation. His right exists only as against municipalities and corporations having the statutory power of eminent domain. *Langley v. Hosiery Mills,* 194 N. C., 644, 140 S. E., 440, and cases there cited. However, it may be done by consent, *Langley v. Hosiery Mills, supra; Brown v. Chemical Company,* 162 N. C., 84, and the defendant Vance Knitting Company joined in the request for the assessment of permanent damages in the event damages were allowed.

Even if it be conceded that there is any evidence in the record tending to show that the water coming from the Vance Knitting Mill in anywise adversely affects the value of the lands of the plaintiffs we are of the opinion that as to this defendant the motion for judgment as of nonsuit should have been allowed. The waters coming from its hosiery mill were first discharged by the defendant town through its Muddy Creek sewage plant. After the construction of the plant on Abbotts Creek the defendant town then diverted the said water into Abbotts Creek. The Knitting Company has no control over the disposition of the water. It is disposed of under the sole supervision and control of the defendant town. Under such circumstances no liability is imposed upon the Knitting Company for any damage caused to the property of the plaintiffs on account of the emptying of such dye water into Abbotts Creek. If there is any damage sole responsibility therefor rests upon the defendant town. *Hampton v. Spindale,* 210 N. C., 546, 187 S. E., 775; 43 C. J., 1158-9; *Carmichael v. Texarkana,* 116 Fed., 845, 58 L. R. A., 911.

The defendant town of Kernersville concedes that its motion for judgment as of nonsuit was properly overruled, but insists that there were errors committed in the trial which entitles it to a new trial.

The liability of the town is not to be determined by any negligent conduct on its part in the operation of its disposal plant. If in so doing it in fact discharges foul matter upon the lands of the plaintiffs, or it so pollutes the water of the stream which crosses plaintiffs' land that foul and noxious odors emanate therefrom it is liable for the resulting damage, even though in so doing it is exercising a governmental function. An action by a landowner against a municipality or corporation possessing the right of condemnation for the maintenance of a continuing nuisance which adversely affects the value of plaintiffs' land is, by the demand for permanent damage either by the plaintiff or by the defendant, converted into an action in the nature of a condemnation proceedings for the assessment of damages for the value of the land or easement taken. The assessment of permanent damages for the main-

tenance of a continuing nuisance as here alleged and the payment of such damages vests the defendant with an easement entitling it to a continued use of the property in the same manner. No matter how urgent the demands of the public may be or how necessary to the progress of the country, no man's property may be taken without compensation. In those cases wherein the right is asserted to pollute streams or otherwise appropriate or subject lands to an additional burden the question of negligence is not involved. Courts uniformly hold that where the action is for damages by way of compensation, which when paid, secures an easement, the owner of the property is entitled to recover. The pollution of a stream is equivalent to a taking and an appropriation in part. *Staton v. R. R.*, 111 N. C., 278, 16 S. E., 181; *Thomason v. R. R.*, 142 N. C., 318, 55 S. E., 205; *Beach v. R. R.*, 120 N. C., 498, 26 S. E., 703; *Lassiter v. R. R.*, 126 N. C., 509, 36 S. E., 48. The law permits the acquisition of the easement in such cases by the payment of permanent damages, the judgment having that effect. *Brown v. Power Co.*, 140 N. C., 333, 52 S. E., 954; *Thomason v. R. R., supra.*

"The decisions of this State are in approval of the principle that the owner can recover such (permanent) damage for a wrong of this character (damages resulting from the operation of a sewage plant which polluted a stream crossing plaintiff's land), and that the right is not affected by the fact that the acts complained of were done in the exercise of governmental functions or by express municipal or legislative authority, the position being that the damage arising from the impaired value of the property is to be considered and dealt with to that extent as a 'taking or appropriation,' and brings the claim within the constitutional principle that a man's property may not be taken from him even for the public benefit except upon compensation duly made." *Donnell v. Greensboro*, 164 N. C., 331, at p. 334; *Sandlin v. Wilmington*, 185 N. C., 257, 116 S. E., 733; *Hines v. Rocky Mount*, 162 N. C., 409, 78 S. E., 510; *Cook v. Mebane*, 191 N. C., 1, 131 S. E., 407; *Moses v. Morganton*, 192 N. C., 102, and 195 N. C., 92. The damages are confined to the diminished pecuniary value of the property incident to the wrong or to the continued maintenance of the nuisance in the nature of an easement. *Moser v. Burlington*, 162 N. C., 141, 78 S. E., 74; *Hines v. Rocky Mount, supra; Metz v. Asheville*, 150 N. C., 748, 64 S. E., 881; *Williams v. Greenville*, 130 N. C., 93; 40 S. E., 977. In such case, and except as affected by the existence of certain rights peculiar to riparian ownership, a recovery does not seem to depend on whether damage is caused through the medium of polluted water or noxious air; the injury is considered a taking or appropriation of the property to that extent, and compensation may be awarded. *Donnell v.*

Greensboro, supra; Brown v. Chemical Co., supra; Wagner v. Conover, 200 N. C., 82, 156 S. E., 167.

Our decisions are also in support of the proposition that where the injuries are by reason of structures or conditions permanent in their nature, and their existence and maintenance is guaranteed or protected by the power of eminent domain or because the interest of the public therein is of such an exigent nature that the right of abatement at the instance of an individual is of necessity denied, it is open to either plaintiff or defendant to demand that permanent damages be awarded; the proceedings in such cases to some extent taking on the nature of condemning an easement. *Rhodes v. Durham,* 165 N. C., 679, 81 S. E., 938.

It follows that as to plaintiffs' cause of action for damages for the pollution of a stream crossing their property was properly tried upon the theory that permanent damages should be assessed and paid. As to the appropriation of an easement in plaintiffs' land, however, to entitle the plaintiff to permanent damages it must appear that the wrong committed by the defendant or the use of plaintiffs' property is continuing in its nature. Single and individual acts of trespass may not be considered.

The plaintiff alleged and sought to prove that in the construction of defendant's plant on Abbotts Creek timber, underbrush and shrubbery were cut off the banks of the stream; that such timber, etc., served as a protection against erosion of the banks during heavy rains, and that by reason of the cutting of the timber, etc., the stream has been filled in causing it to more easily overflow and damage plaintiffs' property. There is no evidence to support this allegation as against the defendant. The plaintiff testified: "I saw the right-of-way had been cut out on up the stream. It was young growth that was cut off on my land and the ditch bank was cleared off." He offered a witness who testified that he, as an employee of the WPA, together with a dozen or fifteen others, "went down the ditch just below the bridge, I will say 200 feet, and cut off the underbrush. We used a briar scythe; we started down at the water and come up to the top of the bank, and piled it back and burned it. That was while the disposal plant was under construction. I was working for the WPA and not for the town of Kernersville." This being in substance the only evidence offered by the plaintiff, it is insufficient to charge the defendant with liability for any resulting damages.

The plaintiff likewise testified that shortly after the disposal plant was completed, or during the period of its construction, he walked up the stream and "I noticed the ditch had been straightened up there, leaving the banks raw. Where the creek had been straightened they

put in stakes and poles and the trash and brush had been thrown in behind those poles. It come a heavy rain in 1937 and washed all the poles and trash down the creek, consequently it lodged on the lower bank part of my bottom and filled the ditch up and then it began overflowing. There was nothing done on my land in connection with the ditch except this undergrowth was cut off. The ditch was not straightened on my land. It was straightened down to it." There is no allegation in the complaint of this alleged trespass. Even if it be conceded that the straightening of the stream in the manner testified by the plaintiff on property lying above that of the plaintiff constituted a trespass and that the evidence is sufficient (which it is not) to show that the defendant straightened the stream and braced the banks in the manner indicated by plaintiff's testimony, it constituted a single trespass, which was not continuing in its nature.

The court submitted only one issue which was as to the permanent damages, if any, plaintiff is entitled to recover. On this issue it submitted to the jury for its consideration the evidence as to the trespass by someone in cutting the underbrush and small growth on the banks of the stream and the evidence tending to show that someone had straightened the stream and that the logs and underbrush used to brace the banks had washed away and lodged on plaintiffs' property in such manner as to cause it to more easily overflow. It also submitted for the jury's consideration evidence that mosquitoes had been more prevalent since 1937 without evidence to show any causal connection between this condition and the discharge of sewage and dye water into the stream. It likewise submitted evidence that plaintiffs had sold their cow since 1937 without showing any causal connection between such act and the condition of the stream due to the pollution thereof.

Just to what extent the consideration of these elements of damages in respect to individual trespass and in respect to the prevalence of mosquitoes and the sale of the cow of plaintiffs entered into the deliberations of the jury in assessing permanent damages we are unable to determine on this record.

The plaintiff is entitled to have permanent damages assessed for the maintenance of the continuing nuisance alleged, if established, or rather for the appropriation by the defendant of an easement over and across the lands of the plaintiffs in the use of the stream in the manner complained of. The damages to be thus assessed are those which are proximately caused by the use of the stream by the defendant in the manner alleged by the plaintiff, if it is found that it is so used, which is a continuing and permanent use amounting to the appropriation of an easement. The damages are to be assessed as of the time the defendant first began to discharge into the stream water and other substance which

polluted the water and produced noxious and offensive odors on plaintiffs' land. The damages are to be ascertained upon the basis of the difference between the fair and reasonable market value of the property just before the defendant began to so use the stream and the fair and reasonable market value thereof just after the beginning of such use, assessed upon the theory that the defendant at that time took and appropriated an interest in the property of the plaintiffs for which it must pay. Past, present and prospective damages are not to be considered.

Reversed as to defendant Vance Knitting Company, Inc.

New trial as to defendant town of Kernersville.

MRS. J. B. McGILL, MOTHER OF DECEASED EMPLOYEE; V. R. McGILL, AND J. D. BRIDGERS, NEPHEW, v. TOWN OF LUMBERTON, EMPLOYER; AND MARYLAND CASUALTY COMPANY, CARRIER.

(Filed 16 June, 1939.)

1. Master and Servant § 40a—

In order for the death of an employee to be compensable it must result from an injury by accident arising out of and in the course of the employment. Public Laws of 1929, ch. 120, sec. 2 (j) (f).

2. Master and Servant § 52b—Evidence of violent death raises prima facie case that death resulted from an accident.

Where the dependents of a deceased employee show that his death resulted from a bullet wound, such showing raises a *prima facie* case only of death by accident, placing upon the employer the burden of going forward with evidence to show that the employee killed himself within the exemption or forfeiture under sec. 13, ch. 120, Public Laws of 1929.

3. Master and Servant § 55d—

Where it appears that the Industrial Commission has found the facts under a misapprehension of the law the cause will be remanded for findings by the Commission upon consideration of the evidence in its true legal light.

BARNHILL, J., dissenting.

SCHENCK and DEVIN, JJ., concur in dissent.

APPEAL by claimants from *Sinclair, J.*, at December Term, 1938, of ROBESON.

Proceeding under the North Carolina Workmen's Compensation Act for compensation on account of the death of V. R. McGill, chief of police of the town of Lumberton.

The hearing commissioner made findings of fact, pertinent portions of which are substantially these:

The body of V. R. McGill, chief of police of the town of Lumberton, was found on 18 November, 1936, in a room in the town building. He died as the result of a wound in the head inflicted by a bullet fired from a pistol owned by him. "No persons that might have murdered the chief of police have been indicted or apprehended." The death of the deceased did not arise out of *or* in the course of his employment, nor did the deceased suffer injury by accident arising out of and in the course of his employment resulting in his death.

Upon these findings the commissioner concluded as a matter of law: "Those claiming compensation under the provisions of the Workmen's Compensation Law are required to prove to the satisfaction of the Industrial Commission among other things an injury by accident arising out of and in the course of the employment before compensation can be awarded and if death results must prove that the death resulted from an injury by accident arising out of and in the course of the employment. After resolving every doubt in favor of the claimants in this case, we are of the opinion that the burden has not been sustained." Compensation was denied and in accordance therewith an award issued.

The Full Commission, on appeal thereto, in opinion rendered, states: "The actual cause of the death of . . . deceased . . . is unknown. However, there is a substantial amount of evidence in the record that he committed suicide." Then, after adverting to the decision in *West v. Fertilizer Co.*, 201 N. C., 556, 160 S. E., 765, the opinion continues: "In the instant case, as expressed above, the Full Commission recognizes the fact that a police officer is exposed to peculiar danger; however, the evidence is clear that the shooting of the plaintiffs' deceased occurred in the day time, which does not in the opinion of the Full Commission present a presumption that he sustained an injury by accident arising out of and in the course of his employment as is held in the case of night watchmen where they are found at a place where they are expected to be, even though the motive of the assailant is unknown."

Thereupon, the Commission affirms the findings of fact, conclusions of law and the award of the hearing commissioner, and denies compensation, all of which was sustained on appeal to the Superior Court.

From judgment in accordance therewith, claimants appeal to the Supreme Court and assign error.

F. Ertel Carlyle and McLean & Stacy for plaintiffs, appellants.

W. C. Ginter and Varser, McIntyre & Henry for defendants, appellees.

WINBORNE, J. Is there error in the judgment below? We are constrained to hold that there is.

As used in the North Carolina Workmen's Compensation Act, "The term 'death' as a basis for the right of compensation means only death resulting from an injury," and "'injury' means an injury by accident arising out of and in the course of employment . . ." Public Laws 1929, ch. 120, sec. 2 (j) (f). *Harden v. Furniture Co.*, 199 N. C., 733, 153 S. E., 728; *Plemmons v. White*, 213 N. C., 148, 195 S. E., 370.

"The condition antecedent to compensation is the occurrence of an injury (1) by accident (2) arising out of and (3) in the course of employment." *Conrad v. Foundry Co.*, 198 N. C., 723, 153 S. E., 260; *Plemmons v. White, supra,* and cases there cited.

The Workmen's Compensation Act, sec. 13, also provides in part that: "No compensation shall be payable if the injury or death was occasioned . . . by the willful intention of the employee to injure or kill himself . . ." and that "the burden of proof shall be upon him who claims an exemption or forfeiture under this section." Public Laws 1929, ch. 120.

Evidence of violent death, unexplained, suggests accident rather than suicide. *Warren v. Ins. Co., ante,* 402, 2 S. E., 2d, 17; *Gorham v. Ins. Co.*, 214 N. C., 526, 200 S. E., 5.

While the burden of proof is upon those claiming compensation throughout to prove death of employee resulting from injury by accident arising out of and in the course of his employment, when evidence of violent death is shown, they are entitled at least to the benefit of the inference of accident from which, nothing else appearing, the Commission may find, but is not compelled to find, the fact of death resulting from injury by accident, a constituent part of the condition antecedent to compensation, injury by accident arising out of and in the course of employment. In other words, this inference is sufficient to raise a *prima facie* case as to accident only. Then if employer claims death of employee is by suicide, the statute places the burden on him to go forward with proof negativing the factual inference of death by accident. See *Warren v. Ins. Co., supra.*

In the case in hand claimants are entitled to have the Industrial Commission, in finding the facts, consider the evidence in the light of these legal principles. It appears that this has not been done.

Facts found under misapprehension of the law will be set aside on the theory that the evidence should be considered in its true legal light. *S. v. Fuller*, 114 N. C., 886, 19 S. E., 797; *S. v. Casey*, 201 N. C., 620, 161 S. E., 81. The principle is also applied in *Tickle v. Hobgood*, 212 N. C., 763, 194 S. E., 474; *Bullock v. Williams*, 213 N. C., 320, 195 S. E., 791; *Farris v. Trust Co., ante*, 466, 2 S. E., 2d, 363.

The case is remanded to the end that the North Carolina Industrial Commission, applying the legal principles here declared, may proceed to findings of fact and a determination of the claim in accordance with prescribed practice.

Error and remanded.

BARNHILL, J., dissenting. The deceased was last seen alive about 9:30 or 10:00 a.m., and his body was found about 6:00 o'clock p.m. When found he was in a uniform and the pistol he usually carried was in his holster. He died from a pistol shot wound, the bullet having entered at the root of the nose, ranging backward and downward. His body was found in a small room in the city hall building of the town of Lumberton. The door to the room was equipped with a Yale lock which automatically locked the door when it was closed, and the door was closed and locked and the windows were closed and locked. The door could not be opened from the outside except with a key.

The deceased was found about the center of the room with his feet near a chair and there was a revolver, which was ordinarily kept in a box nailed in the window on the east side of the building, lying at his feet.

The facts in this case are such that I find it impossible to agree with the majority. I do not consider *Warren v. Ins. Co., ante,* 402, authoritative, except as to the point that evidence of death by violent means is *prima facie* evidence of death by accident. In that case plaintiff was suing on the double indemnity provisions of a life insurance policy, which included a clause excluding death by suicide. As the plaintiff was only required to make out a *prima facie* case of death by violent means evidence of violent death was sufficient for that purpose. As the defendant sought to avoid liability under the exclusion clause the burden then shifted to it to show suicide. Here plaintiff was required to show more than an injury by accident resulting in death. He must show that the injury arose out of and in the course of employment. While the evidence tending to show that deceased died from a pistol shot wound is *prima facie* evidence of accident, it raises no other presumption and does not relieve the plaintiffs of the burden of showing that such injury also arose out of and in the course of his employment. This they have failed to do.

Nor do I think that ch. 120, sec. 13, Public Laws 1929, is pertinent on the particular facts in this case. Plaintiffs must first show that the deceased suffered an injury arising out of and in the course of employment which caused death before any burden rests upon the defendant to go forward and undertake to avoid liability on the plea that such injury was willfully inflicted. Until a *prima facie* case of liability is made

out the issue as to the willful intention of the employee to injure or kill himself does not arise. Until there is evidence of liability there is nothing from which the defendant need undertake to exempt itself or to prove a forfeiture of the right to an award.

Negligence cases are analogous. As in those cases the defendant is not put to proof of contributory negligence until there is first established a *prima facie* case of negligence, so, here, the defendant is not put to proof of an allegation that the injury resulting in death was willfully inflicted until there is first a *prima facie* case established tending to show that the deceased suffered an injury by accident arising out of and in the course of his employment.

Even so, while the Commission did not use direct language to that effect, it is clear from this record that the Commission in fact placed the burden on the defendant much more heavily than the law requires. The last sentence in that part of the opinion of the hearing Commissioner quoted in the majority opinion, to wit: "After resolving every doubt in favor of the claimants in this case we are of the opinion that the burden has not been sustained," clearly indicates that the defendant was required to remove from the minds of the Commission every doubt as to the right of the plaintiffs to recover.

While all the evidence tends to show that the deceased suffered an injury by accident resulting in his death and that such injury was received in the course of his employment—that is, in the daytime, when he was ordinarily on active duty—there is no evidence tending to show that the accident arose out of his employment. In the *Warren case* the burden did not shift to the defendant to establish its affirmative defense until after the plaintiff had first made out a *prima facie* case. In this proceedings the burden does not shift until the claimants have first offered evidence which at least established a *prima facie* right of recovery. The evidence in the case cannot be construed as establishing a *prima facie* cause of action unless we hold that mere evidence that the deceased died from a pistol shot wound is evidence not only of accidental death, but is also evidence that he suffered such injury by accident which arose out of and in the course of his employment.

Under these circumstances the Commission was not required to make a specific finding as to whether the injury was intentionally inflicted by the deceased.

SCHENCK and DEVIN, JJ., concur in dissent.

R. H. RIGSBEE AND WIFE, LELIA N. RIGSBEE, v. A. M. RIGSBEE AND WIFE, ELSIE S. RIGSBEE, ET AL.

(Filed 16 June, 1939.)

1. **Wills § 33g—Remainders after life estate held to vest upon death of life tenants, unaffected by other provision for disposition of trust property.**

   The will in question devised to each of testator's children, respectively, a parcel of real estate for life with the remainder to their "children." By another item the will set up a trust estate with provision for the equal distribution of the *corpus* at the expiration of 30 years "among my children and their issue," with further provision that if any child should die during the 30-year period leaving no "issue" at his death the interest of such child either in the trust fund or the property specifically devised should go into the trust fund for equal distribution at the expiration of the 30-year period. *Held:* The provisions relating to the trust estate are separate and distinct from and do not effect the property specifically devised when the life tenant survives the 30-year period, and the remainder over to the children of each of the first takers does not vest at the expiration of the 30-year period, but vests only upon the death of the life tenant, even though this may result in partial intestacy if any child should die after the expiration of that period without issue him surviving, C. S., 1737, having no application.

2. **Wills § 31—**

   The rule favoring the early vesting of estates and the presumption against partial intestacy cannot prevail against the expressed language of the will.

APPEAL by plaintiffs, R. H. Rigsbee and wife, Lelia N. Rigsbee, and defendants, A. M. Rigsbee and wife, Elsie S. Rigsbee; Lelia R. Rezner, Rosa L. Fulford and W. A. Fulford; W. A. Fulford, Jr., and Winifred Fulford Mason, from *Nimocks, J.*, at Chambers, 1 April, 1939. From DURHAM. Affirmed.

J. L. Morehead for A. M. Rigsbee et al; Hedrick & Hall for R. H. Rigsbee et al; Victor S. Bryant for Rosa L. Fulford, appellants.

Egbert L. Haywood for appellees.

SEAWELL, J. It will be noticed that plaintiffs and certain of the defendants appealed from the judgment. Only two briefs were filed, in which the formal division between plaintiffs and defendants is not observed. It is unnecessary to observe it in this opinion.

In another of its phases the will of A. M. Rigsbee was construed by this Court in an opinion reported as *Haywood v. Rigsbee,* 207 N. C.,

684, 178 S. E., 102. The will is printed in full in that Report, beginning with page 686, and we refer to it, if further perusal may be desired.

Only the parts of the will directly bearing upon the question before us are reproduced here. That question is rather circumscribed, and we are inclined to confine our attention as closely as we may to its immediate consideration. When and in what manner will the roll be called to determine who are the remaindermen taking after the life estates created in the will?

At the time of the execution of his will, on 7 August, 1893, A. M. Rigsbee had eight living children, and at the time of his death, 29 November, 1903, there were seven, a daughter, Cora F. Markham, having predeceased him. One son, W. T. Rigsbee, died during the thirty years following the death of his father. Both of these died without ever having had any children.

Under the terms of the will, certain lands were devised to each of the children in fee. In addition to this each child was devised certain real estate for life, with the remainder to the children of such child, if any were living at the time of the death of the life tenant. These life estates, with remainders, were created in Items Second to Ninth of the will, inclusive, and may be summarized as follows: "Item Second: Cora F. Markham: 'During her natural life' . . . 'and at her death' . . . 'to her children if any are living at her death.' Item Third: Robert H. Rigsbee: 'For and during his natural lifetime and at his death to his children if any living then.' Item Fourth: Mary E. Middleton: 'For and during her natural life, and at her death to her children then living.' Item Fifth: Zoa Rigsbee: 'For and during her natural life and at her death to her children then living.' Item Sixth: Sallie A. Rigsbee: 'For and during her natural life, and at her death to her children then living.' Item Seventh: William T. Rigsbee: 'For and during his natural life, and at his death to his children then living.' Item Eighth: Mattie T. Rigsbee: 'For and during her natural life, and at her death to her children then living.' Item Ninth: Rosa Rigsbee: 'For and during her natural life and at her death to her children then living.' "

Item Thirteenth of the will sets up a trust providing that all of the residue of the estate, except county and municipal bonds, should be sold and converted into cash, which, with the county and municipal bonds, should be delivered to the trustees, to be held and finally disposed of as provided in the trust. It is provided that "The said trust is to continue and exist for thirty years from the time of my death and is then to be closed by an equal distribution of the fund among my children and their issue."

This item also contains the following provision: "If any of my children shall die leaving no issue at their death, then the property and

estate of such child either in the trust fund or devised specifically to them for life, shall go into the trust fund specifically or the proceeds thereof as my Trustees think wisest, and be treated, managed and finally divided as if originally a part of the trust fund."

Of the children who survived the thirty-year period of the trust, which terminated 29 November, 1933, all had children of their own living at the institution of this suit, with the exception of Miss Sallie Rigsbee, who has never had any children and is unmarried.

Upon these facts the appellants contend that the limitations over or remainders after the life estates designated in the above items of the will became vested respectively in the children of R. H. Rigsbee and the children of the several other life tenants, children of the testator, upon the expiration of the thirty-year term of the trust; or, in other words, that the expiration of the trust marks the time at which the roll should be called with respect to those who shall take remainders under these provisions. Amongst the arguments advanced in support of that position are the provisions of C. S., 1737, relating to the vesting of contingent interests upon death without issue (*Hilliard v. Kearney,* 45 N. C., 221; *American Yarn Co. v. Dewstoe,* 192 N. C., 121, 133 S. E., 407), which they contend applies to these remainders; the rule of construction favoring the early vesting of property interests (*Bank v. Murray,* 175 N. C., 62, 94 S. E., 665); and the presumption against intestacy (*Crouse v. Barham,* 174 N. C., 460, 93 S. E., 979; *Faison v. Middleton,* 171 N. C., 170, 88 S. E., 141; *Foust v. Ireland,* 46 N. C., 184; *Harper v. Harper,* 148 N. C., 453, 62 S. E., 553).

The appellees contend that as to the property involved in this litigation the contingency contained in the original limitations, that is, the existence of members of a class (children of the life tenants), who may take upon the death of such life tenant, still persists, notwithstanding the provisions of the trust, and prevents vesting of the remainders until that contingency is removed and certainty as to the takers, if any there are, is substituted for it upon the death of the life tenants; and that the roll is to be called at the death of the life tenant. They argue, however, that the devises set out in the above Items Second to Ninth, inclusive, are so affected by the provisions of Item Thirteenth, creating the trust, that if the contingency named in the trust—that is, the death of the life tenant without issue—should happen either during the thirty-year period or thereafter, the property must go into the trust, by which device the objection of partial intestacy may be obviated.

With respect to administration, the will divides the property with which it deals into two classes, one which goes to the beneficiaries by direct devise, and another which reaches them mediately from the trust. The former does not come under any obligation to the trust until the

happening of the event mentioned in Item Thirteenth, namely, the death of the life tenant without issue, when the property so affected falls within the trust. In our opinion, to be thus effective that event must have happened within the thirty-year period following testator's death, that is to say, on or before 29 November, 1933, and not thereafter. Correspondingly, the trust has no concern with other property, and we find no expressions in Item Thirteenth which are intended to control or affect its disposition.

The trust constitutes a distinct and separate plan, within the general testamentary scheme, for the security of the objects of the testator's regard during the thirty-year period of the trust, and for such further time as the effect of his beneficence may last. The very creation of a trust indicates a desire to effect a disposition of the property different from that which might be made conveniently in direct devises. The terminology used in designating the beneficiaries is at times different, in the direct devises "children," in the trust "issue," and we are constrained to conclude that the descriptive words were used advisedly. While the trust sticks closely to the interests of the immediate family of the testator, it lets in, at the close, a larger class than that provided for in the direct devises—probably both because of a natural regard for the testator's descendants, as well as to avoid an invidious contrast at the time of distribution which might reflect on his humanity. Considering this separateness of treatment and the carefully chosen expressions in Item Thirteenth which, as we have stated, seem to us to have no general application to the disposition of property other than that included in the trust, this section of the will is of no material aid to us in interpreting its other parts or supplying any want of testamentary direction therein.

Upon such analysis we are unable to see how the provisions of C. S., 1737 can be made to apply to the devise of property outside the trust, since the contingencies as to such property, which are all identical, are not those of which the statute takes cognizance, and are not affected with the remoteness attending limitations over depending on an indefinite failure of issue. The statute might apply as to the property drawn within the trust upon such a contingency, but as to that the roll has been called and those qualified to take have answered. *Haywood v. Rigsbee, supra.* In fact, the contingency which the appellants point out as calling for the application of the statute, perhaps through the vicarious offices of the trust provisions, do not arise out of the limitations of the will, but *sub silentio,* because the will does not speak.

The rule favoring an early vesting of property is one of interpretation and may not be invoked either against the plain wording of the will or to supplement a want of testamentary expression in that regard, where

no doubt exists (*Freeman v. Freeman,* 141 N. C., 97, 53 S. E., 620); nor can we, in the face of the plain provisions of the will, indulge the presumption against intestacy to advance the time when contingent interests may vest so as to destroy the effect of the contingency, nor loose the draw-strings of the trust and enlarge the receptacle for the admission of property which the testator did not commit to it, so that partial intestacy may be avoided. (*McCallum v. McCallum,* 167 N. C., 310, 83 S. E., 250).

We think the following quotation from the opinion in *Fulton v. Waddell,* 191 N. C., 688, 689, 132 S. E., 669, per *Justice Brogden,* is applicable to this situation and expresses the conclusion we have reached in the case at bar: "The remainder is limited to a class, and the class is to be ascertained at the termination of the life estate. *Bowen v. Hackney,* 136 N. C., 187; *Witty v. Witty,* 184 N. C., 375.

"The person or persons answering the description when the life estate terminates, takes the whole property. In other words, when the contingency upon which the estate is to vest happens, the law immediately calls the roll of the class. Those who can answer, take. *Gill v. Weaver,* 21 N. C., 41; *Sanderlin v. Deford,* 47 N. C., 74; *Knight v. Knight,* 56 N. C., 167; *Hawkins v. Everett,* 58 N. C., 42; *Grissom v. Parish,* 62 N. C., 330; *Britton v. Miller,* 63 N. C., 270; *Wise v. Leonhardt,* 128 N. C., 289; *Cooley v. Lee,* 170 N. C., 18; *Witty v. Witty, supra; Phinizy v. Foster,* 90th Ala., 262.

"The prevailing rule governing in such cases is thus stated in *Demill v. Reid,* 71 Md., 187: 'It seems to us to be clear law, as well as good sense, that in a case like this where there is an ultimate limitation upon a contingency to a class of persons plainly described, and there are persons answering the description *in esse* when the contingency happens, they alone can take."

The conclusion is supported by *Moseley v. Knott,* 212 N. C., 651, 194 S. E., 100; *Mercer v. Downs,* 191 N. C., 203, 131 S. E., 575; *Bowen v. Hackney, supra,* 48 S. E., 633. In *Moseley v. Knott, supra,* there is a collection of authorities to the same effect.

It is not necessary for us to deal with any question of intestacy in the decision of this case. We only say that property not intended to be administered through the trust cannot be drawn into it upon the theory advanced.

The judgment of the court below is

Affirmed.

G. W. DANIEL v. EAST TENNESSEE PACKING COMPANY AND J. G. GARNER.

(Filed 16 June, 1939.)

1. Trial § 22b—

On motion to nonsuit the evidence must be considered in the light most favorable to plaintiff. C. S., 567.

2. Appeal and Error § 21—

Where the charge of the court is not in the record it will be presumed correct.

3. Automobiles § 24c—Evidence held sufficient for jury as to whether driver, at time of collision, was acting in scope of his employment.

The evidence tended to show that defendant company's salesman informed plaintiff, a manager of a market purchasing the company's products, that he had to go to another city to see another representative of the company on company business, that plaintiff went on the trip as an invited guest, and that the accident in suit occurred en route to such other city. *Held:* The evidence was sufficient to be submitted to the jury on the question of whether at the time of the accident defendant's salesman was acting in the scope of his employment and in the furtherance of defendant's business.

4. Automobiles § 18g—Evidence held sufficient for jury on question of driver's negligence in failing to avoid colliding with car skidding on the highway.

The evidence tended to show that the accident in suit occurred on an asphalt road made slick by rain, that a car on the highway was skidding from one side of the road to the other, that the driver of the car immediately behind slowed up and stopped partially on the shoulder of the road and avoided a collision, but that the driver of defendant's car, going in the same direction behind the two cars, failed to slow up, either because the driver thought he could pass the skidding car or because of defective brakes and steering apparatus on defendant's car, and struck the skidding car, causing the injury to plaintiff, a guest in defendant's car. *Held:* The evidence was sufficient to be submitted to the jury on the question of negligence of the driver of defendant's car.

5. Automobiles § 21—

A guest in an automobile injured in a collision may recover of either of the drivers of the cars involved if the collision was the proximate result of their concurrent negligence.

6. Negligence §§ 6, 7—

A person is liable for an injury if his negligence is in any degree a proximate cause of the injury, since he may be exonerated from liability only if the total proximate cause of the injury is attributable to another or others.

7. Automobiles §§ 15, 18f—

Evidence that the driver of defendant's car stated that the car had defective brakes and steering apparatus and that he could have stopped the car and avoided the accident if the car had had good brakes, is competent, the probative force being for the jury.

BARNHILL, J., dissents.

APPEAL by defendants from *Olive, Special Judge,* at April Term, 1939, of FORSYTH. Affirmed.

This is a civil action for actionable negligence brought by plaintiff against the defendants to recover damages. The defendants denied negligence. There was no plea of contributory negligence set up in the answer of the defendants, as plaintiff was a guest in the car driven by defendant J. G. Garner.

The case was tried before Oscar O. Efird, judge, and a jury, in the Forsyth County court. The issues submitted to the jury and their answers thereto, were as follows:

"1. Was the defendant J. G. Garner, in operating the automobile described in the complaint, acting in the furtherance of and in the scope of his employment with the East Tennessee Packing Company, as alleged in the complaint? Answer: 'Yes.'

"2. Was the plaintiff injured by the negligence of the defendants, as alleged in the complaint?

"A. As to the defendant East Tennessee Packing Company? Answer: 'Yes.'

"B. As to the defendant J. G. Garner? Answer: 'Yes.'

"3. What amount of damages, if any, is the plaintiff entitled to recover? Answer: '$1,000.00.'"

Judgment was rendered on the verdict by the Forsyth County court. The defendants made numerous exceptions and assignments of error and appealed to the Superior Court; that court rendered judgment as follows: "This cause being heard in due course at the April Term, 1939, of the court, on the appeal of the defendants from a judgment of the Forsyth County court, in favor of the plaintiff, and the court having heard the arguments of counsel and being of the opinion that each of the assignments of error of the defendants should be overruled and that the judgment of the Forsyth County court should be affirmed; it is therefore ordered, adjudged and decreed that each of the assignments of error of the defendants is hereby overruled and that the judgment of the Forsyth County court is hereby affirmed; that the costs of the appeal are hereby taxed against the defendants. Herbert E. Olive, Judge Presiding."

From this judgment the defendants made numerous exceptions and assignments of error and appealed to the Supreme Court. The material ones and necessary facts will be set forth in the opinion.

Walter E. Johnston, Jr., and Fred M. Parrish for plaintiff.
Ratcliff, Hudson & Ferrell for defendants.

CLARKSON, J. At the close of plaintiff's evidence and at the conclusion of all the evidence, the defendants made motions in the court below for judgment as in case of nonsuit. C. S., 567. The court overruled these motions and in this we can see no error. The evidence for plaintiff must be taken in its most favorable light. The charge of the Forsyth County court is omitted from the record; it is therefore presumed to be correct.

The defendant J. G. Garner was an employee of the East Tennessee Packing Company at the time of the collision, Sunday, 29 May, 1938. He was driving a 1937 Ford which had on each door an emblem, or insignia, of the East Tennessee Packing Company. The emblems had the picture of the state of Tennessee through a circle, with the word "Selecto," their brand name, on the sign, and "East Tennessee Packing Company" below. That car was the car which Garner used about his business in Winston-Salem in calling on the trade, including the Purity Market. He had been with the company eight years and the firm did a wholesale business, selling meats. The plaintiff was manager of the Purity Market, in Winston-Salem, and bought products from the defendant company through Garner. When Garner came to get his usual order he told plaintiff that he had to go to Charlotte the next day to see the salesman of the East Tennessee Packing Company over there on some company business, and asked plaintiff if he would like to go. Garner had been selling plaintiff meat, as manager of the Purity Market, for some time, about twice a week.

We think the evidence was sufficient to be submitted to the jury that Garner, at the time of the collision, was an employee of the East Tennessee Packing Company, in the scope of his employment, and about his master's business. The jury so found and the presumption is that the trial judge charged correctly on this aspect. *Misenheimer v. Hayman,* 195 N. C., 613; *Puckett v. Dyer,* 203 N. C., 684; *Jackson v. Scheiber,* 209 N. C., 441 (446).

In *Robinson v. McAlhaney,* 214 N. C., 180 (182-3), speaking to the subject, it is said: "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. Telegraph*

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," citing authorities.

In *York v. York*, 212 N. C., 695 (699), we find: "In *Harper v. R. R.*, 211 N. C., 398 (402), citing many authorities, it is said: 'It is well settled in this jurisdiction that negligence on the part of a driver of a car will not ordinarily be imputed to another occupant unless such other occupant is the owner of the car and has some kind of control over the driver. They must be engaged in a joint enterprise or joint venture. Automobile driver's negligence is not, as a general rule, imputable to a passenger or guest." At p. 723, quoting from *Albritton v. Hill*, 190 N. C., 429 (430), it is said: "In reference to concurrent negligence we have held that where two proximate causes contribute to an injury the defendant is liable if his negligent act brought about one of such causes. *White v. Realty Co.*, 182 N. C., 536; *Wood v. Public Service Corp.*, 174 N. C., 697; *Harton v. Telephone Co.*, 141 N. C., 455."

Plaintiff and Garner, a defendant and the employee of the East Tennessee Packing Company, left Winston-Salem for Charlotte on the evening of 29 May, 1938, about 2:30 o'clock. It was raining. When about eight miles south of Lexington, going towards Salisbury, they had a collision with what is known as the "Byerly" Dodge car. Mrs. Andrew Byerly testified, in part: That she spoke to Garner after the collision; "I said, 'Was you in the wreck?' and he said, 'Yes, I was in the wreck.' I said, 'Well, who was the fault of it?' He said, 'It could have been me; I expect it was me,' and then he said he saw the car slipping. He said, 'I could have stopped.' Q. Is that all he said? Ans.: 'And I thought I could pass it,' that's what he said. He said, 'I thought I could pass by it.' When he talked about stopping, he said, 'I could have had stopped.' Q. Which car did he say he saw slipping? Ans.: 'My daughter's car' (Corinna Byerly). Q. What was it he said he didn't stop his car? Ans.: He said, 'I could have stopped,' and he said, 'I could have passed by'; I believe that's what he said, 'I thought I could pass by.' He said, 'I could have stopped but I thought I could pass by.' "

Corinna Byerly testified that she was driving toward Lexington: "My car was a 1929 Dodge Sedan. About the time of this wreck I was driving about twenty miles an hour. We were driving along very slowly and first my rear end slipped to my right and then, you see, I tried to right it around, and then my rear end went to my right, first went to my left and then slipped around to my right, and that's when I got across the road. At the time of the collision with the car driven by Mr. Garner, my car was almost right in the road. I had almost gotten it around right. Mr. Garner didn't slacken his speed any that I noticed. He didn't pull to the right off the road at all. After I got my car right in the road, or straight in the road, it was just about to the center of the line at the time of the collision. Mr. Garner's car stayed on the hard surface the entire time. The fender of my car was smashed up and the radiator was mashed in on one side and, of course, the hood was smashed up. The frame was knocked up. We never did have it repaired, it was smashed up so bad." She could see the Garner car coming very fast, it never decreased its speed. It was in evidence that Corinna Byerly was driving at the rate of fifty miles an hour the "Byerly" car, on the slick road "as it skidded right across." The road was wet and slick as it had been raining, and in that condition it was hard to drive—one had to be very cautious. It was a black asphalt road, usual width of 18 feet and 6 feet shoulders on each side. The road was practically straight. The "Byerly" car was seen by the driver of the "Riddle" car, which was in front of the "Garner" car, going towards Salisbury, about 400 to 450 feet. The driver of the "Riddle" car, at that distance, said it was skidding about like Corinna Byerly testified. The driver of the "Riddle" car was bringing his car to a stop and thus avoided the collision by driving to the right over to the side ditch and passing the "Byerly" car. The "Garner" car, which was behind him, crashed into the "Byerly" car. The plaintiff was knocked unconscious, his head hitting the windshield and his knee-cap being seriously injured. Plaintiff being a guest and passenger, we think there was evidence of concurrent negligence between the driver of the car plaintiff was riding in and the "Byerly" car.

As said in *White v. Realty Co.*, 182 N. C., 536 (538): "But if any degree, however small, of the causal negligence, or that without which the injury would not have occurred, be attributable to the defendant, then the plaintiff, in the absence of any contributory negligence on his part, would be entitled to recover; 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, he is liable.' *Wood v. Public Service Corp., supra* (174 N. C., 697), and cases there cited." The present case is similar to that of *Cunningham v. Haynes,* 214 N. C., 456.

We do not think the negligence of the driver of the "Byerly" car was the sole and only proximate cause of plaintiff's injury. In the *Cunningham case, supra,* speaking to the subject, it is held: "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 contributed to the result in any degree."

In *Groome v. Davis, ante,* 510, it is held: "Where collision is caused by negligence of the drivers of both cars, a guest in one of the cars may recover against either of the drivers without regard to liability as between the drivers."

Garner told plaintiff and his wife that "He had had a wreck with his car when it was new and turned it over and had to have it overhauled and repaired, and since that time his brakes nor his steering gear had never worked properly, and had he had good brakes he might have avoided this accident that he and I had." This evidence was competent, the probative force was for the jury.

There is no better rule of law than that of the prudent man. On the slick and slippery asphalt road, the driver of the "Riddle car" in front of the car driven by Garner, saw the "Byerly" car dancing as it was from one side of the road to the other. He slowed down, turned to the right and ran partly on the shoulders of the road and avoided the injury. Garner saw, or in the exercise of due care could have seen, the "Byerly" car, crippled as it were on the slick and slippery road, and should have slowed down, turned to the right and attempted to avoid the injury like the driver of the "Riddle" car did. Of course, if his car was in such a condition that he could not stop or slow down, on account of defective brakes, this was some evidence of negligence.

On the entire record, we think the matter was for a jury to pass on. We see no error in the court below overruling the exceptions and assignments of error on the appeal by the defendants from the Forsyth County court.

The judgment of the court below is

Affirmed.

BARNHILL, J., dissents.

ADAM DARR AND FLORA DARR v. CAROLINA ALUMINUM COMPANY.

(Filed 16 June, 1939.)

1. **Waters and Water Courses § 4: Easement § 2—**

An upper landowner does not have an easement by necessity to drain his land by a ditch extending across the lower lands of another, even though this is the most convenient or the only way by which he can drain his land.

2. **Waters and Water Courses § 4: Easement § 3—**

A mere showing of the use of a drainage ditch across the lands of another is insufficient to establish a prescriptive right to the use of such ditch, since in the absence of evidence in rebuttal such use will be presumed permissive and not adverse.

3. **Waters and Water Courses § 12—Evidence held not to show any interference with any vested right of defendant in use of drainage ditch.**

Plaintiff's evidence tended to show that he had drained his land through a ditch which had been dug, beginning on his land and running through the lands of another and thence into a river, that subsequently defendant built and maintained a dam lower down upon the river which caused deceleration in the flow of the water resulting in the deposit of sand and the growth of vegetation along the river and the mouth of the drainage ditch upon the lands of the lower proprietor so that the drainage ditch failed to properly drain plaintiff's land. *Held:* Upon plaintiff's failure to establish that he had a vested legal right to use the drainage ditch on the lands of the lower proprietor by deed or prescription, defendant's motion to nonsuit was properly granted, since the evidence fails to show any interference with any vested legal right of plaintiff.

APPEAL by plaintiffs from *Phillips, J.*, at September Term, 1938, of DAVIDSON.

Civil action for recovery of permanent damages to land and damage to crops allegedly resulting from unlawful and negligent acts of defendant in "prohibiting the natural drainage and natural flow of water" along the streams over certain lands of plaintiffs.

These facts are not controverted: Plaintiffs are the owners of a farm containing approximately 145 acres, situated in Boone township, Davidson County. It is bounded on the north by lands of J. F. Barnhart; on the south by lands of the Shoaf heirs; and on the west by the Yadkin River, which flows in a southern direction. About 40 acres of the farm are in a basin, bounded on three sides by higher land. The land along the banks of the river, the land along the southern boundary, and that part of plaintiff's land to the east of basin are higher than that in the basin. Rising several miles to the northeast, Tanyard Branch runs in a southwestern direction across plaintiffs' lands and then through a

portion of the lands of the Shoaf heirs, and empties into the east side of the Yadkin River on the Shoaf land. Meadow Ditch begins north of plaintiffs' lands and extends in a southern direction almost parallel to the river, over plaintiffs' farm, and through the ridge on the southern boundary thereof, and approximately 450 feet across the lands of the Shoaf heirs and connects with Tanyard Branch on the Shoaf land, about 600 feet from the river.

In 1927 defendant completed the construction of a dam across Yadkin River at High Rock, which created a lake covering a large area, and extending several miles up the river. Defendant has purchased and owns water rights up the river to and on the Shoaf lands on both sides of and up Tanyard Branch beyond the mouth of Meadow Ditch, and for 225 feet up and on both sides of Meadow Ditch.

Plaintiffs allege in substance: That the lake created by defendant's dam at High Rock has caused the channel of Yadkin River to become filled with sand, debris, and growth, which in turn has caused its tributary streams that flow over plaintiffs' land to become so filled with "sand, vegetable growth, bushes, and other impediments" as to prevent the natural flow therein of water from the lands of the plaintiffs, and above, and to become ponded upon their land to their damage; and that this condition is due to and caused by negligence of defendant in permitting the streams to fill up and in failing to keep them cleaned out and drained.

Defendant denies the material allegations in these respects.

Plaintiff offered evidence tending to show in substance: That the lake created by defendant's dam at High Rock has retarded the natural flow of the water of Yadkin River to such an extent that the channel has gradually filled up with sand, thereby raising the level of the water, which has impeded the natural rapid flow of water in the river at the mouth of Tanyard Branch; that, as a result, the rapidity of the flow of water in Tanyard Branch has been so lessened that the branch has filled up with sand, debris and undergrowth, and timber; that the filling up of Tanyard Branch has raised the channel of that branch to such an extent that it is higher than the mouth of Meadow Ditch; and that as a result the flow of the water in Meadow Ditch has been so retarded as to permit sand and silt to settle therein and to obstruct the drainage and flow of Meadow Ditch across their land, causing water to pond in the lowest parts of the basin, and about 10 acres of the land to become soaked, soggy, and sour, and unfit for farming, to which use it has been devoted for years, by which plaintiffs are damaged in various estimates.

Defendant offered evidence tending to refute such evidence of plaintiffs.

Evidence offered by plaintiff further tended to show that, while Meadow Ditch, which some of the witnesses called Meadow Branch, has existed for more than 70 years, it is not a natural watercourse. The witness P. C. Shoaf, testifying for plaintiff, said: "Mr. Darr's meadow back up there is kinder of a swag, . . . The ditch goes through kind of a ridge over into Tanyard Branch. It is cut pretty deep there."

R. K. Williams, testifying for plaintiff, said: "This land where overflows and drowns out I estimate is four feet lower than the land below there down next to Tanyard Branch where the ditch is cut through that high ridge. That is the reason why the ditch is so much deeper toward the lower end than it is up where it is overflowed." Again, the same witness testified: "Still that ditch has got to be cut through that high ridge to drain that land above. That ditch was not a natural drainage, it was bound to have been cut there. There is no other low place below that basin to cut a ditch through."

There is evidence that Meadow Ditch has been cleaned out on the plaintiffs' land from time to time for 25 years. However, there is no evidence that it has been cleaned out across the Shoaf land, nor is there evidence of the circumstances under which the ditch was constructed, nor is there evidence of adverse user over the Shoaf land.

Reserving exception to refusal of motion for judgment as in case of nonsuit at the close of plaintiffs' evidence, defendant offered evidence, and renewed motion for nonsuit at the close of all the evidence. The motion was allowed. From judgment in accordance therewith, plaintiffs appeal to Supreme Court and assign error.

P. V. Critcher and McCrary & DeLapp for plaintiffs, appellants.

R. L. Smith & Son, Don A. Walser, and Paul R. Roper for defendant, appellee.

WINBORNE, J. The evidence presented in the record on this appeal, considered in the light most favorable to plaintiffs, is insufficient to require the submission of issues to the jury.

The action is laid upon allegations that defendant has obstructed the natural flow of watercourses over plaintiffs' land.

Plaintiffs offered evidence tending to show that it is the obstructing of the flow of water in Meadow Ditch on the lands of the Shoaf heirs that has caused the alleged damage to their land. But on the very threshold of the case there is a lack of evidence tending to show that Meadow Ditch is a natural stream or water course. To the contrary, all the evidence discloses that it is an artificial stream—a ditch cut through a ridge of land which separates plaintiffs' bottom land from

the Shoaf land through which the ditch runs in entering Tanyard Branch, where plaintiffs claim the obstructions to be.

In *Brown v. R. R.*, 165 N. C., 392, 81 S. E., 450, it is said that the upper landowner "cannot artificially increase the natural quantity of water, or change its natural manner of flow by collecting it in a ditch and discharging it upon the servient land at a different place or in a different manner from its natural discharge." *Porter v. Durham*, 74 N. C., 767, at 780; *Briscoe v. Parker*, 145 N. C., 14, 58 S. E., 443.

In *Porter v. Armstrong*, 129 N. C., 101, 39 S. E., 799, speaking to the question of what is a natural watercourse, the court said: "Much stress seems to be laid upon the fact that the natural drainway of the Pigford farm was through Strawberry Canal. This may be so in the sense that it is the most convenient way to drain the said farm, but that fact does not make the canal a natural watercourse. A watercourse consists of bed, banks and water. Angell on Watercourses, sec. 4; Gould on Waters, sec. 41. A natural watercourse has such characteristics while in a state of nature and without artificial construction. Natural watercourses are such as rivers, creeks, and branches. A canal can never come under such a designation, unless it is a mere enlargement of a natural watercourse."

Applied to the case in hand, Meadow Ditch as described in the evidence brought forward, not being a natural watercourse, and, nothing else appearing, plaintiffs have no legal right to collect the water on their land and discharge it through that ditch over the lands of another.

But, while plaintiffs do not allege that they have acquired any easement or right to use Meadow Ditch across and on the land of the Shoaf heirs, it is here contended by them that they have the legal right to drain their lands through the ditch on their land and through the ridge and land of intervening owners into Tanyard Branch, for two reasons: (1) By necessity; (2) By prescription.

If it be a fact that drainage through Meadow Ditch is the most feasible way to drain the plaintiffs' farm, that fact does not make the ditch a natural watercourse. *Porter v. Armstrong, supra.* Commenting upon a case of similar character, Angell in his treatise on the Law of Watercourses, p. 134, quotes from *Butler v. Peck*, 16 Ohio St., 334, where this question is stated: "Whether an owner of land having upon it a marshy sink or basin of water which basin as to considerable portion of the water which collects within it, has no natural outlet, may lawfully throw such water by artificial drains, upon the lands of an adjacent proprietor?" and answers: "We are clear that no such right exists. It would sanction the creation, by artificial means, of a servitude which nature has denied."

The question here is not whether it is the only way to drain plaintiffs' meadow land, but whether plaintiffs have acquired the right to drain their lands by means of an artificial ditch over the lands of another.

On the second contention: The rule with respect to acquiring prescriptive rights over private property is firmly imbedded in the law.

In 17 Am. Jurisprudence, 986, Easements, sec. 85, the writer states: "It is a well settled rule that a right of drainage of waters through the lands of another may be acquired by prescription. The right, however, can be created only by actual use which has been adverse, peaceable, uninterrupted, and continued for the prescriptive period."

In *Snowden v. Bell,* 159 N. C., 497, 75 S. E., 721, *Allen, J.,* said: "It is well established in this State that the right to a private way may be acquired by a continuous adverse use for 20 years, and that a mere user for the required period is not sufficient to confer the right." See, also, same case reported in 166 N. C., 208, 80 S. E., 888. *Boyden v. Achenbach,* 86 N. C., 397; *S. v. Norris,* 174 N. C., 808, 93 S. E., 950; *Nash v. Shute,* 184 N. C., 383, 114 S. E., 470; *Perry v. White,* 185 N. C., 79, 116 S. E., 84; *Durham v. Wright,* 190 N. C., 568, 130 S. E., 161; *Weaver v. Pitts,* 191 N. C., 747, 133 S. E., 2; *Grant v. Power Co.,* 196 N. C., 617, 146 S. E., 531; *Gruber v. Ewbanks,* 197 N. C., 280, 148 S. E., 246; *Hemphill v. Board of Aldermen,* 212 N. C., 185, 193 S. E., 153.

In *Boyden v. Achenbach, supra,* it was held that "there must be some evidence accompanying the user giving it a hostile character and repelling the inference that it is permissive and with the owner's consent, in order to create the easement by prescription and impose the burden on the land." This principle is cited with approval in *Nash v. Shute, supra.*

In *Perry v. White, supra,* this Court, speaking through *Clark, C. J.,* said: "Conceding that the ditch had existed and been kept up continuously for draining plaintiffs' land for the past 30 years over the land of the defendant, the plaintiffs would not have acquired the right of easement thereby. This user may have been permissive, and the law presumes that it was. Mere user for 30 years will not confer an easement unless it appears that it was adverse."

Applying these principles to the case at bar, mere user is the only evidence of right in plaintiffs to use Meadow Ditch across the Shoaf lands. The presumption that this use was permissive, and not adverse, is not rebutted. If it then be conceded that the condition at the junction of Yadkin River and Tanyard Branch, and of Tanyard Branch and Meadow Ditch are as plaintiffs contend, defendant at most has deprived them of facilities for their own drainage which they before possessed and used, but without vested right so to do. See *Willey v.*

R. R., 98 N. C., 263, 3 S. E., 485, in which the factual situation and rights of parties are not dissimilar to the present case.

This disposes of the appeal, and dispenses with necessity to inquire into the relative rights and responsibilities of the parties with respect to conditions about which plaintiffs complain.

The judgment below is

Affirmed.

WILLIAM M. GEORGE, ADMINISTRATOR OF W. EDWARD GEORGE, v. WINSTON-SALEM SOUTHBOUND RAILWAY COMPANY.

(Filed 16 June, 1939.)

1. **Evidence § 47—**

A physician qualified as an expert may testify from his examination of the wounds of deceased that deceased was lying prone upon the track at the time he was struck and killed by defendant's train.

2. **Railroads § 10—Evidence held for jury on question of defendant's negligence in failing to stop train before striking intestate lying in a helpless condition on the track.**

The evidence tended to show that intestate was struck and killed by defendant's train on a fair, clear night, that the track along which the train approached deceased was straight and unobstructed for a distance of three-quarters of a mile, and that the train could have been stopped within 300 or 400 feet. The engineer testified that he did not see intestate. There was medical expert testimony that at the time intestate was injured he was lying prone on the tracks. *Held:* The expert testimony is sufficient to present for the jury's determination whether the intestate was lying on the tracks in an apparently helpless condition, and the evidence as to the conditions at the scene of the accident and the engineer's failure to see deceased is sufficient to present for the jury's determination whether the engineer, by the exercise of ordinary care, could have discovered intestate in time to have stopped the train before hitting intestate, and whether he failed to exercise such care, and whether such negligent failure caused the death of deceased, and the granting of defendant's motion to nonsuit was error.

BARNHILL, J., dissenting.

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

APPEAL by plaintiff from *Sink, J.*, at February Term, 1939, of DAVIDSON. Reversed.

Willis & Seawell for plaintiff, appellant.

Craige & Craige and Phillips & Bower for defendant, appellee.

SCHENCK, J. This is an action for the wrongful death of the plaintiff's intestate alleged to have been caused by the negligent failure of the defendant to avail itself of the last clear chance to avoid running its train over and fatally injuring the plaintiff's intestate while on the track of the defendant. At the close of the plaintiff's evidence the defendant's motion for judgment as in case of nonsuit was allowed, and from judgment accordant with the court's ruling the plaintiff appealed, assigning as error such ruling and judgment.

The evidence, when viewed in the light most favorable to the plaintiff, tended to show that about 1:55 a.m., on 18 July, 1938, the plaintiff's intestate, Edward George, was "lying down upon the tracks" of the defendant, and was run over by the train of the defendant moving in a southern direction, and the track of the defendant was straight, practically level and unobstructed from the place where the intestate was lying in a northern direction for approximately 1,500 yards, or three-fourths of a mile; the night was clear and fair; the train was travelling approximately 30 miles per hour and carried 25 cars; the headlight and brakes of the train were in proper order and the train could have been stopped within 300 or 400 feet; that the engineer did not see anybody on the track, but about 5:25 o'clock of the same morning he found particles of flesh on the "left back drive of the brake head of the engine."

Defendant's first contention that the evidence of the plaintiff tending to show that the intestate was lying down upon the track was incompetent, cannot be sustained. The evidence consisted of the testimony of Dr. J. R. Terry, the coroner, whom the court held to be a medical expert, and was to the effect that he went to the scene before the body of the intestate had been removed, and judging "from the nature, the condition and position of the wounds," he had an opinion satisfactory to himself that "the deceased was lying down upon the tracks at the time the same were inflicted." This evidence was competent under the authority of *McManus v. R. R.*, 174 N. C., 735, where *Hoke, J.*, says: "It was also urged for error that Dr. McCoy, a witness for plaintiff, who had made a professional examination of the intestate at the time, was allowed, over defendant's objection, to testify that, 'from the nature, condition and position of the wounds, he was of opinion that the intestate was lying down at the time the same was inflicted.' It will be noted that this witness, admitted to be an expert, spoke from a professional and personal examination of the intestate, and the answer, to our minds, was clearly within the domain of expert opinion. Both question and answer are approved and upheld, we think, in *Ferebee v. R. R.*, 167 N. C., 290; *Parrish v. R. R.*, 146 N. C., 125; *S. v. Jones*, 68 N. C., 443."

In *Henderson v. R. R.*, 159 N. C., 581, where the allegations were similar to those of the instant case, *Allen, J.*, says: "The allegation of negligence in the complaint is that the deceased was down on the track in an apparently helpless condition, and that the engineer of the defendant could have discovered him in time to stop the train before reaching him, by the exercise of ordinary care. The burden was on the plaintiff to prove the truth of this allegation and to establish in the minds of the jury: (1) that the deceased was down on the track in an apparently helpless condition; (2) that the engineer could have discovered him in time to stop the train before reaching him, by the exercise of ordinary care; (3) that he failed to exercise such care, and as a direct result the deceased was killed."

Applying this statement of the law to evidence in the instant case, we have (1) the testimony of Dr. Terry that in his opinion the deceased was lying down upon the track at the time the fatal wounds were inflicted. This was sufficient to be submitted to the jury upon the first requisite laid down by the court.

As to whether (2) the engineer could have discovered the deceased in time to stop the train before reaching him, by the exercise of ordinary care, we have the evidence that the track was straight, level and unobstructed for three-quarters of a mile in the direction from which the train approached the deceased, the night was clear and fair, the train was running 30 miles per hour, and the brakes and headlight were in proper condition and the train could have been stopped within 300 or 400 feet. This was sufficient evidence to be submitted to the jury upon the second requisite laid down by the court. In *Deans v. R. R.*, 107 N. C., 686 (696), *Avery, J.*, in speaking to a state of facts similar to those of the instant case, says: "The jury were at liberty to exercise their own common sense and to use the knowledge acquired by their observation and experience in everyday life in solving the question whether the engineer, in the exercise of due diligence, might have discovered, from his elevated position on the engine, the fact that plaintiff's intestate was lying helpless across the rail, and whether by prompt and strenuous effort he could have saved his life without putting his passengers in jeopardy. . . . Courts and juries acting within their respective provinces must take notice of matters of general knowledge and use their common sense where the evidence makes the issue of law or fact depend upon their exercise."

As to whether (3) the engineer failed to exercise ordinary care and as a result thereof the deceased was killed, we have the testimony of the engineer himself that he did not see the deceased, and all of the evidence tends to show that the engine struck, ran over and killed the deceased.

This was sufficient to carry the case to the jury upon the third requisite laid down by the court.

When we view the evidence in the light most favorable to the plaintiff, as we must do upon a motion to nonsuit, we are constrained to hold that his Honor erred in sustaining the demurrer to the evidence.

Reversed.

BARNHILL, J., dissenting. The deceased lived in a shanty car parked on a siding on the east side of the track near Ella Station. There was a main track, sidetrack, and house track. The deceased was carried home by friends about 11:30 on the night of 17 July. He entered his shanty car sometime after 12:00 o'clock. The train, which it is not seriously denied struck him, passed that point about 1:55 a.m., 18 July. The next morning the mangled body of the deceased was found on the east side of the main track near the frog where the sidetrack and house track branch off from the main track. There was evidence that there was no sign on any part of the front part of the engine that it had struck a human being. The first signs found were on the brakehead approximately 35 feet back from the front of the cowcatcher. There were signs between the two main drivewheels and under the cab. The only evidence in the record that the deceased was prone on the track at any time is the evidence of the physician, who testified that in his opinion, from the nature, condition, and position of the wounds, the deceased was lying down upon the track *at the time* the same were inflicted; that the body was lying between the rails when it was found, and that: "I say that he was lying on the track on account of the wound. We do not know that someone did not throw him under the wheel. We do not know that he did not jump under the train." There was also evidence that the headlight on the train was in good condition and was on at the time; that the brakes on the train were likewise in good condition, and that the engineer and fireman were keeping a lookout and saw no one.

It is well established in this jurisdiction that negligence on the part of a railroad company is not presumed from the mere fact that the mangled body of a person is found on or near the track, or from the fact that a train struck a person on the track. *Harrison v. R. R.*, 204 N. C., 718, and cases there cited; *Upton v. R. R.*, 128 N. C., 173; *Clegg v. R. R.*, 132 N. C., 292. To establish negligence in a case of this type, plaintiff is required to prove: (1) That the deceased was down on the track in an apparently helpless condition; (2) that the engineer or fireman saw or, by the exercise of ordinary care in keeping a proper lookout, could have seen the deceased in such position a sufficient distance ahead to stop the train before injuring him; and (3) that the engineer

failed to exercise ordinary care in stopping his train and avoiding injury to the deceased who was at the time so situated, as a proximate result of which the deceased was killed. *Clegg v. R. R., supra; Henderson v. R. R.*, 159 N. C., 581.

In my opinion the evidence relied upon by the plaintiff is not sufficient to establish a *prima facie* case of negligence. That the deceased was prone on the track *at the time* he received the injuries does not prove, or tend to prove, that he was prone on the track at the time the train approached. As stated by the physician, we do not know whether he was thrown under the wheel or jumped or staggered into the train, or stepped in front of the train when it was so near that it was impossible for the train to be stopped. As to when he got on the track is left in the field of speculation. That his legs were cut off and one arm and his head were severed from the body would seem to indicate, circumstantially at least, that he was prone at the instant he received his wounds, but this could not be held for evidence that he was lying on the track in an apparently helpless condition not possessed of his faculties a sufficient distance ahead of the train so that the crew, by the exercise of reasonable care, could have seen him in time to stop the train and avoid the injury.

The evidence offered by the plaintiff tends strongly to show that this was not the fact. There was no sign on the front of the train. The first indication that the train had come in contact with a human being was at a point 30 or 35 feet back from the front. Furthermore, the plaintiff offered evidence tending to show that the engineer and fireman were keeping a lookout and did not see any object on the track ahead of the train.

The deceased retired to his shanty after 12:00 o'clock a.m. He was struck by a passing train about 1:55 a.m. When and why he left his shanty after retiring and just how and under what conditions he came in contact with the passing train is unsolved by this record. An explanation thereof can be arrived at only by speculation and surmise. There is no evidence tending to explain the same.

The record is devoid of any fact or circumstance tending to establish negligence on the part of the defendant. In my opinion the judgment dismissing the action as of nonsuit should be sustained.

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

STATE v. JAMES CURETON.

(Filed 16 June, 1939.)

1. **Criminal Law § 50: Homicide § 30—Question propounded by court held not to amount to an expression of opinion as to whether fact had been proven.**

In this prosecution for homicide the court asked a witness when defendant shot deceased the last time. *Held:* The question did not amount to an expression of opinion that defendant did the shooting in view of the fact that the witness had just testified that defendant had shot deceased four times and described the circumstances of each shot and then testified that defendant had shot deceased the fifth time, since under these circumstances the question amounted to no more than an inquiry as to the time the fifth shot was fired, and *further* defendant's exception was rendered immaterial by defendant's later admission that he shot deceased.

2. **Homicide § 25—Evidence held sufficient for jury on question of defendant's guilt of first degree murder.**

The State's evidence tended to show that defendant and deceased engaged in an altercation, that deceased then left defendant's home, that defendant stated that he would kill deceased before daylight, that he procured a pistol, went to the house where deceased was some three hours later and shot and killed deceased, who was unarmed and was making no hostile demonstrations at the time. *Held:* The evidence is sufficient to be submitted to the jury on the question of defendant's guilt of murder in the first degree although the evidence was contradicted in material points by defendant's evidence.

3. **Criminal Law § 52b—**

Upon defendant's motion to nonsuit, the evidence must be taken in the light most favorable to the State.

4. **Criminal Law § 41d—**

When defendant goes upon the stand, the State, on cross-examination, may ask him whether he had been indicted for a particular offense or question him as to particular acts impeaching his character, although as to other witnesses the State might ask them questions only as to defendant's general reputation.

5. **Homicide § 27f—Charge on question of self-defense held without error.**

The failure of the court to charge with particularity upon the principles of the right of self-defense in the preliminary portion of the charge defining the various kinds of homicide, lawful and unlawful, is not erroneous when in subsequent portions of the charge the court repeatedly instructs the jury that defendant would have the right to kill in self-defense if it reasonably appeared to him at that time necessary to save himself from death or great bodily harm.

6. **Criminal Law § 41f—Charge as to weight and credibility to be given testimony of witnesses in general held not error.**

The court, in instructing the jury upon the weight and credibility to be given the testimony of witnesses in general, charged that the jury might

consider the witness' manner and interest in the case, if the witness is interested. *Held:* There being no charge that the jury should scrutinize defendant's testimony, the absence of an instruction that if the jury believed defendant's testimony they should give it the same weight as that of any other witness, is not error.

7. Criminal Law § 53c—Instruction as to burden of proving matters in mitigation when killing with a deadly weapon is admitted, held without error.

The failure of the court to charge that when an intentional killing with a deadly weapon is admitted or established the defendant may rely upon the State's evidence to mitigate the offense from murder in the second degree to manslaughter, is not error when none of the State's evidence tends to show matters in mitigation and, defendant having admitted the intentional killing with a deadly weapon, an instruction that the burden was upon defendant to establish matters in mitigation to the satisfaction of the jury is correct.

8. Same: Homicide § 30—

A charge, in stating defendant's contentions, that the burden was not upon the State to satisfy the jury beyond a reasonable doubt that defendant was guilty of murder in the second degree *is held* not prejudicial in view of the fact that defendant admitted the intentional killing of deceased with a deadly weapon and the fact that, immediately following, the court charged as to the presumptions arising therefrom.

9. Homicide § 30—

Error in the charge in regard to the burden of proof upon the question of defendant's guilt of murder in the second degree is rendered harmless by the jury's verdict of guilty of murder in the first degree upon a charge repeatedly and correctly charging the burden of proof upon this degree of homicide.

APPEAL by defendant from *Clement, J.*, at March Term, 1939, of FORSYTH. No error.

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

Phin Horton, Jr., James M. Little, Jr., J. A. Myatt, and Julian C. Franklin for defendant, appellant.

SCHENCK, J. The defendant was convicted of murder in the first degree, and from judgment of death appealed to the Supreme Court, assigning errors.

The State's evidence tended to show that on the night of 14 January, 1939, the deceased, Melvin Nesbit, and one Fannie Byrd had been to a party on Underwood Avenue in the city of Winston-Salem, and about 1 o'clock a.m., they went to the house of the defendant, James Cureton, about two or three houses from the party; that the deceased engaged in

a gambling game with the defendant and others at the defendant's house; that about 5 o'clock a.m., deceased and defendant had a quarrel over the amounts claimed by each to be due him; that the quarrel led to a fight in which only minor injuries were inflicted; that the defendant procured his rifle, and deceased left the house; that when defendant learned that the deceased had left the house he stated that he would kill the deceased "before daylight"; that deceased went to the home of Fannie Byrd and was there at 8:30 o'clock a.m., when the defendant entered the house and charged the deceased with having "a knife after me last night," and when the deceased denied having had a knife, the defendant shot the deceased five times with a pistol, from which shots he died about two weeks thereafter; that the deceased was unarmed at the time he was shot by the defendant.

The defendant's evidence, consisting solely of his own testimony, tended to show that in the altercation at his house about 5 o'clock a.m., the deceased cut him and his clothing, and that the defendant went about 8:30 o'clock a.m., to the house of Fannie Byrd, not knowing that the deceased was there, to tell her to tell the deceased that if he did not pay for the clothing he had cut, the defendant was going "to have him up"; that when the defendant entered Fannie Byrd's house he saw the deceased, and charged him with having cut his clothes the preceding night, whereupon the deceased said "I ain't cut you like I am going to cut you" and started at the defendant with his knife drawn, and the defendant shot the deceased in order to protect himself from the deadly assault being made upon him; that the defendant then went and surrendered to the police and told them he had shot the deceased.

The first assignment of error discussed in the appellant's brief is to a question propounded to the witness Fannie Byrd by the court in the following language: "When did he (defendant) shoot him (deceased) the last time," to which the witness replied: "I don't know." *S. v. Oakley,* 210 N. C., 206, and *S. v. Bean,* 211 N. C., 59, are cited to sustain this exception. These authorities are not applicable to this case. The witness had just testified that the defendant had shot the deceased four times, and then shot him the fifth time, and had described where the deceased was and what he was doing when the four shots were fired, and stated "when he (deceased) was going down, James (defendant) reached around and shot him again." The question propounded was tantamount to asking the witness where did you say the defendant shot the deceased the last time, and did not tend to lead the jury to believe that the judge had formed the opinion that the defendant did the shooting. And again, while up to this time the defendant by his plea of not guilty had denied that he was the person who shot the deceased, he later, as witness in his own behalf, admitted that he fired the fatal shots, but

contended he did so in self defense. So, if there was error in the question propounded, it was rendered harmless by the subsequent admission by the defendant.

The second assignment of error discussed in appellant's brief relate to the denial by the court of his motion for nonsuit as to the charge of murder in the first degree. We can see no error in this action of the court. The State's witness testified in effect that the defendant about 5:30 o'clock a.m., stated that he would kill the deceased "before daylight," that he procured a pistol, went to the house where deceased was, about 8:30 o'clock a.m., and shot the deceased five times, when the deceased was unarmed and making no hostile demonstrations toward the defendant. While defendant's version of what took place was different from that of the State's witnesses, on a motion for nonsuit the evidence must be taken in the light most favorable to the State.

The third assignment of error discussed in appellant's brief is to the court's allowing the defendant to be asked on cross-examination whether he had been indicted as an accessory in another killing. The rule is: "The party himself, when he goes upon the witness stand, can be asked questions as to particular acts impeaching his character, but as to other witnesses it is only competent to ask the witness if he knows the general character of the party." *S. v. Sims,* 213 N. C., 590.

The fourth assignment of error discussed in the appellant's brief is to a clause in the charge of the court as follows: "Excusable homicide occurs when a person kills another in defense of himself or his family, kills in self defense or where he kills another by accident or misadventure, or where an insane person kills another." The appellant complains that the court failed to instruct the jury "that where the defendant reasonably deems himself in danger of great bodily harm by another, he is justified in using whatever force is necessary, even to killing his adversary to repel an attack." While it is true that at the time the portion of the charge assailed was given the court did not charge the jury that the defendant would have the right to use such force as reasonably seemed necessary to him at the time to prevent death or great bodily harm, the court did repeatedly, at least three or four times, so charge the jury. The clause assailed was used at the outset of the charge when the court was instructing the jury as to the various kinds of homicide, both lawful and unlawful, and it was not at that time incumbent upon the court to go into the principles of the right to self defense with any great particularity. In this assignment we find no error.

The fifth assignment of error discussed in appellant's brief is to a clause in the charge reading: "Take into consideration what the witness says and how he says it, the witness' interest in the case, if the witness

is interested in it." This clause can only be understood when taken in connection with what preceded and followed it. The court charged: "You may believe all a witness says, or you may believe part a witness says, or you may believe nothing a witness says. You are the sole judges of the weight you give to the testimony of any witness that goes upon the witness stand. Take into consideration what a witness says and how he says it, the witness' interest in the case if the witness is interested in it. Take into consideration the witness' opportunity to know what he is talking about. After doing that, you decide on what weight you will give the testimony of any witness that goes upon the witness stand." This is not an instruction singling out any witness as interested, and then instructing the jury as to how such witness' testimony should be considered. If such was the case the exception by the defendant would have merit. There was no instruction to scrutinize the testimony of the defendant in the light of his interest in the result of the verdict. The instruction given had general application to all witnesses in the case, and did not require the further instruction that if the jury believed the testimony of an interested witness they would give to such testimony the same weight as that given to the testimony of disinterested witnesses. We see no error in the instruction complained of.

The sixth assignment of error discussed in the appellant's brief relates to the court's failure to instruct the jury that when it is admitted or proven that the defendant slew the deceased with a deadly weapon the defendant could rely upon the State's evidence to mitigate the offense from murder in the second degree to manslaughter, or excuse it on the ground of self defense, and to the instruction to the effect that the burden was upon the defendant to produce evidence to satisfy the jury of matters and things in mitigation and excuse. These assignments call for serious thought, but in the light of the facts of this case we are of the opinion, and so hold, they cannot be sustained for the reason that there is in the State's evidence nothing tending to show mitigation or excuse. The State's evidence all tends to show that the defendant, after making threats to kill the deceased, procured a pistol, sought out the deceased and shot him to death, while unarmed and helpless. Hence, since the defendant admitted the intentional killing with a deadly weapon, it was incumbent upon him, if he would reduce the homicide from murder in the second degree, to produce evidence to satisfy the jury of matters and things in mitigation. *Adams, J.*, in speaking to a similar situation in *S. v. Wallace*, 203 N. C., 284, 289, says: "It is true that a person on trial for a crime of this character may rely on the State's evidence to show matters in mitigation or excuse. But as the State offered no such evidence there was no error in the instruction that

it was incumbent upon the defendant to establish such matters to the satisfaction of the jury." There was no prejudicial error in the charge assailed by these assignments.

The seventh assignment of error discussed in the appellant's brief relates to a clause in the charge which reads: "Then the burden is not on the State to satisfy you beyond a reasonable doubt he is guilty of murder in the second degree." The court was presenting the contentions of the defendant and charged the jury: "He (the defendant) contends when you consider all of the evidence you should not so find and you should not convict him of that offense (murder in the first degree). Then, the burden is not on the State to satisfy you beyond a reasonable doubt he is guilty of murder in the second degree. He having admitted that he slew the deceased with a pistol, nothing else appearing, then the presumption of law is he is guilty of murder in the second degree." While the statement that the "burden is not on the State to satisfy you beyond a reasonable doubt he is guilty of murder in the second degree" may not be an accurate statement of the law, in view of the defendant's admission that he intentionally slew the deceased with a deadly weapon, any error in the charge was harmless, since upon such admission, as stated by the court, "the presumption of law is he is guilty of murder in the second degree." Likewise, "as the prisoner was convicted of the greater offense of murder in the first degree, this exception is not material." *S. v. Johnson,* 161 N. C., 264. The evidence was amply sufficient to sustain the verdict and there is no exception to the charge in so far as it relates to the crime of murder in the first degree of which the defendant was convicted. Throughout the charge the court consistently and repeatedly placed the burden upon the State to establish each element of the offense of murder in the first degree beyond a reasonable doubt. We see no prejudicial error in the portion of the charge assailed by this assignment.

The remaining assignments of error discussed in appellant's brief are to the denial of a new trial and to the judgment entered. These assignments are disposed of by our holdings upon the other assignments discussed.

We have given each assignment of error discussed in the appellant's brief the careful consideration that the gravity of the case demands, and we find in the record

No error.

STATE v. ERIC ROBERSON.

(Filed 16 June, 1939.)

1. **Criminal Law § 41b—**

While the scope of the cross-examination is largely in the discretion of the trial court such discretionary power does not include authority to exclude in its entirety evidence directly challenging the credibility or disinterestedness of the witness.

2. **Same—**

While ordinarily the witness' answers to questions on cross-examination relative to collateral matters are conclusive, this restriction does not apply to questions tending to disclose bias, corruption, prejudice or interest.

3. **Criminal Law § 41g—**

The credibility of a witness is affected by the fact that he is an accomplice in the crime charged and testifies for the prosecution.

4. **Criminal Law § 41b—Exclusion of evidence on cross-examination of witness testifying for the State tending to show that he was an accomplice and that case against him had been nolle prossed held error.**

Upon appeal to the Superior Court from conviction in the municipal court in this prosecution of defendant for operating a lottery, testimony sought to be elicited on cross-examination tending to show that the State's principal witness had been arrested with lottery paraphernalia in his possession, that he was indicted, entered a plea of guilty, and became the State's witness against the defendant, that the officers recommended to the solicitor of the municipal court leniency for the witness and that a *nolle pros* was entered, should have been admitted for the consideration of the jury in determining the credibility of the witness, since even though the *nolle pros* had been already entered against the witness the cause against him could be reinstated and his testimony in the Superior Court might have been influenced by the expectation of leniency, and the exclusion of this evidence, emphasized by the remarks of the court to the jury during the argument, is prejudicial error and entitles the defendant to a new trial.

5. **Criminal Law § 37—**

The best evidence rule does not apply to proof of matters not directly at issue in the trial.

APPEAL by defendant from *Sink, J.*, at November Term, 1938, of FORSYTH. New trial.

The defendant was indicted in the municipal court of the city of Winston-Salem under a warrant which charged that he "did unlawfully and willfully promote, set on foot, carry on publicly or privately a certain lottery where a game of chance is played." Defendant having been convicted and sentenced, appealed to the Superior Court. When

the cause came on for trial in the Superior Court the defendant was again convicted. From judgment pronounced thereon the defendant appealed.

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

Roy L. Deal for defendant, appellant.

BARNHILL, J. The State's principal witness, Ed Penn, was arrested with lottery tickets and cash on his person. After being confined in jail for some time he implicated a number of other persons, including the defendant, in violations of the lottery statute in carrying on what is popularly known as a "numbers racket." The witness entered a plea of guilty in the municipal court and testified against the defendant and others. He testified that he was selling numbers for the defendant.

While Penn was confined in jail he asked certain lawyers to tell Eric that he, the prosecuting witness, would give him, the defendant, until in the morning and if he didn't come down and get him out on bond he would call all the police and tell them. "I told them if Eric didn't come down tonight and get me out in the morning I will just let them know who the banker is." The next morning he called in certain of the police and gave information against this defendant and others. The defendant and the others were thereupon arrested and put upon trial, charged with operating a lottery.

Penn entered a plea of guilty, became a State's witness, and testified against the defendant and others. On cross-examination he was asked if it was not a fact that after he had testified a *nolle pros* was entered in his case and no punishment was imposed upon him. On objection this evidence was excluded. The record shows the defendant would have answered in the affirmative. In excluding the evidence the court did so upon the theory that the amount of punishment does not impeach the witness. On objection the court likewise excluded an admission of the defendant that at the time he was tried there was a suspended sentence existing against him in the municipal court.

The State tendered the solicitor for the municipal court who testified he made no agreement with Penn that if he would testify against the defendant and others he would *nolle pros* his case. On cross-examination he would have stated, if permitted to do so, that officers had made recommendations to him as solicitor about leniency for Penn, and that the case against Penn was *nolle prossed.*

During the course of the argument of counsel for the defendant in respect to the credibility of the witness Penn he was interrupted by the solicitor who objected to the argument. The court sustained the

objection and instructed the jury as follows: "Gentlemen of the jury, there is no evidence to sustain the argument that there is an arrangement by which the witness Ed Penn is trying to or has worked himself out of a hole." The defendant excepted. Following a further colloquy between the solicitor, counsel for the defendant, and the court, the court stated: "I thought I made it clear on the question of his meting out punishment. I held and instructed the jury there was no evidence he had done so and that argument was (not) proper. There is no evidence to say whether he was fined, imprisoned, turned loose, or what. He specifically denied that he had entered into some kind of agreement." And further: "The court instructs counsel nothing occurred in this trial to justify that argument. The State put on the stand the solicitor from city court down there to show he didn't have an agreement with him. The witness himself denied it and there is no evidence to the contrary." Counsel: "Didn't Mr. Johnson make a statement about the disposition about the case?" The court: "I specifically ruled out what he did also, for two reasons: One is that it is immaterial and another is that a record was made of it and that would have been the best evidence. I specifically ruled it out, or intended to rule it out, all the way through."

Ordinarily, when a witness is cross-examined concerning collateral matters for the purpose of impeachment his answers are conclusive and he may not be contradicted by other evidence. Otherwise, oftentime the trial would be unduly prolonged and the minds of the jury would be diverted from the real matters at issue. *S. v. Patterson,* 24 N. C., 346; 3 Jones on Evidence, 1530 and 1551; *S. v. Robertson,* 166 N. C., 356, 81 S. E., 689. Likewise, the extent of such cross-examination in respect to such matters is within the discretion of the trial court.

This rule does not apply in all its rigor when the cross-examination is as to matters which, although collateral, tend to show the bias, interest, favor, animus, hostility, prejudice, temper, disposition or conduct of the witness in relation to the cause or the parties. His answers as to these matters are not to be deemed conclusive, and may be contradicted by the interrogator. *S. v. Patterson, supra;* 28 R. C. L., 614.

Latitude is allowed in showing the bias, hostility, corruption, interest or misconduct with respect to the case or other facts tending to prove that the testimony of the witness is unworthy of credit. 3 Jones on Evidence, 1538; 5 Jones Commentaries on Evidence, 2nd Ed., 4611; 28 R. C. L., 615. "The doctrine of excluding facts offered by *extrinsic testimony* has never been applied to the subject of bias." 2 Wigmore on Evidence, 2nd Ed., 332.

Cross-examination would be of little value if a witness could not be freely interrogated as to his motives, bias and interest, or as to his con-

duct as connected with the parties or the cause of action; and there would be little safety in judicial proceedings if an unscrupulous witness could conclude the adverse party by his statements denying his prejudice or interest in the controversy. 3 Jones on Evidence, 1534.

For the purpose of affecting the credibility of a witness, he may be cross-examined as to his interest in the event of the suit or the state of his feelings toward the respective parties . . . his conduct in connection with the cause of action . . . or collateral facts which tend to show that he is prejudiced or interested. 3 Jones on Evidence, 1536-37; *Newton v. Harris,* 6 N. Y., 345; 5 Jones Commentaries on Evidence, 4612.

The cross-examiner is at liberty and is often compelled to attack the credibility of the witness and, for that purpose, must be allowed latitude in asking questions which would otherwise be irrelevant to the issue. For the purpose of testing the credibility of a witness, it is permissible to investigate the situation of the witness with respect to the parties and to the subject of litigation, his interest, his motives, inclinations and prejudices, and such like. 3 Jones on Evidence, 1526-27.

It bears against the credibility of a witness that he is an accomplice in the crime charged and testifies for the prosecution; and the pendency of an indictment against the witness indicates indirectly a similar possibility of his currying favor by testifying for the State; so, too, the existence of a promise or just expectation of pardon for his share as accomplice in the crime charged. 2 Wigmore on Evidence, 2nd Ed., 350.

While latitude is allowed in showing the bias, hostility, corruption, prejudice and interest or misconduct of the witness with respect to the case or other facts tending to prove that his testimony is unworthy of credit, 3 Jones on Evidence, 1538, the question as to the extent to which the cross-examination may extend is to be determined with a view to the discretion of the trial judge. Nevertheless, if the latter has excluded testimony which would clearly show bias, interest, the promise, or the hope of reward on the part of the witness, it is error and may be ground for a new trial. *Alford v. U. S.,* 75 L. Ed., 624; 3 Jones on Evidence, 1538. The discretionary power of the trial judge is to confine the cross-examination within reasonable limits. It does not include the authority to exclude altogether questions, and the answers thereto, which directly challenge the disinterestedness or credibility of the witness' testimony.

The defendant sought to prove by the cross-examination of the principal State's witness, Penn, and the solicitor of the county court (and the record shows that he would have done so if the court had permitted

the witnesses to answer) that Penn was arrested, and at the time of his arrest had in his possession lottery paraphernalia; that he was indicted and placed in jail; that the witness entered a plea of guilty and became the principal witness for the State against this defendant; that the officers recommended to the solicitor of the municipal court leniency for the witness; and that, although the witness had entered a plea of guilty, a *nolle pros* was entered in his case, even though there was then pending against him a suspended sentence.

While these facts of themselves do not prove as a matter of law that the witness was unworthy of belief, they seriously challenge his credibility. The defendant had a right to have the jury informed as to these matters and to debate before the jury the effect of such circumstances upon the credibility of the witness. Although the testimony does not constitute direct evidence of any agreement that the witness in return for his testimony would be freed from punishment for his part in the crime committed, the jury might well find that the facts and circumstances were such that the witness testified in the reasonable expectation that he would receive leniency in return for having turned State's evidence and testified against this defendant, and that his testimony, by reason thereof, was unworthy of belief. At least the circumstances vitally affect the disinterested nature of his testimony.

It is true that when Penn testified in the Superior Court a *nolle pros* had already been entered in the case against him, yet, the suspended sentence was still pending and the cause against him could be reinstated, notwithstanding the *nolle pros*. The jury might consider that the witness was unduly influenced in his testimony by these circumstances.

The error in denying the defendant the right to cross-examine the witnesses in respect to these matters was emphasized by the remarks of the court to the jury and to counsel during the argument. The statement that the solicitor of the municipal court had testified that he had made no promise to the witness and that the witness had testified that there was no agreement, and that "there is no evidence to the contrary," was in effect a statement that the testimony of Penn was to be considered as that of a disinterested witness, who was unimpeached.

The evidence the defendant sought to develop by cross-examination was not immaterial, as the court stated in the presence of the jury, and although the *nolle pros* was entered in writing as the judgment of the court, it was not necessary for the defendant to produce it. It was not directly at issue in the trial and the best evidence rule did not apply.

There is other evidence in the record against this defendant and the testimony as a whole, if believed and accepted by the jury, is amply sufficient to support a conviction. Even so, the error in denying de-

fendant's counsel the right to cross-examine the witness Penn and the solicitor of the municipal court in the respects indicated and to argue that the facts which would have been developed thereby materially affected Penn's credibility was prejudicial error, which entitles the defendant to a

New trial.

IRA PAGE, TRADING AS PAGE OIL COMPANY, v. I. B. McLAMB.

(Filed 16 June, 1939.)

Automobiles §§ 14, 18g—

Evidence that defendant's truck was parked on the side of the highway, at least partially on the hard surface, without lights, rear or front, and that the driver of plaintiff's tractor did not observe the truck in time to avoid colliding with it, *is held* sufficient to overrule defendant's motion to nonsuit.

APPEAL by defendant from *Nimocks, J.*, at January Term, 1939, of DURHAM.

Oscar G. Barker for plaintiff, appellee.
Ezra Parker and Bennett & McDonald for defendant, appellant.

PER CURIAM. This is an action to recover property damage caused by a collision of the plaintiff's tractor and trailer with the defendant's truck upon the public highway.

There was allegation and evidence tending to prove that the defendant's truck was parked at least partially on the hard surface of the road in the nighttime without lights either in front or rear, and that the driver of the plaintiff's tractor did not observe the truck in time to avoid colliding with it. This was sufficient to deny the defendant's motion for nonsuit. *Williams v. Express Lines,* 198 N. C., 193; *Cole v. Koonce,* 214 N. C., 188; *Clarke v. Martin, ante,* 405.

We have examined the exceptions preserved to portions of the evidence and find therein no prejudicial error.

Since the jury, under a charge to which no exceptions were taken, has answered the issues against the defendant, the judgment predicated upon the verdict must be affirmed.

No error.

MRS. B. C. OUTLAW, ADMINISTRATRIX OF ESTATE OF B. C. OUTLAW, DECEASED, v. CITY OF ASHEVILLE.

(Filed 8 March, 1939.)

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 *Nettles, J.*, at December Term, 1938, of BUNCOMBE. Affirmed.

This was an action instituted in the general county court of Buncombe County to recover of defendant the value of certain water mains and lines which were alleged to have been appropriated by the city of Asheville. From judgment of nonsuit in the county court the plaintiff appealed to the Superior Court. In the Superior Court the judgment of the county court was reversed and the cause was remanded to the county court for trial by a jury, upon the issues raised in the pleadings. From the judgment of the Superior Court, the defendant appealed to the Supreme Court.

Cecil C. Jackson for plaintiff.
Philip C. Cocke, Jr., for defendant.

PER CURIAM. The Court being evenly divided in opinion, *Winborne, J.*, not sitting, the judgment of the Superior Court is affirmed as the disposition of this appeal without becoming a precedent, in accordance with the practice of the Court. *Mills v. Jones*, 213 N. C., 802.

Affirmed.

W. H. WOODBURY v. NU-ENAMEL CORPORATION.

(Filed 8 March, 1939.)

APPEAL by defendant from *Johnston, J.*, at October Term, 1938, of BUNCOMBE. No error.

Plaintiff was a representative of the Nu-Enamel Corporation, with stores at Asheville and Charlotte. It became agreeable to both parties that plaintiff's representation should cease and a new representative of the defendant continue their business at both points. Plaintiff, however, had a stock of goods, wares, and merchandise in both stores, as well as furniture and equipment, fixtures, signs, counters, shelving, chairs, etc., suitable to carry on the business.

The stock of goods, wares, and merchandise was purchased by the defendant and is not here in controversy. There were negotiations, however, between the parties with regard to the purchase and sale of the equipment of plaintiff in the stores. Plaintiff finally agreed that he would sell the equipment to the defendant for $1,500 in cash, and made a subsequent modification or offer by which he agreed to take $1,500 upon installment notes endorsed by the Nu-Enamel Company, since he did not know the person whom the Nu-Enamel Corporation intended to install in the business at both places and was not willing to take his notes.

It developed that prior to this modification, and without the knowledge of the plaintiff, the defendant Nu-Enamel Company had actually sold to their new representative all of the equipment of the plaintiff referred to, at the price of $1,500, and had taken installment notes therefor, and this representative had gone into possession of the property.

The defendant claims that under a prior agreement the defendant, or such person as they might contract with to carry on the business, should have possession of the equipment until demand for its return should be made by the plaintiff, and that no such demand had been made, and further contended that whatever it did was in pursuance of a promise to help the plaintiff with the sale of the equipment.

The case was submitted on appropriate instruction, and the jury having answered the issues in favor of the plaintiff, the defendant appealed.

J. Y. Jordan, Jr., and Harkins, Van Winkle & Walton for plaintiff, appellee.

Edwin S. Hartshorn and Carswell & Ervin for defendant, appellant.

PER CURIAM. We think the evidence in this case sufficient to support the verdict. We do not find in the record sufficient cause to disturb the result of the trial.

No error.

FRANCES DURHAM v. THE SOVEREIGN CAMP OF THE WOODMEN OF THE WORLD, INC.

(Filed 12 April, 1939.)

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.

STATE *v.* POWELL.

APPEAL by the defendant from Armstrong, J., at August Term, 1938, of CABARRUS. Affirmed.

This is an action to recover on a certificate of insurance issued by the defendant on the life of Ben H. Durham, who died on 28 September, 1936, wherein the plaintiff was named as beneficiary. The defendant contended that the evidence established that the issuance of said certificate was procured by false and fraudulent representations, and for that reason no liability was incurred thereunder, and that the action should have been nonsuited. The plaintiff contended that under the evidence the case should have been submitted to the jury. The trial judge held with the plaintiff and the jury rendered a verdict for the plaintiff, and from judgment predicated upon the verdict the defendant appealed, assigning error.

Sherrin & Barnhardt and E. R. Alexander for plaintiff, appellee.
Hartsell & Hartsell for defendant, appellant.

PER CURIAM. The Court being evenly divided in opinion, *Clarkson, 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 this Court. *Collins v. Ins. Co.*, 213 N. C., 800.

Affirmed.

STATE v. LOGAN POWELL.

(Filed 12 April, 1939.)

APPEAL by defendant from *Armstrong, J.*, at October Term, 1938, of CABARRUS. No error.

The defendant was charged with possession of intoxicating liquor for the purpose of sale. From judgment imposing sentence upon verdict of guilty, defendant appealed.

Attorney-General McMullan and Assistant Attorneys-General Bruton and Wettach for the State.
R. R. Hawfield for defendant.

PER CURIAM. The evidence offered by the State was sufficient to carry the case to the jury. The only exception noted at the trial was to the ruling of the court in permitting a State's witness, a police officer, to say, in describing his visit to defendant's premises, where a quantity of whiskey was found, "We took a search warrant," without producing

the warrant. There was no motion or request for the production of the warrant, and the objection seems to have been made after the evidence was in.

The exception is without merit.

No error.

MRS. MATTIE E. TAYLOR AND HUSBAND, ANDREW TAYLOR; NANNIE A. MOZINGO AND HUSBAND, JACK MOZINGO; CARRIE BELL JOYNER AND HUSBAND, SAM JOYNER; SALLIE H. NICHOLS AND HUSBAND, T. H. NICHOLS; EFFIE B. HEMBY AND HUSBAND, RAY HEMBY; LILA G. MOZINGO AND HUSBAND, LUTHER MOZINGO, v. C. D. SMITH, JR., AND R. T. MARTIN, ADMINISTRATOR OF THE ESTATE OF C. D. SMITH, SR.

(Filed 10 May, 1939.)

APPEAL by defendant C. D. Smith, Jr., from *Frizzelle, J.*, and a jury, at September Term, 1938, of PITT. No error.

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

"1. Did the late C. D. Smith, Sr., on January 6, 1937, sign and execute the purported lease of record in Book X-21, at page 360, in the office of the register of deeds of Pitt County? Ans.: 'Yes.'

"2. On January 6, 1937, the date of the alleged or purported lease, did C. D. Smith, Sr., have sufficient mental capacity to execute or make the same? Ans.: 'No.'

"3. Was the execution of the paper writing procured by the exercise of undue influence or fraud, as alleged? Ans.: 'Undue influence, Yes.'

"4. What was the reasonable rental value of the property for 1937? Ans.: '$900.00.'

"5. What was the reasonable rental value of said property for 1938? Ans.: '$900.00.' "

Judgment was rendered by the court below on the verdict.

The defendant made several exceptions and assignments of error and appealed to the Supreme Court.

J. B. James for plaintiff.

John Hill Paylor for defendant C. D. Smith, Jr.

PER CURIAM. We have read the record and briefs and can see no prejudicial or reversible error in the trial in the court below. The exceptions and assignments of error made by the defendant cannot be sustained. If error, they were not prejudicial.

In the judgment of the court below we find

No error.

CARRIE C. GURLEY v. NATIONAL COUNCIL JUNIOR O. U. A. M.

(Filed 10 May, 1939.)

APPEAL by defendant from *Olive, Special Judge,* at February Term, 1938, of MECKLENBURG.

Civil action to recover funeral benefits.

Henry A. Gurley was a member of "Dilworth Council No. 12," Jr. O. U. A. M., and as such was enlisted in the Funeral Benefit Department of the defendant National Council. He died on 4 September, 1937, leaving the plaintiff his surviving widow, legal dependent and beneficiary. She brings this action to recover funeral benefits.

Upon denial of liability and issues joined, there was a verdict and judgment for plaintiff, from which the defendant appeals, assigning errors.

Charles W. Bundy for plaintiff, appellee.
Sharp & Sharp for defendant, appellant.

PER CURIAM. The case was tried under and is controlled by the decisions in *Evans v. Junior Order,* 183 N. C., 358, 111 S. E., 526; *Witty v. Junior Order, ibid.,* 679, 111 S. E., 721; and *Hancock v. National Council of Junior Order,* 180 S. C., 518, 186 S. E., 538. The questions involved are fully discussed in these late cases, and it would serve no useful purpose to reiterate here what has been so recently said in these decisions.

The verdict and judgment will be upheld.

No error.

BEESON HARDWARE COMPANY v. CAROLINA MORTGAGE COMPANY, TRUSTEE, KESWICK CORPORATION, TRUSTEE, SECURITY NATIONAL BANK, TRUSTEE, AND CAROLINA DEBENTURE CORPORATION, AND GEORGIA SPENCER WHITE.

(Filed 24 May, 1939.)

APPEAL by plaintiff from *Sink, J.,* at 20 January, 1939, Term, of GUILFORD. Affirmed.

D. H. Parsons for plaintiff, appellant.
W. G. Mordecai and Thos. W. Sprinkle for defendants, appellees.

PER CURIAM. The plaintiff, a second mortgagee, brought this action in High Point municipal court against the holders of the first mortgage to restrain its foreclosure and ascertain the amount of indebtedness secured by it, securing a restraining order as ancillary relief. Upon the hearing in the municipal court, the injunction was continued to the hearing. Upon appeal of the defendants to the Superior Court of Guilford County, the restraining order was dissolved, the judgment of the court below reversed, and the action dismissed.

While the principal controversy was over the application of the statute of limitations—C. S., 442, subsec. 2—defendants' brief may be considered in effect a demurrer *ore tenus* to plaintiff's cause of action. As to this, while the plaintiff seeks to have the amount of the debt secured by the senior mortgage ascertained, it makes no challenge as to such amount except because of the inclusion therein of alleged usury. The case is controlled by *Pinnix v. Casualty Co.*, 214 N. C., 760. Upon this authority, the judgment is

Affirmed.

STATE OF NORTH CAROLINA EX REL. ALEX H. McLEOD, AND ALL OTHER CREDITORS OF THE ESTATE OF W. W. MAURER, DECEASED, WHO DESIRE TO JOIN IN THE PROSECUTION OF THIS ACTION AND CONTRIBUTE TO THE EXPENSES HEREOF, RELATORS, AND ALEX H. McLEOD, PLAINTIFF, V. WILLIAM MAURER, JR., ADMINISTRATOR OF THE ESTATE OF W. W. MAURER, DECEASED; WILLIAM MAURER, JR., INDIVIDUALLY, AND HIS WIFE, MRS. WILLIAM MAURER, JR.; JOHN MAURER AND HIS WIFE, MRS. JOHN MAURER; DONALD MAURER AND HIS WIFE, MRS. DONALD MAURER; ETHEL PLEASANTS AND HER HUSBAND, FRANCIS PLEASANTS; EDNA MAURER, J. W. MAURER AND R. W. MAURER, SINGLE; E. G. MAYNARD AND C. J. JOHNSON, DEFENDANTS.

(Filed 24 May, 1939.)

APPEAL by defendant from *Bivens, J.*, at December Term, 1938, of MOORE. Affirmed.

U. L. Spence for plaintiff.
Johnson & McCluer for defendants Maynard and Johnson.

PER CURIAM. The plaintiff on behalf of himself and other creditors of the estate of W. W. Maurer, deceased, instituted this action against the administrator and heirs at law of W. W. Maurer and the sureties on the administrator's bond for the determination of questions involved in the settlement of the estate of said decedent. The defendants May-

nard and Johnson, sureties on the administrator's bond, demurred on the ground of misjoinder of parties and causes of action. From judgment overruling their demurrer, the defendants appealed.

The demurrer was properly overruled. C. S., 135; C. S., 456; and C. S., 507. *Leach v. Page,* 211 N. C., 622, 191 S. E., 349; *Robertson v. Robertson, ante,* 562.

Judgment affirmed.

LILLIE P. ALBRIGHT v. EDWIN W. PEARCE, ADMINISTRATOR C. T. A., D. B. N., OF THE ESTATE OF W. E. PHIPPS, DECEASED, AND JAMIE C. PHIPPS.

(Filed 31 May, 1939.)

APPEAL by defendants from *Grady, Emergency Judge,* at Special April Term, 1939, of GUILFORD.

Civil action to recover, after foreclosure of deed of trust, balance due on certain first mortgage real estate bonds secured thereby.

The case was heard below upon an agreed statement of facts. The controverted question is on defendants' plea of the one-year statute of limitations, Public Laws 1933, ch. 529, sec. 1, upon contention that this action was not instituted within one year next after the date of the foreclosure sale. With respect thereto the agreed statement shows these pertinent facts: After advertisement the property described in the deed of trust was offered for sale at public auction on 18 March, 1935. On the same day report of the highest bid submitted by proposed purchasers was made to the clerk of the Superior Court. There having been no advance bid within ten days next thereafter, the substitute trustee, on 29 March, 1935, upon payment of the purchase price, executed and delivered to the purchasers, who had submitted the highest bid, a deed for the property described in the deed of trust. Plaintiff instituted this action for deficiency judgment on 28 March, 1936.

The court below being of opinion that the action is not barred, rendered judgment in favor of the plaintiff.

Defendants appeal to the Supreme Court and assign error.

Frazier & Frazier for plaintiff, appellee.
Moseley & Holt for defendants, appellants.

PER CURIAM. The question here presented is controlled by the recent decision in the case of *Building & Loan Assn. v. Black, ante,* 400, 2 S. E., 2d, 6, by authority of which the judgment below is hereby

Affirmed.

MARGARET HILL v. DUKE POWER COMPANY.

(Filed 31 May, 1939.)

APPEAL by plaintiff from *Hill, Special Judge,* at September Term, 1938, of GUILFORD.

Civil action by passenger on bus to recover damages for an alleged assault by defendant's driver.

The jury answered the issue of liability in favor of the defendant.

From judgment on the verdict, the plaintiff appeals, assigning as error the failure of the court to comply with C. S., 564, in charging the jury on the law of the case.

George A. Younce and Adam Younce for plaintiff, appellant.
W. S. O'B. Robinson, Jr., and R. M. Robinson for defendant, appellee.

PER CURIAM. On a controverted issue of fact, the jury has responded in favor of the defendant. The record is free from reversible error.

The exception to the charge is not well taken. *Rooks v. Bruce,* 213 N. C., 58, 195 S. E., 26. It is not sustained.

The verdict and judgment will be upheld.

No error.

R. D. ITTERLY v. E. C. HILL.

(Filed 31 May, 1939.)

APPEAL by defendant from *Sinclair, J.,* at October Term, 1938, of CUMBERLAND.

This was an action to recover $400 placed in the hands of the defendant by the plaintiff. The defendant admitted the execution of three notes aggregating $400 to secure the money received by him from the plaintiff, but alleges that said notes and money have been paid and overpaid, partially by the delivery of merchandise to the plaintiff and partially by cash, and asks judgment by way of counterclaim for $96.42. The case was submitted to the jury upon appropriate issues, which were answered in favor of the plaintiff, and from judgment predicated upon the verdict the defendant appealed, assigning errors.

W. Louis Ellis, Jr., for plaintiff, appellee.
Robert H. Dye for defendant, appellant.

PER CURIAM. The assignment of error principally relied upon by the appellant is to the charge to the effect that if the jury should answer the issue as to the indebtedness of the defendant to the plaintiff in any amount, they would answer the issue as to the indebtedness of the plaintiff to the defendant "Nothing," since, if the defendant was indebted to the plaintiff, the plaintiff could not be indebted to the defendant. We see no error in this charge. The defendant admitted the receipt of the money from the plaintiff and execution of the notes for the same, and alleged payment and overpayment thereof by the delivery of merchandise and cash. Before the plaintiff, under these circumstances, could become indebted to the defendant it was necessary for the defendant to establish by the greater weight of the evidence that the notes (representing money received by him from plaintiff) had been paid before the plaintiff could be indebted to the defendant in any amount.

We have considered the other assignments of error and find them without merit.

No error.

LEONARD TURNAGE, APPEARING BY HIS NEXT FRIEND, JOHN GOULDING, v. NEW BERN CONSISTORY No. 3, C. A. SEIFERT, SECRETARY, TRADING AS MASONIC THEATRE; O. A. KAFER, MANAGER, AND SETH E. RAWLS.

(Filed 31 May, 1939.)

APPEAL by defendants from *Williams, J.*, and a jury, at February Term, 1939, of CRAVEN. No error.

This is an action brought by plaintiff against the defendants, to recover damages for slander. The issues submitted to the jury (which indicate the controversy) and their answers thereto were as follows:

"1. Did the defendant Rawls wrongfully and falsely speak of and concerning the plaintiff defamatory words, in substance, as alleged in the complaint? Ans.: 'Yes.'

"2. If so, was the defendant Rawls at such time the servant, agent or employee of the defendant, New Bern Consistory No. 3, and acting within the scope of his employment at such time? Ans.: 'Yes.'

"3. What compensatory damage, if any, is the plaintiff entitled to recover by reason thereof? Ans.: '$50.00.'

"4. What punitive damage, if any, is the plaintiff entitled to recover by reason thereof? Ans.: 'Nothing.'"

The court below rendered judgment on the verdict. The defendants excepted and assigned error and appealed to the Supreme Court.

L. T. Grantham and W. B. R. Guion for plaintiff.
L. I. Moore for defendant.

PER CURIAM. At the close of plaintiff's evidence and at the conclusion of all the evidence, the court below overruled the motions made by defendants for judgment as in case of nonsuit. C. S., 567.

The defendant also demurred *ore tenus* to the complaint and to the evidence and moved to dismiss the action. These motions cannot be sustained. We think the language spoken by Rawls and set forth in the complaint, and repeated in the presence of others, was such defamatory words as amounted to slander. That Rawls, who spoke the language, was about his master's business. We think that New Bern Consistory No. 3 is not immune from an action like the present because it gives its net profits, derived from its operation of a moving picture show, to crippled children's hospitals. It must be just before being generous.

In the judgment of the court below, there is

No error.

MRS. M. B. APPLE v. DUKE POWER COMPANY.

(Filed 16 June, 1939.)

APPEAL by plaintiff from *Hill, Special Judge,* at September Term, 1938, of GUILFORD.

Civil action to recover damages for an alleged negligent injury.

On 17 February, 1938, plaintiff was a passenger on defendant's bus going from Jefferson Square in the city of Greensboro to the village of Pomona. The bus was constructed with a front-door entrance and a middle exit. As plaintiff started to alight upon reaching her destination, her feet slipped on the "slanting . . . slippery and dirty" floor of the bus causing the heels of her shoes to catch on the metal strip around the edge of the exit and to throw her to the bottom step.

Plaintiff testified that she saw the "dirty slick place, which looked worn," before she was hurt, as she got up, when she was standing there. "It was dirty and looked slick, but I did not think it was slick enough to fall on." Other passengers immediately preceded and followed the plaintiff without injury or mishap. The record discloses no other instance of a passenger experiencing similar difficulty on the bus.

There was evidence *pro* and *con* as to whether plaintiff really suffered any injury.

From judgment of nonsuit entered at the close of plaintiff's evidence, she appeals, assigning error.

George A. Younce and Adam Younce for plaintiff, appellant.
W. S. O'B. Robinson, Jr., and R. M. Robinson for defendant, appellee.

PER CURIAM. We agree with the trial court that while this may be a border-line case, the plaintiff has not successfully handled the laboring oar or fixed the defendant with liability. *Smith v. Bus Co.*, 216 N. C., 22; *Powers v. Sternberg*, 213 N. C., 41, 195 S. E., 88.

The legal requirements in such a case are too well established to require further elaboration here. *Smith v. Bus Co., supra.*

Upon the record, the judgment will be upheld.

Affirmed.

DISPOSITION OF APPEAL FROM THE SUPREME COURT OF NORTH CAROLINA TO THE SUPREME COURT OF THE UNITED STATES

Belk Bros. Co. v. Maxwell, Comr. of Revenue, 215 N. C., 10. Petition for *certiorari* denied 5 June, 1939.

AMENDMENT TO RULES 22 AND 26

Amend Rule 22, paragraph 2, line 9, by adding the word "receipted" between the words "provided" and "statement," so as to make the statement read—"provided receipted statement of such costs is given the Clerk of the Court before the case is decided.

Amend Rule 26, paragraph one, line 7, by adding the word "receipted" between the words "provided" and "statement," so as to make the line read—"provided receipted statement of such costs is given the Clerk before the case is decided.

Amend Rule 26 by striking out lines 8, 9, and 10 and inserting in lieu thereof the following: "In pauper appeals the actual cost of preparing typewritten copies of the transcript of appeal and of the brief shall be allowed the appellant, not to exceed twenty-five cents per page and not to exceed sixty pages for transcript and twenty pages for brief."

Approved and adopted at conference, 16 June, 1939.

SEAWELL, J., *For the Court.*

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see Criminal Law § 41d, *S. v. Cureton*, 778; credibility of accomplices, see Criminal Law § 41g, *S. v. Roberson*, 784; mentality, see Witnesses § 5, *S. v. Cade*, 393.

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ANALYTICAL INDEX.

ABATEMENT AND REVIVAL.

§ 6. Procedure to Raise Question of Pendency of Prior Action.

Objection on the ground of another action pending between the same parties on the same cause may be taken by answer, C. S., 511, 517. *Johnson v. Smith*, 322.

§ 8. Pendency or Termination of Prior Action.

Plaintiff instituted an action in the county of his residence to collect damages resulting from an automobile collision. C. S., 469. The defendant died prior to service of process and thereupon defendant's administratrix was joined as a party defendant. *Held:* The administratrix may not claim that the action is not properly pending because not instituted in the county in which she had given bond, C. S., 465, since venue is governed by the status of the parties at the commencement of the action, but defendant administratrix may move for a removal of the cause to the county of her residence and the scene of the collision involved for the convenience of witnesses and the promotion of the ends of justice. C. S., 470 (2). *Johnson v. Smith*, 322.

§ 9. Identity of Actions.

In an action instituted to recover damages resulting from an automobile collision, defendant died prior to service of process. Thereafter defendant's administratrix was joined as a party and duly served with process. The administratrix started this action in another county to recover damages for the death of intestate based on the same automobile collision. Defendant in the present action filed answer pleading pendency of the former action and moved to dismiss the present action. *Held:* Prior to his death intestate might have set up a counterclaim in the prior action, to which right his administratrix succeeded, C. S., 461, 521 (1), and in contemplation of law the two actions are identical as to subject matter and parties and the second action was properly dismissed upon defendant's plea. *Johnson v. Smith*, 322.

§ 11. Survival of Actions for Negligent Injuries Causing Death.

An action for damages resulting from an automobile collision does not abate upon the death of the defendant, C. S., 461, but may be continued upon the joinder of defendant's personal representative as a party, and the personal representative may set up therein a counterclaim for damages for the death of her intestate arising out of the same accident, C. S., 521 (1). *Johnson v. Smith*, 322.

§ 16. Actions Involving Legal or Domestic Relationships.

When defendant dies pending plaintiff's appeal from an order allowing defendant counsel fees and support pending litigation of plaintiff's suit for divorce, defendant's administrator will be made a party upon motion aptly made in the Supreme Court, and upon affirmance of the order, plaintiff will be required to pay the allowance for counsel fees and such installments of alimony allowed as were due at the time of defendant's death. *Briggs v. Briggs*, 78.

ACTIONS.

§ 4. Civil Act Based Upon Criminal Act of Plaintiff.

In the husband's suit for divorce on the ground of two years separation, the wife's defense that the separation was the result of his unlawful abandonment of her is valid, and the husband's demurrer *ore tenus* thereto is properly overruled, since a party may not maintain a civil action based upon his own violation of the criminal laws of the State. *Hyder v. Hyder*, 239.

ADVERSE POSSESSION.

§ 4f. Adverse Possession by Husband or Wife Against Heirs.

Possession of husband *held* not adverse to wife's heirs, since his possession was lawful as tenant by the curtesy; and registration of encumbrance executed by him is insufficient to put heirs on notice. *Wolfe v. Smith*, 286.

§ 4g. Hostile Character of Possession as Between Successive Devisees.

When devise to heir is void because he was witness to the will, his possession and the possession of those claiming under him may be adverse to contingent remainderman under the will. *Barrett v. Williams*, 131.

§ 6. Continuity of Possession.

The fact that a person claiming by adverse possession suffers the *locus in quo* to be sold for taxes and bought in at the sale by his wife with money furnished by him is not such a break in the continuity of possession as to preclude the submission of the issue to the jury. *Barrett v. Williams*, 131.

§ 20. Instructions.

When defendants introduce evidence that plaintiffs went into possession of a certain tract of land after asking and obtaining permission of defendants, it is error for the court to fail to instruct the jury that such possession would not be adverse to defendants, even without a request for special instruction, since this is a substantive feature of the case arising on the evidence. *Self Help Corp. v. Brinkley*, 615.

ANIMALS.

§ 8. Needlessly Killing Useful Animal.

A dog is a useful beast or animal within the meaning of the statute making it unlawful to willfully injure, needlessly mutilate, or kill any useful beast or animal. C. S., 4483. *S. v. Dickens*, 303.

Prior offenses committed by a useful animal does not justify the killing of the animal. *Ibid.*

Uncontradicted evidence that the defendant killed the prosecuting witness' pointer dog without just cause, excuse, or justification, *held* to sustain a peremptory instruction by the court. *Ibid.*

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§ 2. Judgments and Orders Appealable.

Appeal from denial of motion to dismiss on ground that action was barred by statute of limitations *held* premature and fragmentary. *Johnson v. Ins. Co.*, 120.

§ 3a. Parties Who May Appeal.

A party who is not a necessary party to the action and who has no enforceable interest in the contract sued on is not entitled to be heard on appeal. *Trust Co. v. Toney*, 206.

§ 6e. Objections and Exceptions to, and Motions to Strike Out, Evidence.

Where subsequent testimony of a witness discloses that his prior testimony related to matters not within his personal knowledge, the prior evidence will be considered on appeal in the absence of a motion to strike out, since if the motion to strike had been made and allowed, the facts testified to might have been proven by a competent witness. *Ledwell v. Milling Co.*, 371.

An objection to the admission of evidence *en masse* is insufficient, it being required that appellant point out the evidence objected to. *Wilson v. Williams*, 407.

§ 8. Theory of Trial.

An appeal will be determined in accordance with the theory of trial in the lower court. *Smith v. Bonney*, 183.

§ 18a. Time of Making Application for Certiorari.

An application for *certiorari* will be denied when not made until after the appeal has been decided by the Supreme Court. *Gorham v. Ins. Co.*, 195.

§ 18c. Certiorari to Correct or Amplify Record.

A motion for *certiorari* to bring up the entire remarks of the trial judge relative to the phase of the record applicant asserts was misinterpreted cannot be allowed when it appears that the parties agreed that applicant should print in its brief "all or any part" of the judge's remarks, the agreement being binding on the courts as well as on the parties. *Gorham v. Ins. Co.*, 195.

Petition for *certiorari* is denied in this case because not made in apt time and because precluded by prior agreement of the parties in regard to the record, but the Supreme Court has nevertheless examined the entire remarks of the trial court, urged as disclosing a misinterpretation of the record in the decision of the Court, and has found nothing that would have changed the result, a full examination disclosing that the record is and was as it was intended to be. *Ibid.*

§ 19. Necessary Parts of Record.

Upon appeal from judgment entered in a submission of controversy without action, the agreed facts with the required affidavits, C. S., 3236, are necessary parts of the record proper. Rule of Practice in the Supreme Court 19. *Realty Corp. v. Koon*, 459.

APPEAL AND ERROR—*Continued.*

§ 20a. Index of Record.

An index of exhibits solely by the alphabetical designation of such exhibits does not comply with the requirements of Rule of Practice in the Supreme Court No. 19. *Millwood v. Cotton Mills*, 519.

§ 21. Matters Not Appearing of Record Presumed Without Error.

Where the charge of the court is not in the record it will be presumed correct. *Daniel v. Packing Co.*, 762.

§ 22. Conclusiveness and Effect of Record.

The record imports verity, and the Supreme Court is bound thereby. *Gorham v. Ins. Co.*, 195.

§ 28. Form and Requisites of Briefs.

A reference in the brief to exhibits should designate the page of the record on which they are printed. *Millwood v. Cotton Mills*, 519.

§ 29. Abandonment of Exceptions by Failure to Discuss in Brief.

Exceptions which are not set out and discussed in appellant's brief are deemed abandoned. Rules of Practice in the Supreme Court, No. 28. *Wilson v. Williams*, 407; *Unemployment Compensation Com. v. Trust Co.*, 491.

§ 37b. Review of Rulings Upon Discretionary Matters.

The discretionary powers of the court are not to be exercised arbitrarily or according to the mere inclination of the court, but according to law to attain even and exact justice, but the exercise of a discretionary power will not be reviewed on appeal in the absence of abuse. *Sykes v. Blakey*, 61.

Order denying motion that jury be permitted to view the premises is entered in discretion and is not reviewable. *Durham v. Lawrence*, 75.

Motion to set aside verdict for excessive award is addressed to discretion of trial court and its disposition thereof is not reviewable. *Durham v. Lawrence*, 75.

§ 37e. Findings of Fact.

The findings of fact by the referee supported by evidence, affirmed by the county court and the Superior Court on appeal, are conclusive and not subject to review in the Supreme Court unless the findings are based upon testimony which is incompetent and prejudicial. *Pack v. Katzin*, 233.

§ 38. Presumptions and Burden of Showing Error.

The burden is upon appellant not only to show error but also that the rulings complained of were prejudicial. *Collins v. Lamb*, 719.

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. *Outlaw v. Asheville*, 790; *Durham v. Woodmen of the World*, 791.

§ 39a. Harmless and Prejudicial Error in General.

A new trial will not be awarded for error unless the error is prejudicial and probably influenced the jury in rendering the verdict. *Collins v. Lamb*, 719.

§ 39d. Harmless and Prejudicial Error in Admission or Exclusion of Evidence.

Exceptions to the admission and exclusion of evidence cannot be held prejudicial when the result would not be altered even though rulings had been made on the exceptions in accordance with appellant's contentions. *Pate v. Duke University*, 57.

Admission of hearsay evidence will not be held for prejudicial error when it is merely cumulative of other competent evidence in the case, and another

witness is permitted to testify to substantially the same fact without objection, and on cross-examination by appellant the same facts are again brought out in evidence. *Wolfe v. Smith*, 286.

The exclusion of evidence cannot be held prejudicial when the record fails to show what the answer of the witness would have been had he been permitted to answer the question. *Hammond v. Williams*, 657.

Appellant must show that evidence excluded was material in order for its exclusion to be held prejudicial. *Ibid.*

The exclusion of evidence cannot be held prejudicial when the record fails to show what the testimony of the witnesses would have been. *Aydlett v. By-Products Co.*, 700.

The exclusion of expert opinion testimony cannot be held for error when appellant fails to show that the witnesses were qualified to testify upon the matter. *Ibid.*

§ 39c. Harmless and Prejudicial Error in Instructions.

An instruction will be construed as a whole, and an exception thereto will not be sustained when the instruction, so construed, contains no prejudicial error. *In re Will of Williams*, 259.

The charge must be prejudicial to appellant in order for his exception thereto to be sustained. *Hammond v. Williams*, 657.

§ 40a. Review of Judgments on Findings or Agreed Facts.

Where the facts agreed are insufficient to enable the court to proceed to judgment, judgment entered thereon is erroneous and the case will be remanded for further proceedings. *Blake v. Hospital Care Assn.*, 703; *Sheets v. Walsh*, 711.

§ 40e. Review of Judgments on Motions to Nonsuit. (Evidence will be considered in light most favorable to plaintiff, see Trial § 22b.)

Where an agent of a bank testifies as to the circumstances under which the draft in question was deposited in the bank, but later admits, on cross-examination, that he had no recollection of the particular transaction in suit, *held*, his testimony must be considered on appeal in so far as it is pertinent to the issue in the absence of a motion by the adverse party to strike out, since if the motion to strike had been made and allowed the bank might have proved the transaction by its agent who handled it. *Ledwell v. Milling Co.*, 371.

§ 40g. Review of Constitutional Questions.

The constitutionality of a statute will not be determined unless the question is properly presented, and when on appeal from a conviction in the Superior Court for violation of a statute, it appears that the State had no right to appeal to the Superior Court from acquittal in the municipal court, and that the warrant was insufficient to charge a violation of the statute, the judgment of the Superior Court will be vacated and the appeal dismissed. *S. v. Nichols*, 80.

§ 41. Questions Necessary to Determination of Appeal.

On appeal from judgment of the Superior Court entered upon appeal from the county court, only exceptions relating to matters which may recur upon a second trial and necessary to a determination of the correctness of the judgment of the Superior Court, will be considered, and the decision of the Supreme Court does not necessarily imply approval or disapproval of exceptions not considered. *Perry v. Sykes*, 39.

Where it is determined that judgment as of nonsuit is properly entered upon the plea of the bar of statute of limitations, whether the evidence is sufficient

APPEAL AND ERROR—*Continued.*

to sustain the allegations of negligence and proximate cause need not be determined. *Hooper v. Lumber Co.*, 308.

Where it is determined on appeal that appellant's motion to nonsuit on the issue of negligence should have been allowed the question of contributory negligence of plaintiff need not be considered. *Hudson v. Oil Co.*, 422.

Where it is determined on appeal that defendant's motion to nonsuit should have been allowed, exceptions relating to the instructions on the issues submitted need not be considered. *Sansom v. Warren*, 432.

When a new trial is awarded on one exception, other exceptions relating to matters which may not arise on the subsequent hearing need not be determind. *Vandiford v. Vandiford*, 461; *Carruthers v. R. R.*, 675.

§ 43. Determination of Petitions for Rehearings.

Petition to rehear this case, reported in 214 N. C., 309, is allowed, it appearing that the action was one to redeem land from tax foreclosure, and so much of the former opinion not necessary to this decision is declared *dicta*. *Gower v. Clayton*, 82.

Petition to rehear for asserted misinterpretation of record is dismissed, it appearing that the record was correctly construed. *Gorham v. Ins. Co.*, 195.

Where petitioner fails to show substantial or prejudicial error, the petition for rehearing will be dismissed. *Sawyer v. Cox*, 241.

§ 47b. Partial and General New Trial.

A general new trial is awarded in this action to recover for negligent personal injuries for error in the admission of evidence on the issue of damages. *Parker v. Belotta*, 87.

§ 49a. Law of the Case.

The decision of the court upon a former appeal becomes the law of the case and is controlling upon the subsequent hearing and upon subsequent appeal. *Warren v. Ins. Co.*, 402.

§ 49b. Stare Decisis.

The doctrine of *stare decisis* requires that decided cases should be given great weight when the same points again come up in litigation in the same jurisdiction, and that the Court should not swerve or depart from the prior decisions from any private sentiments or judgments. *S. v. Dixon*, 161.

The fact that a decision is of recent date does not affect the application of the doctrine of *stare decisis*. *Ibid.*

APPEARANCE.

§ 1. Special Appearance.

Defendant making a special appearance and moving to dismiss is entitled to final determination of his motion prior to hearing of plaintiff's motion for judgment by default. *Bank v. Derby*, 669.

ARBITRATION AND AWARD.

§ 1b. Attack of Agreement to Arbitrate.

Where an agreement to arbitrate the disputed line between the lands of the parties provides that the line should be run in accordance with old deeds, papers, plats, and titles, in accordance with corners as contended by plaintiffs, plaintiffs may not maintain that they were induced to execute the agreement to arbitrate by fraudulent misrepresentation, and demurrer to plaintiffs' cause of action to set aside the agreement to arbitrate on the ground of fraud is properly sustained. *Holland v. Whittington*, 330.

ARSON.

§ 3. Sufficiency of Evidence and Nonsuit.

Evidence that fresh footprints made by defendant were found about the dwelling house in question the morning after it caught fire and burned to the ground, that the night it caught fire it was occupied by the owner and his family, and that bad feeling existed between the defendant and the owner of the house, *is held* insufficient to be submitted to the jury as to defendant's guilt of arson in the absence of evidence that the fire was of incendiary origin, or that, even conceding that it was of incendiary origin, that it was set fire by defendant, the mere showing of the motive and the presence and opportunity of defendant to commit the offense being insufficient to exclude all reasonable hypothesis of innocence. *S. v. Jones*, 660.

ASSAULT AND BATTERY.

§ 8. Warrant and Indictment.

An indictment charging a felonious assault with intent to kill as defined in C. S., 4213, embraces as a lesser degree of the crime charged the offense of assault with a deadly weapon, and where the evidence is sufficient to sustain a verdict of the offense charged, defendant may not complain of a verdict of guilty of the lesser offense. *S. v. High*, 244.

§ 12. Instructions.

In this prosecution for felonious assault with intent to kill, the instruction of the court as to the lesser offenses embraced in the charge *are held* without error. *S. v. High*, 244.

ATTACHMENT.

§ 22. Proof of Title or Prior Lien by Intervening Third Party.

Whether bank in which debtor deposited draft was an agent for collection or a purchaser of the draft entitled to a prior lien as against the attaching creditor, *held* for jury upon the evidence. *Ledwell v. Milling Co.*, 371.

§ 24. Liabilities on Defendant's Undertaking.

Summary judgment against surety on defendant's bond in attachment proceeding to which surety was not a party, *held* error. *Hoft v. Lighterage Co.*, 690.

AUTOMOBILES.

III. Operation and Law of the Road

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9. Attention to Road and Due Care in General. Newbern v. Leary, 134.
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20a. Contributory Negligence of Guest or Passenger. Mason v. Johnston, 95; Groome v. Davis, 510.

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21. Parties Liable to Guest of Passenger. Mason v. Johnston, 95; Groome v. Davis, 510; Daniel v. Packing Co., 762.
22. Actions by Guests of Passengers. Groome v. Davis, 510.

V. Liability of Owner for Driver's Negligence

24c. Competency and Sufficiency of Evidence on Issue of Respondeat Superior. Daniel v. Packing Co., 762.

§ 7. Pedestrians.

The failure of a pedestrian to observe the statutory provisions in crossing a street at an intersection at which traffic control lights are operated is not negligence *per se*, but is evidence to be considered with other evidence in the case in determining whether the pedestrian exercised due care for his own safety. Chapter 407, Private Laws of 1937, sec. 135 (c). *Templeton v. Kelley*, 577.

§ 9. Attention to Road and Due Care in General.

A motorist is required, in the exercise of due care, to keep a proper lookout to see and avoid pedestrians and vehicles on the highway. *Newbern v. Leary*, 134.

§ 12a. Speed in General.

The fact that the speed is within the statutory maximum does not relieve a driver of the duty of further reducing speed if made necessary by special hazards in order to avoid colliding with any person or vehicle. *Reid v. Coach Co.*, 469; *Templeton v. Kelley*, 577.

Speed involves more than mere chance of being at a particular spot at a given instant. *Groome v. Davis*, 510.

§ 12c. Speed at Intersections.

Under the provisions of ch. 311, Public Laws of 1935, which repealed former statutes relating thereto, a person driving a car in a residential district is under duty to reduce his speed below the *prima facie* limit of 25 miles per hour in approaching and crossing an obstructed intersection to such speed as is reasonable under the circumstances, and to keep a proper lookout to avoid a collision. *Wooten v. Smith*, 48.

§ 12d. Speed in Residential and Business Districts.

A charge defining a "residential district" as being "the territory contiguous to a highway, not comprising a business district, when the frontage on the highway for a distance of 300 feet or more is mainly occupied by dwellings and buildings in use for business" *is held* without error, the definition of a residential district in chapter 148, Public Laws 1927, Art. 1, sec. (s), not having been repealed by Public Laws of 1937, chapter 407, sec. 2 (a), since sec. 145 of the later act repeals only prior laws in conflict therewith. *Reid v. Coach Co.*, 469.

Instruction as to speed limit in residential district and requirement to slacken speed at special hazards *held* without error. *Ibid.*

Speed in excess of 20 miles per hour in a business district is *prima facie* evidence that the speed is excessive and unlawful, but such evidence is not *prima facie* proof of proximate cause, but is merely evidence to be considered with other evidence in determining actionable negligence. *Templeton v. Kelley*, 577.

§ 12e. Boulevards and Through Highways.

Instruction that attempt to cross "through highway" intersection in front of truck driven at excessive speed constituted negligence *per se held* error. *Stephens v. Johnson*, 133.

AUTOMOBILES—*Continued.*

Right of driver to assume that motorist approaching intersection from servient highway will observe stop signal is not absolute. *Groome v. Davis*, 510.

The failure of a driver upon a servient highway to stop before entering or traversing a through highway intersection is not negligence *per se* nor *prima facie* negligence, but is merely evidence of negligence to be considered with the other evidence in the case. *Ibid.*

The requirement to stop before entering or traversing an intersection of a through highway does not obtain until the proper sign has been erected by authority of the Highway Commission, and a motorist along a through highway may not assume that vehicles along a servient highway will stop unless he knows of the existence of the highway stop sign and makes such fact affirmatively appear in the evidence. *Ibid.*

§ 13. Stopping, Starting, Turning, and Backing.

Whether defendant observed rule of road in turning across highway into driveway *held* for jury under the evidence. *Mason v. Johnston*, 95.

Evidence of contributory negligence in stopping without observing statutory provisions *held* properly submitted to jury. *Newbern v. Leary*, 134.

It is not negligence *per se* to back an automobile on the highway, such action not being prohibited by statute nor by any principle of the law of negligence, and such action being habitual in parking cars in towns and cities and in returning to a point inadvertently passed on the highway, and in backing, it is common practice to use the side of the highway the driver is required to use in going forward. *Newbern v. Leary*, 134.

The evidence tended to show that defendant stopped his automobile in the line of travel of pedestrians at the intersection of streets in a city, and that as plaintiff pedestrian, whose path was thus blocked, attempted to walk behind the car in crossing the street, defendant put the car in reverse without warning, causing the injury in suit. *Held:* The overruling of defendant's motion to nonsuit was not error. *Croom v. Petty*, 465.

§ 14. Parking and Parking Lights.

Evidence that defendant's truck was parked on right side of highway, partially on hard-surface, at night without proper lights, when it was struck by plaintiff's car, *held* to take case to jury. *Clarke v. Martin*, 405; *Page v. McLamb*, 789.

§ 15. Condition of and Defects in Vehicles.

Declaration of defendant's driver that car had defective brakes and that if car had had good brakes he could have avoided the accident *held* competent. *Daniel v. Packing Co.*, 762.

§ 17. Skidding.

Evidence *held* sufficient for jury on question of driver's negligence in failing to avoid colliding with car skidding on the highway. *Daniel v. Packing Co.*, 762.

§ 18a. Last Clear Chance.

Evidence that defendant's truck was being driven at excessive speed, and that car in which intestate was riding was being backed along straight highway, and that truck failed to slow up or turn to left to avoid collision, although there was room to turn to left, *held* to justify submission of issue of last clear chance. *Newbern v. Leary*, 134.

AUTOMOBILES—*Continued.*

§ 18b. Proximate Cause.

Excessive speed is not negated as a proximate cause by the fact that the speeding automobile is traveling on the proper side of the highway and that if the speed had been greater or less the accident would not have occurred, since the rationale of the statutes is that speed should not exceed that which will give the driver control of the car under circumstances likely to arise. *Groome v. Davis*, 510.

§ 18c. Contributory Negligence.

Fact that plaintiff driver struck truck parked on highway at night without proper lights *held* not to show contributory negligence as matter of law. *Clarke v. Martin*, 405; *Page v. McLamb*, 789.

Evidence *held* not to disclose contributory negligence as a matter of law on part of cyclist fatally injured in collision at intersection. *Wooten v. Smith*, 48.

Evidence that a pedestrian failed to observe statutory requirements in crossing a street at an intersection at which traffic control lights were maintained *held* not to establish contributory negligence as a matter of law. *Templeton v. Kelley*, 577.

§ 18f. Competency and Relevancy of Evidence in Actions for Negligent Operation of Vehicles.

Evidence that the driver of defendant's car stated that the car had defective brakes and steering apparatus and that he could have stopped the car and avoided the accident if the car had had good brakes, is competent, the probative force being for the jury. *Daniel v. Packing Co.*, 762.

§ 18g. Sufficiency of Evidence and Nonsuit.

Evidence *held* for jury on question of whether driver exercised due care in traversing intersection. *Wooten v. Smith*, 48.

Evidence *held* not to disclose contributory negligence barring recovery as a matter of law on part of cyclist fatally injured in collision at intersection. *Ibid.*

Conflicting evidence as to whether defendant, in turning across the highway into the driveway of his residence, observed the rule of the road by ascertaining first if such turn would affect the operation of any other vehicle, and second, by giving the required signal, N. C. Code, 2621 (103) (a), *held* to raise an issue of fact for the jury in this action by a guest riding on a motorcycle to recover for injuries sustained when the motorcycle and defendant's car collided. *Mason v. Johnston*, 95.

Evidence *held* for jury on issue of negligence on part of driver colliding with car backing on highway. *Newbern v. Leary*, 134.

Evidence that automobile in which intestate was riding was backing on highway at time of collision *held* not to show contributory negligence as matter of law, but issue was properly submitted to jury. *Newbern v. Leary*, 134.

The evidence, considered in the light most favorable to plaintiff, tended to show that defendant parked his truck on the right side of the highway, partially on the hard surface thereof, in order to load lumber thereon before light on a foggy morning, that the truck had no red light on the rear but that a searchlight attached to the rear of the cab was casting its rays to the rear, and that plaintiff, driving his automobile about 25 miles per hour, approached the truck from the rear and failed to see the truck in time to avoid colliding with it, either by stopping or driving around it. *Held:* Defendant's motion to

nonsuit on the ground of contributory negligence should have been denied upon authority of *Cole v. Koonce*, 214 N. C., 188. *Clarke v. Martin*, 405.

Evidence that defendant's truck was parked on the side of the highway, at least partially on the hard surface, without lights, rear or front, and that the driver of plaintiff's tractor did not observe the truck in time to avoid colliding with it, *is held* sufficient to overrule defendant's motion to nonsuit. *Page v. McLamb*, 789.

The evidence tended to show that defendant stopped his automobile in the line of travel of pedestrians at the intersection of streets in a city, and that as plaintiff pedestrian, whose path was thus blocked, attempted to walk behind the car in crossing the street, defendant put the car in reverse without warning, causing the injury in suit. *Held:* The overruling of defendant's motion to nonsuit was not error. *Croom v. Petty*, 465.

The evidence tended to show that the highway at the scene of the accident was built up on both sides, for about 300 feet, with residences and buildings, including a post office, church and several stores, that a large number of children were leaving the church from a Sunday school Christmas Eve party, and that defendant's bus, running at a speed estimated by a witness at from 40 to 50 miles an hour, struck and fatally injured plaintiff's intestate, a child four and one-half years old, and that the wheel of the bus skidded on the shoulder of the highway 133 feet before it stopped with intestate lying in front of the rear wheel. *Held:* The evidence was plenary to be submitted to the jury on the question of the negligent operation of the bus. *Reid v. Coach Co.*, 469.

Evidence that the driver of a taxicab whipped around a car in front of him in a business district at a speed of 25 to 30 miles per hour and struck a pedestrian standing in the middle of the street, *is held* sufficient to be submitted to the jury upon the issue of negligence, and evidence that the pedestrian failed to observe traffic lights *is held* not to establish contributory negligence as matter of law. *Templeton v. Kelley*, 577.

Evidence *held* sufficient for jury on question of driver's negligence in failing to avoid colliding with car skidding on the highway. *Daniel v. Packing Co.*, 762.

§ 18h. Instructions.

Instruction that statute required motorist to operate car at intersection in residential district at a speed not exceeding 10 miles per hour, *held* error. *Wooten v. Smith*, 48.

Instruction that attempt to cross "through highway" intersection in front of truck driven at excessive speed constituted negligence *per se held* error. *Stephens v. Johnson*, 133.

It is error for charge on issue of negligence to omit any reference to proximate cause. *Ibid.*

Charge in regard to standard of care required of defendant when faced with sudden emergency in instruction on issue of negligence *held* favorable rather than prejudicial to defendants upon the evidence in this case. *Newbern v. Leary*, 134.

§ 20a. Contributory Negligence of Guest or Passenger.

Whether guest on motorcycle was guilty of contributory negligence under the circumstances in failing to remonstrate with the driver *held* to require submission of issue to the jury. *Mason v. Johnston*, 95.

A guest or passenger in a vehicle may be guilty of contributory negligence by failing to remonstrate with the driver of the vehicle when the circum-

AUTOMOBILES—*Continued.*

stances are such that a man of ordinary prudence would make such remonstrance, and such negligence is active negligence on the part of the guest and is distinct from the doctrine of imputed negligence. *Ibid.*

The failure of plaintiff guest to remonstrate with the driver of the car, traveling at a speed of 65 or 70 miles an hour on a through highway, and the failure of such guest to warn the driver of the approach of another car along a servient highway to the intersection of the highways because she assumed that the driver saw such other car in the exercise of due care, *is held* not contributory negligence on the part of the guest as a matter of law. *Groome v. Davis*, 510.

§ 21. Parties Liable to Passenger or Guest.

A passenger on a motorcycle injured in a collision between the motorcycle and an automobile may not recover of the driver of the car if the driver of the motorcycle was guilty of negligence constituting the sole proximate cause of the accident, but under the evidence in this case the question *is held* one for the jury. *Mason v. Johnston*, 95.

Where collision is caused by negligence of the drivers of both cars, a guest in one of the cars may recover against either of the drivers without regard to liability as between the drivers. *Groome v. Davis*, 510.

A guest in an automobile injured in a collision may recover of either of the drivers of the cars involved if the collision was the proximate result of their concurrent negligence. *Daniel v. Packing Co.*, 762.

§ 22. Actions by Guest or Passenger.

Evidence *held* for jury in guest's action against driver of car on through highway to recover for injuries from collision at intersection. *Groome v. Davis*, 510.

§ 24c. Competency and Sufficiency of Evidence on Issue of Respondeat Superior.

The evidence tended to show that defendant company's salesman informed plaintiff, a manager of a market purchasing the company's products, that he had to go to another city to see another representative of the company on company business, that plaintiff went on the trip as an invited guest, and that the accident in suit occurred en route to such other city. *Held:* The evidence was sufficient to be submitted to the jury on the question of whether at the time of the accident defendant's salesman was acting in the scope of his employment and in the furtherance of defendant's business. *Daniel v. Packing Co.*, 762.

BAILMENT.

§ 6. Actions for Conversion.

The burden is on plaintiff to show the contract of bailment sued on, whether express or implied, by competent evidence, and the fact that the alleged bailee is dead, rendering incompetent testimony as to any transaction or communication with him to establish the bailment, C. S., 1795, is not a circumstance to be considered in passing upon the sufficiency of the evidence. *Troxler v. Bevill*, 640.

The evidence showed that plaintiff had in his brother's safe deposit box an envelope with his name and the sum of $285.00 written thereon in his brother's handwriting, that after his brother's death, on the second witnessed opening of the safe deposit box, the envelope had a mark through the $285.00 and the figures $60.00 written thereunder and that the envelope, which actually contained but $60.00, was turned over to plaintiff. *Held:* Even conceding the

BAILMENT—*Continued.*

evidence sufficient to support an inference of bailment, it is insufficient to be submitted to the jury on the question of the alleged bailee's conversion of the difference between the two sums, there being no evidence of demand and refusal to raise any presumption, and withdrawal by plaintiff being as consonant with the facts shown as the contention of conversion, and as between the two inferences the law will make the inference of innocence. *Ibid.*

BANKRUPTCY.

§ 7. Claims and Priorities.

Plaintiff instituted this action to recover for injuries sustained in an automobile collision prior to the discharge of defendant in voluntary bankruptcy, alleging that the injury was willful and malicious within the meaning of the bankruptcy act, and announced he desired to try the case solely on this theory. Plaintiff's evidence tended to show that defendant attempted to pass plaintiff's car, saw two cars approaching from the opposite direction, and chose to hit plaintiff's car rather than cause the more serious accident, and plaintiff himself testified that he did not think the injury was willful or malicious. *Held:* The evidence does not sustain the allegation that the injury was willful and malicious, and plaintiff having elected to pursue his remedy solely on this theory, judgment of nonsuit was properly entered. *Gray v. Griffin*, 182.

BANKS AND BANKING.

§ 9b. Pledges to Secure Notes to Bank.

A provision in a note that the collateral therewith deposited may be held by the payee to secure other indebtedness of the maker to the payee, due or to become due, is valid. *Tesh v. Rominger*, 52.

Where sale of securities at less than their face value is established, burden is on pledgee to show due diligence. *Bank v. Turner*, 665.

§ 13. Office and Duties of Statutory Receiver in General.

The Commissioner of Banks acts as a receiver under the inherent power of the court only in matters which are not provided for by statute, C. S., 218 (e), and his powers and duties in the collection and distribution of the assets of an insolvent bank are derived from the statute, C. S., 218 (e), (6), (7), (14), (17), and while in certain aspects he represents the creditors and depositors, in the assertion of a debt owed the bank and in the payment of a judgment against the bank out of its assets, he acts *pro hac vice* the bank. *Hoft v. Mohn*, 397.

BILLS AND NOTES.

§ 9d. Purchasers or Holders for Collection.

In the absence of any specific agreement, the intention of the parties determines whether a bank is the owner or an agent for collection of items deposited in it. *Ledwell v. Milling Co.*, 371.

Where a check or draft is deposited in a bank as cash and credited to the account of a depositor with the right to check against the deposit in the usual course of business without restrictions or contemporaneous agreement with respect thereto, the bank becomes the owner of the check or draft; but when a check or draft is deposited as such, the bank holds same for collection even though the amount is credited to the depositor with the privilege of drawing against it, especially when there is an express agreement giving the bank the right to cancel the credit if the paper is not paid. *Ibid.*

BILLS AND NOTES—*Continued.*

Where a bank allows a depositor to draw against uncollected items deposited for collection, the bank is entitled to hold the paper so deposited or the proceeds thereof at least as collateral security, since its act in permitting withdrawal by the depositor constitutes a waiver of the original agreement of deposit for collection only. *Ibid.*

Evidence *held* for jury on question of waiver of original agreement that bank should act as agent for collection. *Ibid.*

§ 9e. Purchase or Discharge.

Whether a stranger paying the amount of a negotiable note to the payee or holder, purchases the note or pays and discharges it depends, ordinarily, on the circumstances surrounding the transaction. *Ins. Co. v. McCraw*, 105.

§ 17. Payment and Discharge in General.

Whether a stranger paying the amount of a negotiable note to the payee or holder, purchases the note or pays and discharges it depends, ordinarily, on the circumstances surrounding the transaction. *Ins. Co. v. McCraw*, 105.

§ 22. Defenses in Actions on Notes.

Makers may not set up defense that notes were given for stock which was made worthless by prior wrongful act of payee in causing corporation to execute chattel mortgage. *Hoyle v. Carter*, 90.

In an action on a note, parol evidence which tends to show a supplemental agreement between the parties that the note was to be paid only out of commissions due or to become due from the payee to the maker, is competent. *Ins. Co. v. Guin*, 92.

Answer *held* sufficient to raise issue of whether plaintiff purchased note or paid and extinguished it. *Ins. Co. v. McCraw*, 105.

§ 24. Pleadings in Actions on Notes.

Held: The facts alleged in the answer are sufficient to raise the issue of whether plaintiff bought the note, or paid and discharged it, and plaintiff's demurrer to the answer on the ground that it failed to state facts constituting a defense was properly overruled. *Ins. Co. v. McCraw*, 105.

BOUNDARIES.

§ 2. Definiteness of Description in Deed and Admissibility of Parol and Extrinsic Evidence.

An uncertain description in a deed may be aided by parol to fit the description to the land when the deed itself refers to the source from which evidence *aliunde* may be sought to render the description certain, and when the description in the deed is not patently ambiguous. *Self Help Corp. v. Brinkley*, 615.

Description in this deed *held* sufficiently certain to render evidence *aliunde* competent to fit the description to the land. *Ibid.*

§ 10. Instructions in Processioning Proceedings.

Instruction in this processioning proceedings *held* erroneous in failing to sufficiently state the evidence and explain law arising thereon. *Bradshaw v. Warren*, 442.

BURGLARY.

§ 1. Elements and Essentials of the Crime.

The common law offense of burglary has been divided by statute into burglary in the first degree, which is the breaking and entering of a dwelling house or room used as a sleeping apartment, at nighttime, while the same is

BURGLARY—*Continued.*

actually occupied by any person, with intent to commit a felony; while burglary in the second degree is the commission of the offense when the dwelling house or sleeping apartment is not actually occupied at the time, C. S., 4332. *S. v. Morris*, 552.

§ 10. Instructions.

Where all the evidence shows that dwelling house was occupied at the time, the court need not submit question of second degree burglary. *S. v. Morris*, 552.

§ 11. Verdict and Judgment.

Verdict, interpreted with reference to indictment, evidence and charge, *held* sufficiently definite. *S. v. Morris*, 552.

CARRIERS.

§ 9. Bills of Lading, Notice and Claim of Loss.

An action against a carrier by the consignor to recover the value of certain shipments of goods rejected by the consignee is properly dismissed when instituted without any prior notice or claim of loss having been filed with the carrier as required by the bill of lading as a condition precedent. *Mfg. Co. v. Pridgen*, 247.

§ 21a. Degree of Care and Liability to Passengers in General.

Instruction as to the degree of care required of a carrier for the safety of passengers in accord with *Daniel v. R. R.*, 117 N. C., 592, *held* erroneous, the rule as given in *Hollingsworth v. Skelding*, 142 N. C., 246, approved. *Perry v. Sykes*, 39.

§ 21b. Injuries to Passengers in Transitu.

Evidence of negligence of driver of taxicab, resulting in injury to passenger therein, *held* sufficient to be submitted to the jury. *Perry v. Sykes*, 39.

CLEANERS, DYERS AND PRESSERS.

§ 1. Licensing and Regulation.

This prosecution was instituted to test the validity of ch. 30, Public Laws of 1937. The warrant charged that defendant "did unlawfully . . . operate a press shop" without obtaining a license. *Held:* The act sought to be challenged applies only to those who "engage in the business" or "who shall continue to do the business" defined in the act, and does not perforce apply to those who operate the business. *S. v. Nichols*, 80.

CLERKS OF COURT.

§ 3. Jurisdiction and Powers of Clerk as a Court.

Clerks of the Superior Court have jurisdiction to enter a judgment upon a *retraxit*. *Steele v. Beaty*, 680.

COLLEGES AND UNIVERSITIES.

§ 3. Right of Student to Award of Degree.

Where certificate upon which student is admitted contains false representations, he may not compel university to award degrees. *Pate v. Duke University*, 57.

University's promise that it might reopen case upon student's successfully passing delinquent courses *held* not to bind it to award degrees. *Ibid.*

COMPROMISE AND SETTLEMENT.

§ 2. Acceptance of Check with Stipulation Thereon That it Is in Full Payment.

A person accepting checks with knowledge that they were tendered in full settlement is estopped from asserting the contrary. *Durant v. Powell*, 628.

CONSTITUTIONAL LAW.

§ 4a. Legislative Powers in General.

The General Assembly has the power to broaden or restrict common law concepts and definitions. *Unemployment Compensation Com. v. Ins. Co.*, 479.

Our State Constitution is a grant of power. *Unemployment Compensation Com. v. Trust Co.*, 491.

§ 4b. Taxing Power of General Assembly.

It is peculiarly the function of the lawmaking body to levy assessments and to devise a scheme of taxation. *Belk Bros. Co. v. Maxwell, Comr.*, 10.

§ 6a. Duty of Courts to Construe Statutes.

The courts must interpret a statute as it is written, the wisdom of the act being the legislative function. *Unemployment Compensation Com. v. Ins. Co.*, 479.

It is the duty of the courts to declare the law as written and not to make it. *Millwood v. Cotton Mills*, 519.

The wisdom of permitting municipalities to engage in private and competitive business is for legislative determination, and the courts must construe the statutes embodying the legislative policy as they are written. *Kennerly v. Dallas*, 532.

§ 6b. Power and Duty of Courts to Determine Constitutionality of Statutes.

The courts may not determine the constitutionality of a statute unless the question is properly presented. *S. v. Nichols*, 80.

It is the duty and function of the Supreme Court to declare void acts of the General Assembly which plainly violate the basic, organic law of the Constitution. *S. v. Dixon*, 161.

§ 13. Equal Protection, Application, and Enforcement of Laws.

Real Estate License Act *held* void as discriminating within a class. *S. v. Dixon*, 161.

CONTEMPT OF COURT.

§ 2b. Willful Disobedience of Court Order.

Upon the hearing of this order to show cause why defendant should not be attached for contempt for failure to pay alimony and counsel fees as required by the prior judgment, defendant pleaded his inability to pay. The court found defendant had earned $140.00 since the original order, and adjudged defendant to be in contempt. *Held:* Since the judgment for contempt was not dated and fails to show the length of time during which defendant earned the sum stated, and fails to find any facts on the defendant's plea of disavowal, the record and findings are insufficient to support a judgment for contempt for "willful disobedience" of a court order. C. S., 978. Whether the matter was properly before the resident judge "at chambers" is not decided. C. S., 986. *Berry v. Berry*, 339.

CONTRACTS.

§ 4. Acceptance.

Party accepting offer by rendering services may not do so with secret reservations as to compensation. *Durant v. Powell*, 628.

CONTRACTS—*Continued.*

§ 8. General Rules of Construction.

When a contract is not ambiguous, the meaning of its terms must be ascertained from the writing itself, and inferences from extraneous facts may not be considered in aid of its interpretation. *Grocery Co. v. R. R.*, 223.

A contract must be considered contextually as a whole without technical distinction or arbitrary preference between any of its clauses because of their historical significance or the order in which they come in the instrument. *Ibid.*

The courts must construe a contract as made by the parties and cannot grant relief merely because the contract is a hard one. *Durant v. Powell*, 628.

§ 16. Performance and Breach in General.

Evidence *held* sufficient as against nonsuit on plaintiff's cause of action on the contract alleged, under which defendant agreed to purchase pulp wood at a stipulated price per cord and to furnish plaintiff with equipment for cutting and handling the wood, plaintiff contending that defendant breached the contract by failing to furnish the equipment as agreed, rendering it impossible for plaintiff to deliver the wood. *Chesson v. Container Corp.*, 112.

§ 19. Parties Who May Sue: Third Person Beneficiary.

An agreement by some of the beneficiaries to withdraw objection to the will is not made for the benefit of the heirs as a class, and heirs not entering into the agreement are not entitled to a proportionate part of the monetary consideration for the agreement. *Bailey v. McLain*, 150.

§ 22. Competency of Evidence.

Objections to testimony tending to show modifications and abandonment of the contract in suit before the introduction of the contract in evidence are rendered untenable by the subsequent introduction of the contract. *Pack v. Katzin*, 233.

§ 23. Sufficiency of Evidence and Nonsuit.

Evidence *held* sufficient as against nonsuit on plaintiff's cause of action on the contract alleged, under which defendant agreed to purchase pulp wood at a stipulated price per cord and to furnish plaintiff with equipment for cutting and handling the wood, plaintiff contending that defendant breached the contract by failing to furnish the equipment as agreed, rendering it impossible for plaintiff to deliver the wood. *Chesson v. Container Co.*, 112.

§ 24. Instructions in Actions on Contracts.

Instruction *held* for error in failing to submit to jury all elements entering into the question of measure of damages. *Chesson v. Container Co.*, 112.

Instruction *held* for error in failing to submit to jury question of whether plaintiff could have minimized loss. *Ibid.*

§ 25b. Measure and Assessment of Damages by Jury.

When a contract is breached by one party, the law imposes the duty on the other party to exercise reasonable diligence to minimize the loss. *Chesson v. Container Co.*, 112.

The general rule is that a party damaged by breach of contract is entitled, as compensation therefor, to be placed, so far as this can be done with money, in the same position he would have occupied if the contract had been performed, and when the breach prevents performance, this includes profits which the injured party would have realized had the contract not been breached. *Ibid.*

CONTRACTS—*Continued.*

§ 27. Actions for Wrongful Interference with Contractual Relation by Third Person.

Nonsuit for insufficiency of evidence to support allegations *held* proper upon plaintiff's cause of action to recover for defendant's alleged wrongful interference with plaintiff's contract with a third person. *Chesson v. Container Co.*, 112.

CONTROVERSY WITHOUT ACTION.

§ 4. Hearing and Judgment.

Where the facts agreed in the submission of a controversy without action are insufficient to support a judgment, the court may allow amendments concurred in by all the parties, but may not hear evidence and find additional facts, since judgment may be entered only upon facts agreed submitted in writing in compliance with the statutory requirements. C. S., 3236. *Realty Corp. v. Koon*, 459.

CORPORATIONS.

§ 4a. Corporate Existence.

While incorporators became a body incorporate from the date the certificate of incorporation is filed in the office of the Secretary of State, C. S., 1116, there is no presumption that the corporation is organized and doing business as such from that time, the time from which it begins to do business as a corporation being a question of fact to be proved as any other fact. *Hammond v. Williams*, 657.

§ 10. Right of Stockholders to Sue on Behalf of Corporation.

A cause of action for alleged dissipation of the assets of a corporation by wrongfully or unlawfully causing the corporation to execute a chattel mortgage on its assets, accrues to the corporation, and ordinarily a stockholder may not maintain the action against the alleged tort-feasor. *Hoyle v. Carter*, 90.

§ 25. Liability for Torts.

In this action for slander allegedly uttered by defendant's assistant manager in the scope of his authority to prevent thefts from store, *held*, in instructing the jury upon the corporate defendant's contention, it was error for the court to fail to further instruct the jury upon the law of the principal's liability for acts within the agent's implied authority and to apply it to the evidence in the case. *West v. Woolworth Co.*, 211.

The complaint in this action for slander against the receivers of a corporation alleged that defendants' agent, while on duty, uttered the alleged slander. *Held:* The term "while on duty" means acting within the general scope of the employment, and is sufficient to admit of proof that the specific act complained of was within the agent's express or implied authority, and the allegation is sufficient as against demurrer. *Vincent v. Powell*, 336.

Dictation of memorandum by corporate officer to stenographer *held* not a publication. *Satterfield v. McLellan Stores*, 582.

COUNTIES.

§ 7. County Auditors and Accountants.

Held: Under the provisions of the County Fiscal Control Act it is the duty of the county accountant to keep detailed accounts of appropriations and disbursements of county funds and to certify on each warrant or order drawn against the county that provision has been made for its payment and an

COUNTIES—*Continued.*

appropriation duly made or a bond or note duly authorized as required by the County Fiscal Control Act, Michie's Code of 1935, 1334 (15), (53), (59), (60), (66), (67), (68), (75), and defendants' demurrer to the complaint alleging wrongful approval of county vouchers by the county accountant was properly overruled. *Avery County v. Braswell*, 270.

Contention that chairman of board of county commissioners breached his duty in signing vouchers *held* no defense in prosecution of county accountant for wrongfully approving the vouchers. *Ibid.*

§ 13. Allocation and Application of Revenue and Funds to Several Accounts.

The findings of fact were to the effect that the clerk of the Superior Court was in charge of trust funds which he was authorized to invest, and was also delinquent tax collector without authority to invest delinquent tax funds, and that the clerk invested trust funds in mortgage securities but, upon being pressed by the auditor for settlement of the delinquent tax account, exhibited said securities as belonging to his delinquent tax account and placed same in the compartment in the vault reserved for securities belonging to the delinquent tax account. After the death of the clerk the mortgage was paid and the proceeds thereof were claimed by the County Treasurer as belonging to the delinquent tax account and by the receiver of the trust account as belonging to that fund. *Held:* The mere placing of the mortgage security in the compartment of the vault reserved for the securities belonging to the delinquent tax account and the statement by the clerk to the auditor that they belonged to such account could not have the effect of transferring the funds from the trust fund account, and therefore the same should be paid to the receiver of the trust fund. *In re Tilley*, 559.

COURTS.

§ 2a. Appeals from County and Municipal Courts.

The State has no right to appeal from acquittal in municipal court in criminal prosecution, even though it be conceded that acquittal was on special verdict. *S. v. Nichols*, 80.

§ 2c. Appeals to Superior Court from Clerks of Court.

Defendant made a special appearance and moved to dismiss for want of proper service. Plaintiff moved for judgment by default final. The clerk heard both motions together and granted plaintiff's motion and denied defendant's motion. The Superior Court affirmed the clerk's judgment *in solido*. *Held:* Defendant was entitled to appeal from the clerk's refusal of the motion to dismiss, and to a final determination of his motion before a hearing of the motion for judgment by default. *Bank v. Derby*, 669.

Since an appeal from a discretionary order of the clerk as probate judge denying a petition for the removal of an administrator is heard upon matters of law or legal inference, the failure of the Superior Court to finding the facts will not be held material when there is no evidence from which a finding of abuse of discretion by the probate judge could be predicated. *Jones v. Palmer*, 696.

§ 2d. Appeals to Superior Court from Justices of the Peace.

Where plaintiff declares on a contract of insurance in an action instituted in a magistrate's court, he may not contend in the Supreme Court on appeal for reformation of the policy for fraud or mistake, since the magistrate has no jurisdiction of a suit for reformation, and therefore the Superior Court

COURTS—*Continued.*

could acquire no such jurisdiction on appeal, its jurisdiction being derivative. *Cheek v. Ins. Co.*, 36.

A judgment of a justice of the peace is vacated by appeal, and thereupon the action is pending in the Superior Court for trial *de novo*. C. S., 660. *Pridgen v. Lynch*, 672.

§ 9. Application of State and Federal Laws and Decisions.

Since the question of validity of service of process on a foreign corporation involves the Federal question of the denial of due process under the 14th Amendment to the Federal Constitution, the State courts are bound by the ruling of the Supreme Court of the United States. *Langley v. Warehouse*, 237.

The construction and interpretation of the North Carolina Unemployment Compensation Act is for our State courts. *Unemployment Compensation Com. v. Ins. Co.*, 479.

Our State Unemployment Compensation Act was passed pursuant to a plan national in scope, and therefore serious consideration is to be given to the construction placed upon similar language of the Federal statute by the Commissioner of Internal Revenue, but the interpretation of the act is finally for our courts, and neither the ruling of the Commissioner nor that of the State Unemployment Compensation Commission is conclusive. *Unemployment Compensation Com. v. Trust Co.*, 492.

§ 11. Lex Loci and Law of the Forum.

Held: Even conceding appellant's contention that the laws of the State of Virginia govern the legal effect of a deposit of a draft in a bank in that State, drawn on a resident of this State, appellant's contention that under the laws of Virginia such deposit vested title to the draft in the bank as a matter of law is untenable. *Ledwell v. Milling Co.*, 371.

CRIMINAL LAW.

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81d. Questions Necessary to Determination of Appeal. S. v. Watson, 387

§ 2. Intent: Willful.

The word "willful" as used in criminal statutes signifies more than the mere intention to do a thing, and means the commission of the act "without just cause, excuse, or justification." *S. v. Dickens*, 303.

Where statute makes willful commission of act a criminal offense, proof of particular intent is not necessary. *Ibid.*

§ 5a. Mental Incapacity in General.

Court need not instruct jury that defendant would be confined in asylum if found not guilty on plea of insanity. *S. v. Bracy*, 248.

§ 5b. Mental Capacity as Affected by Intoxicants or Drugs.

In this prosecution of defendant for murder committed in the perpetration of a robbery, defendant's contention that at the time he was too drunk to premeditate or deliberate or to form a fixed intent to kill or rob *is held* conclusively determined adversely to the defendant by the verdict of the jury upon the evidence. *S. v. Alston*, 713.

§ 5c. Burden of Proving Mental Irresponsibility.

Instruction that burden was on defendant to prove to satisfaction of jury defense of mental incapacity *held* correct. *S. v. Bracy*, 248.

§ 28c. Proof of Criminal Intent.

Where statute makes willful commission of act a criminal offense, proof of particular intent is not necessary. *S. v. Dickens*, 303.

§ 29b. Evidence of Guilt of Other Offenses.

Evidence of immoral relations in defendant's household *held* competent to show motive, and not objectionable as tending to impeach defendant's character by showing commission of particular crimes. *S. v. Burney*, 598.

§ 32b. Presence of Defendant at or Near Scene of Crime.

Evidence that fresh footprints made by defendant were discovered at the scene of the crime shortly after its commission, and evidence of motive *held* insufficient to be submitted to the jury. *S. v. Jones*, 660.

§ 33. Confessions.

It is not necessary to the competency of confessions not obtained at a judicial hearing before a magistrate that defendant be warned that anything he says or admits will be used against him. *S. v. Dixon*, 438.

The competency of an alleged confession is for the determination of the court upon the preliminary hearing, and when the State's evidence tends to show that the confession was voluntary and defendant introduces no evidence upon the question, the ruling of the court upon the competent evidence is not reviewable. *S. v. Alston*, 713.

Where, upon preliminary hearing to determine the competency of an alleged confession, defendant fails and refuses to offer evidence to show that the con-

fession was involuntary, although given ample opportunity to do so, he waives his right and his testimony thereafter given on the trial tending to show the confession involuntary, is too late to be considered upon the question. *Ibid.*

§ 37. Best and Secondary Evidence.

The best evidence rule does not apply to proof of matters not directly at issue in the trial. *S. v. Roberson*, 784.

§ 38a. Photographs.

The admission of photographs of the body of deceased as it was lying at the spot where it was found, identified by the photographer as taken by him and as being a true picture of the body and the premises before the body was moved, will not be held for error, there being no request that their use be limited or restricted. *S. v. Cade*, 393.

§ 41a. Examination of Witnesses.

Where a witness testifies that she had conversed with defendant during the trial it is competent for the State to elicit testimony explaining the reasons for such conversation. *S. v. Burney*, 598.

§ 41b. Scope of Cross-Examination in General.

The scope of the cross-examination must rest largely in the discretion of the trial court, even though the purpose of the cross-examination is to discredit the witness. *S. v. Coleman*, 716.

While the scope of the cross-examination is largely in the discretion of the trial court such discretionary power does not include authority to exclude in its entirety evidence directly challenging the credibility or disinterestedness of witness. *S. v. Roberson*, 784.

While ordinarily the witness' answers to questions on cross-examination relative to collateral matters are conclusive, this restriction does not apply to questions tending to disclose bias, corruption, prejudice or interest. *Ibid.*

Exclusion of evidence on cross-examination of witness testifying for the State tending to show that he was an accomplice and that case against him had been *nolle prossed held* error. *Ibid.*

§ 41d. Impeaching Defendant as Witness in Own Behalf.

When defendant goes upon the stand, the State, on cross-examination, may ask him whether he had been indicted for a particular offense or question him as to particular acts impeaching his character, although as to other witnesses the State might ask them questions only as to defendant's general reputation. *S. v. Cureton*, 778.

§ 41f. Credibility of Defendant.

When court charges only as to credibility to be given witnesses generally, and does not charge that jury should scrutinize defendant's testimony, the absence of an instruction that if the jury believed defendant's testimony they should give it the same weight as that of any other witness is not error. *S. v. Cureton*, 778.

§ 41g. Credibility of Accomplices.

The credibility of a witness is affected by the fact that he is an accomplice in the crime charged and testifies for the prosecution. *S. v. Roberson*, 784.

§ 41h. Competency of Testimony of Husband or Wife of Defendant.

Solicitor may not comment upon the failure of defendant's wife to testify in his behalf. *S. v. Watson*, 387.

CRIMINAL LAW—*Continued.*

§ 48c. Withdrawal of Evidence.

Where the trial court fully instructs the jury that it should not consider evidence admitted but subsequently withdrawn by the court, the admission of the evidence cannot be held prejudicial, and the denial of defendant's motion for a new trial will not be held error. *S. v. Aiken*, 317.

§ 50a. Expression of Opinion by Court in Course of Trial.

Question propounded by court *held* not to amount to an expression of opinion as to whether fact had been proven. *S. v. Cureton*, 778.

§ 51. Argument and Conduct of Counsel.

The solicitor in his argument to the jury commented on the failure of the defendant to call his wife as a witness in his behalf. The defendant objected, and the court overruled the objection. *Held:* The comment of the solicitor violates C. S., 1802, and the failure of the court to correct the error renders it prejudicial. *S. v. Watson*, 387.

§ 52a. Province of Court and Jury in General.

Credibility of the evidence is for the jury. *S. v. Maxwell*, 32.

Court need not instruct jury that defendant would be confined in asylum if found not guilty on plea of insanity, since the jury must be content to leave with the judge the grave responsibility imposed upon him to render a judgment, upon their verdict, according to law. *S. v. Bracy*, 248.

§ 52b. Nonsuit.

In order to overrule a motion to nonsuit, the State must prove that the act charged was committed and that the person or persons charged committed the act, proof of the *corpus delicti* being just as essential as proof of the identity of the defendant. *S. v. Norggins*, 220.

Circumstantial evidence of defendant's guilt of arson *held* insufficient to be submitted to the jury. *S. v. Jones*, 660.

The proper procedure to test the sufficiency of the evidence is by motion in the cause aptly made, and not by motion to set aside the verdict. *S. v. Caper*, 670.

Upon defendant's motion to nonsuit, the evidence must be taken in the light most favorable to the State. *S. v. Cureton*, 778.

§ 52c. Peremptory Instructions and Directed Verdict.

When defendant pleads not guilty, court may not direct jury to find him guilty of murder in the first or second degree, even though defendant himself testifies he shot and killed deceased. *S. v. Maxwell*, 32.

Where a statute makes the willful commission of an act a criminal offense, so that the proof of a particular intent is not necessary, uncontradicted evidence that defendant did willfully commit the act, justifies an instruction that the jury should return a verdict of guilty if they should find the facts to be as shown by all the evidence. *S. v. Dickens*, 303.

§ 53a. Form and Sufficiency of Instructions in General.

When court charges as to credibility to be given interested witnesses generally, but does not instruct jury that they should scrutinize defendant's testimony, the absence of an instruction that if they believed defendant's testimony they should give it the same weight as that of any other witness is not error. *S. v. Cureton*, 778.

§ 53c. Instructions on Burden of Proof and Presumptions.

Charge on burden of proof and presumptions *held* not to contain reversible error in this homicide prosecution in which an intentional killing with a

deadly weapon was established and defendant admitted killing deceased. *S. v. Cureton*, 778.

§ 53d. Instructions on Less Degrees of Crime Charged.

In this prosecution for felonious assault with intent to kill, the instruction of the court as to the lesser offenses embraced in the charge *are held* without error. *S. v. High*, 244.

Where there is no evidence tending to show defendant's guilt of manslaughter it is not error for the court to fail to instruct jury on this degree of the crime. *S. v. Dixon*, 438; *S. v. Burney*, 598.

Where all the evidence shows that dwelling house was occupied at the time, the court need not submit question of second degree burglary. *S. v. Morris*, 552.

§ 53e. Expression of Opinion as to Weight and Credibility of Evidence.

The court may not express an opinion as to the weight or credibility of the evidence or as to defendant's guilt. C. S., 564. *S. v. Maxwell*, 32.

§ 54b. Form and Sufficiency of Verdict.

Verdict, interpreted with reference to indictment, evidence and charge, *held* sufficiently definite. *S. v. Morris*, 552.

§ 59. Motion to Set Aside Verdict as Being Against Weight of Evidence.

A motion to set aside the verdict as being against the weight of the evidence is addressed to the discretion of the trial court and his refusal to grant the motion is not reviewable on appeal. *S. v. Caper*, 670.

The proper procedure to test the sufficiency of the evidence to support a verdict of guilty of first degree murder is by motions to nonsuit aptly made, or by a motion for a directed verdict on the capital charge with apt exception if overruled, and a motion to set aside the verdict as against the weight of the evidence does not properly present the question upon appeal. *Ibid.*

§ 68a. Right of State to Appeal.

When defendant charged with a misdemeanor is found not guilty in the municipal court on "a special verdict" without the intervention of a jury, it amounts to an acquittal, and, the municipal court having jurisdiction, this ends the matter, the State having no right of appeal to the Superior Court. *S. v. Nichols*, 80.

The right of the State to appeal upon a special verdict, a demurrer, a motion to quash, or a motion in arrest of judgment, C. S., 4649, applies only to judgments rendered in the Superior Court. *Ibid.*

§ 68c. Judgments Appealable.

After defendant's appeal to the Superior Court had been docketed, the county court attempted to modify its judgment, conditioned upon the appeal being withdrawn, and thereafter the Superior Court remanded the case to the county court with provision that either the State or defendant might appeal. Upon trial in the county court after remand, the State appealed from judgment entered upon defendant's plea of *nolo contendere*. Thereafter the Superior Court entered an order striking out the order remanding the case and restored the case to the docket for trial *de novo*. From this last order the defendant appealed to the Supreme Court. *Held:* In a criminal prosecution an appeal will lie to the Supreme Court only from a judgment on conviction or some judgment in its nature final, C. S., 4650, and the order appealed from is interlocutory and the appeal therefrom is dismissed. *S. v. Cox*, 458.

CRIMINAL LAW—*Continued.*

§ 79. Briefs.

In order to present for review the ruling of the trial court upon the admission of evidence, defendant must bring forward his exception to the evidence in his brief. *S. v. Aiken*, 317.

§ 80. Prosecution of Appeals and Dismissal.

Where defendant convicted of a capital crime fails to prosecute his appeal, the motion of the Attorney-General to docket and dismiss, made after expiration of time of serving case on appeal, must be allowed when an inspection of the record proper fails to disclose error. Rule of Practice in the Supreme Court, No. 17. *S. v. Day*, 566.

§ 81a. Matters Reviewable.

The court's ruling upon a motion to set aside the verdict as being against the weight of the evidence is entered in the exercise of a discretionary power and is not ordinarily reviewable. *S. v. Caper*, 670.

§ 81c. Harmless and Prejudicial Error.

A peremptory instruction using the phrase "if you believe all the evidence" rather than "if you find the facts to be from all the evidence," *held* an inadvertence not constituting prejudicial error. *S. v. Dickens*, 303.

Inadvertent error on subordinate feature *held* cured by subsequent correction in the charge. *S. v. Cade*, 393.

Since the State in a prosecution for homicide is not required to negative the mere possibility that deceased received his fatal wound other than at the hands of the defendant, the admission of testimony of a declaration of deceased that he had not been struck by a train has no bearing on the question of the guilt or innocence of the defendant and its admission, though erroneous, is harmless. *S. v. Aiken*, 317.

The admission of irrelevant evidence is not necessarily prejudicial, but when the evidence may have the effect of creating prejudice against defendant or sympathy for the prosecutrix in the minds of the jurors, its admission must be held for reversible error, especially where defendant has been convicted for a capital crime. *S. v. Page*, 333.

Where the evidence would justify the court in confining the jury's inquiry to the question of murder in the first degree or acquittal, any error in the charge on the issue of manslaughter would seem to be harmless. *S. v. Alston*, 713.

The jury's verdict of guilty of murder in the second degree renders immaterial the action of the court in overruling defendant's motion for a directed verdict of "Not guilty" as to the charge of first degree murder. *S. v. Cade*, 393.

The admission of incompetent opinion evidence relating to the *corpus delicti* cannot be held for reversible error when defendant elicits similar opinions in almost identical language upon cross-examination of the witness, especially when defendant's sole defense is an alibi and he does not challenge the existence of the *corpus delicti* except by his plea of not guilty. *Ibid.*

Objection to the admission of testimony cannot be sustained when the witness gives the same testimony on cross-examination without objection. *S. v. Bright*, 537.

Even conceding the implication of a question asked the witness by the solicitor was improper, an objection thereto cannot be sustained when the witness' answer negatives the implication. *S. v. Burney*, 598.

The admission of negative evidence with little, if any, probative force cannot be held prejudicial or reversible. *Ibid.*

CRIMINAL LAW—*Continued.*

The ruling of the court sustaining objections to questions propounded by defendant on cross-examination of the State's witnesses cannot be held prejudicial when it appears that in most instances the questions were substantially answered and that in others the questions were but reduplications of inquiries in a different form, calculated to bring out matter which the witnesses had already negatived. *S. v. Coleman*, 716.

§ 81d. Questions Necessary to Determination of Appeal.

Where a new trial is awarded on one assignment of error, other assignments relating to matters which may not recur on the subsequent hearing need not be considered. *S. v. Watson*, 387.

DAMAGES.

§ 14. Inadequate and Excessive Award.

Motion to set aside verdict for excessive award is addressed to discretion of trial court. *Durham v. Lawrence*, 75.

DEDICATION.

§ 5. Revocation of Dedication.

It is necessary to a withdrawal of a dedication of land from public use that the declaration of the withdrawal be registered. *Sheets v. Walsh*, 711.

DEEDS.

§ 1b. Property or Rights Subject to Transfer by Deed.

A limitation over of the remainder in personal property after a reservation of a life estate therein is void, and the language of the deed in this case *is held* to reserve the "complete use and control" of the personalty in the grantor, which constitutes a reservation of a life estate therein. *Nixon v. Nixon*, 377.

§ 10a. Rights of Parties Under Unregistered Deed.

An unregistered deed is good as between the parties. *Hill v. Street*, 312.

§ 10b. Purchasers and Creditors Within Protection of Connor Act.

Where trustee of resulting trust encumbers lands to secure his personal preëxisting debt, the grantee in the encumbrance is not a *bona fide* purchaser so as to defeat rights of *cestui que trust*. *Wolfe v. Smith*, 286.

Person claiming as purchaser for value under Connor Act must show that very deed under which he claims is supported by consideration. *Sansom v. Warren*, 432.

Creditor taking title through third person may not claim that debt was consideration for debtor's deed unless he establishes parol trust. *Ibid.*

Held: The allegation as to notice is unavailing, since no notice, however full and formal, will take the place of registration, but defendant's demurrer *ore tenus* should not have been sustained, since the complaint alleges that he was not an innocent purchaser for value and the registration laws, C. S., 3309, 3311, protect only creditors and purchasers for value. *Case v. Arnold*, 593.

§ 13a. Estates and Interest Created by Construction of the Instrument in General.

This deed was made to two of grantor's four children with provision that if one or both of the grantees died without issue her share should be equally divided among her surviving brothers and sisters. One of the grantees conveyed all her interest in the *locus in quo* to the other grantee and both the children of grantor who were not grantees in the deed predeceased the

DEEDS—*Continued.*

grantees. *Held:* In any event, the grantee to whom the other had conveyed her interest has an indefeasible fee in the property, since she alone would be entitled to the remainder over if the other grantee predeceased her without issue or if she predeceased the other grantee, such other grantee had already conveyed the contingent limitation over to her, the grantees in the deed being the only contingent remaindermen after the death of the other children of the grantor. *Heath v. Corey*, 721.

§ 14b. Conditions Concurrent and Subsequent.

A deed conveying property to trustees and their successors in office and setting forth the purposes for which the property should be used without a clause of reverter, forfeiture, or reëntry upon condition broken, conveys the fee to the trustees, and the heirs at law of the grantor may not maintain an action for the recovery of the land upon the ground that it was no longer used for the purposes stipulated. *Lassiter v. Jones*, 298.

§ 16. Restrictive Covenants.

Purchasers of lots in subdivision may enforce restrictive covenants *inter se* only if there is a general plan for development. *Humphrey v. Beall*, 15.

Covenants and reservations in deeds for lots sold by developer *held* to show as matter of law absence of general plan for development. *Ibid.*

§ 22. Construction and Operation of Timber Deeds.

Evidence *held* insufficient to show that grantee cut timber from lands of grantor not embraced in the timber deed. *Michael v. Brown*, 655.

DESCENT AND DISTRIBUTION.

§ 3. Heirs and Distributees in General.

Where intestate dies owning personalty and leaving as his sole heirs at law children of two deceased brothers and one deceased sister, the personalty must be equally divided among all his nephews and nieces *per capita* and not *per stirpes*, since each of the heirs at law are of equal degree of kinship. C. S., 137 (5). *Nixon v. Nixon*, 377.

§ 5. Surviving Husband or Wife.

Insured named his wife as beneficiary in policies of insurance on his life. The wife predeceased him. There were no children born to the marriage. *Held:* Upon the wife's death the husband was entitled to the wife's vested interest in the policies, even before reducing same to possession by administration, C. S., 7, the provision of this statute not having been modified by C. S., 137 (8), in cases in which there are no surviving children, and upon the husband's death his heirs are entitled to the distribution of the proceeds of the policies. *Wilson v. Williams*, 407.

DIVORCE.

§ 2a. Separation as Grounds for Divorce.

Where, in the husband's action for divorce on the ground of two years separation, the wife sets up the defense that he had abandoned her, an instruction that the two elements of abandonment are his willful separation from her without just cause or excuse and his failure to provide adequate support, is without error, and plaintiff's contention that the court should have charged that the failure to provide support must have been willful in order to constitute an abandonment is untenable. C. S., 4447. *Hyder v. Hyder*, 239.

Where, in the husband's action for divorce on the ground of two years separation, the wife sets up the defense of abandonment, the burden of the issue

DIVORCE—*Continued.*

is on her to prove the defense by the greater weight of the evidence and not to prove same beyond a reasonable doubt, even though the issue may involve a criminal charge, since the defense is set up in the trial of a civil action. *Ibid.*

In the husband's suit for divorce on the ground of two years separation, the wife's defense that the separation was the result of his unlawful abandonment of her is valid, and the husband's demurrer *ore tenus* thereto is properly overruled, since a party may not maintain a civil action based upon his own violation of the criminal laws of the State. *Ibid.*

The word "separation" as used in C. S., 1659 (4), as amended, means a voluntary separation by mutual agreement with the intent on the part of at least one of the parties to discontinue all the marital privileges and responsibilities, or a separation under judicial decree, or a separation caused by the abandonment or wrongful act of the party sued. *Woodruff v. Woodruff*, 685.

A physical separation caused by the commitment of one of the parties for insanity is not a "separation" constituting ground for divorce, nor may the party committed consent to a separation during the continuance of the mental incapacity. *Ibid.*

Where, after physical separation the husband continues to contribute to the support of the wife, the making of such contributions negatives an intention on his part to terminate the marital privileges and responsibilities necessary to a separation within the meaning of C. S., 1659 (4), as amended. *Ibid.*

§ 4. Affidavit and Conditions Precedent to Actions for Divorce.

The statutory affidavit in an action for divorce is jurisdictional, and a false affidavit knowingly made will not support a decree. *Woodruff v. Woodruff*, 685.

§ 11. Alimony Pendente Lite.

In the husband's suit for divorce on the ground of two years separation, the wife, setting up a valid defense, is entitled to be heard thereon, and an allowance of counsel fees and funds for her support pending the litigation to enable her to present her defense, is proper upon supporting findings, the fact that she seeks no affirmative relief in her answer being immaterial. *Briggs v. Briggs*, 78.

A judgment in a criminal action for abandonment is not *res judicata* as to the wife's right to counsel fees and support pending litigation of a suit for divorce thereafter instituted by the husband, the defendant in the criminal action. *Ibid.*

When defendant dies pending plaintiff's appeal from an order allowing defendant counsel fees and support pending litigation of plaintiff's suit for divorce, defendant's administrator will be made a party upon motion aptly made in the Supreme Court, and upon affirmance of the order, plaintiff will be required to pay the allowance for counsel fees and such installments of alimony allowed as were due at the time of defendant's death. *Ibid.*

Where, in the husband's action for divorce on the ground of adultery, the wife files answer denying the charges and sets up a cross action for divorce from bed and board, C. S., 1660, the finding by the court that the wife denied the charge of adultery under oath, that the court did not find that she was guilty of adultery, and that the husband had abandoned her and that she was financially unable to defray the necessary and proper expenses of the action, was without means of support and that the husband was financially able to make the payments ordered, *is held* sufficient to support the court's order of alimony *pendente lite*, C. S., 1666. *Covington v. Covington*, 569.

DIVORCE—*Continued.*

§ 14. Enforcing Payment of Alimony.

Record and findings *held* insufficient to support judgment for contempt for willful disobedience of court order. *Berry v. Berry*, 339.

DOWER.

§ 3. Nature and Incidents of Inchoate Dower.

Inchoate dower is a mere expectancy or probability standing upon the same footing with the expectancy of heirs apparent or presumptive before the death of the ancestor, except that the right of dower may not be defeated except with the wife's consent. *Trust Co. v. Watkins*, 292.

§ 5. Release of Inchoate Dower by Payment of Present Value.

In determining the present value of inchoate dower or dower consummate, the full value of the dowerable lands, encumbered as well as unencumbered, and without deducting the mortgage debt, constitutes the proper basis of computation. Trust Co. v. White, 565.

§ 6. Nature and Incidents of Dower Consummate in General.

Upon the death of a husband, the widow's right of dower becomes consummate, and is a fixed and vested right of property in the nature of a chose in action, which, upon assignment of dower, becomes a life estate in the property assigned, which estate is subject to all the incidents of any other life estate, and is considered a continuation of the husband's estate. C. S., 4100. *Trust Co. v. Watkins*, 292.

Wife having a dower interest in property held by her husband as tenant in common may not defeat sale for partition. *Ibid.*

§ 10. Merger of Dower with the Fee.

Where a widow is allotted dower in lands and thereafter acquires the remainder interest by purchase, the dower is merged in the fee and ceases to exist. *Trust Co. v. Watkins*, 292.

EASEMENTS.

§ 2. Easements by Necessity.

An upper landowner does not have an easement by necessity to drain his land by a ditch extending across the lower lands of another, even though this is the most convenient or the only way by which he can drain his land. *Darr v. Aluminum Co.*, 768.

§ 3. Establishment by Prescription.

In order for the public to establish a right of way across private lands by prescription, it is necessary that the right of way be established by definite and specific lines, although slight deviations in the line of travel are not fatal, but evidence that the pathway used by the public shifted, as erosion caused by rain and tides made it necessary, is insufficient to establish a public easement. *Cahoon v. Roughton*, 116.

A mere showing of the use of a drainage ditch across the lands of another is insufficient to establish a prescriptive right to the use of such ditch, since in the absence of evidence in rebuttal such use will be presumed permissive and not adverse. *Darr v. Aluminum Co.*, 768.

EJECTMENT.

§ 13. Competency and Relevancy of Evidence.

Where a party in proceedings for partition, made in effect an action in ejectment by the plea of sole seizin sets up a deed from the common source

EJECTMENT—*Continued.*

of title, petitioners may introduce parol evidence attacking the deed for mental incapacity without supporting allegation, but parol evidence on the question of undue influence must be supported by proper allegation. *Gibbs v. Higgins*, 201.

ELECTRICITY.

§ 7. Condition of Wires, Poles and Equipment.

Complaint *held* sufficient to allege negligence in maintenance of power line in this action to recover for the wrongful death of intestate, who was killed when he came in contact with an uninsulated, heavily charged electric light wire. *Kennerly v. Dallas*, 532.

EMINENT DOMAIN.

§ 2. Acts Constituting Taking of Property.

Pollution by sewage disposal plant resulting in depreciation of value of land constitutes taking for which city must pay just compensation. *Ivester v. Winston-Salem*, 1; *Clinard v. Kernersville*, 745.

§ 8. Necessity for, and Amount of Compensation in General.

It is fundamental law in this State, grounded in equity and justice, that private property may not be taken, even for a public purpose, without the payment of just compensation. *Ivester v. Winston-Salem*, 1.

In condemning easement for sewer line court properly confined city's liability to value of easement taken, excluding any element of damages from anticipated negligent operation of easement. *Durham v. Lawrence*, 75.

§ 18. Trial Upon Exceptions.

Charge *held* not to instruct jury that anticipated injury from negligent operation of easement condemned might be allowed. *Durham v. Lawrence*, 75.

In proceedings in condemnation, the trial court's refusal of motions to set aside the verdict for failure to allow a jury view and on the ground that the amount awarded was excessive, is in the exercise of his sound discretion, and his refusal of the motions is not reviewable in the absence of abuse of discretion. *Ibid.*

EQUITY.

§ 1b. He Who Seeks Equity Must Come Into Court with Clean Hands.

In a creditor's action to establish its debt and to have a subsequent conveyance by the debtor set aside as fraudulent as to creditors, the fact that plaintiff's debt is tainted with usury entitles defendant debtor to invoke the forfeiture of interest, C. S., 2306, but does not defeat plaintiff's action, or estop plaintiff from asserting the equitable remedy of setting aside the fraudulent conveyance under the doctrine that he who seeks equity must come into court with clean hands. *Trust Co. v. Realty Corp.*, 526.

§ 1e. Equity Suffers No Right Without a Remedy.

The maxim that "equity suffers no right to be without a remedy" does not contemplate the creation of rights not existing at common law. *Sappenfield v. Goodman*, 417.

§ 2. Laches.

Action against estate for proceeds of insurance funds *held* barred by laches under the maxim that equity aids the vigilant, not those who have slept upon their rights. *Strayhorn v. Aycock*, 43.

Minors having a beneficial interest in lands will not be held guilty of laches in seeking to redeem the lands after judgment in the suit to foreclose the tax sales certificate, nor in failing to examine the docket to see that their inter-

EQUITY—*Continued.*

ests appeared of record, nor will the laches of their father, to whom the lands were conveyed for their benefit, be attributed to them. *Hill v. Street*, 312.

§ 3. Nature of Equitable Rights and Remedies in General.

Since under our practice both law and equity are administered in the same action in the same court, equity may be considered merely the tool by which the law is enabled to make a finer adjustment of individual rights consonant with commendable human conduct. *Bailey v. McLain*, 150.

ESCAPE.

§ 6. Civil Liability for Escape.

The State may not recover of a prisoner moneys expended by it to recapture him after his escape from custody, since the escape does not invade any property right of the State, but the expenditure of the sums is voluntary and made by it for the protection of the people of the State in preserving the integrity of the penal system. *Highway Com. v. Cobb*, 556.

ESTATES.

§ 4. Merger of Estates.

Where a greater and lesser estate meet in the same person, in the same right, without any intermediate estate, the lesser estate is merged in the larger and ceases to exist. *Trust Co. v. Watkins*, 292.

The requirement that a person must own two estates "in the same right" in order for the estates to merge does not mean that they must be acquired in the same manner but that they be held by such person as his own without any equitable claims against them. *Ibid.*

Where a widow is allotted dower in lands and thereafter acquires the remainder interest by purchase, the dower is merged in the fee and ceases to exist. *Ibid.*

Husband and wife executed a mortgage on the *locus in quo* and on the same day executed a deed in fee to the mortgagee for a one-third undivided interest in the property upon consideration *inter alia* of the mortgagee's assumption of one-third of the debt, thereafter the mortgagee foreclosed the instrument under the power of sale and executed deed to the purchaser in fee. *Held:* The interest conveyed by the mortgage, in so far as it affected the one-third interest in the property, was not merged in the fee conveyed by the deed to such one-third interest so as to prevent the purchaser at the foreclosure sale of the mortgage from obtaining the fee in the entire lands, since a merger of estates does not obtain when it would be inimical to the interest of the owner. *Land Bank v. Moss*, 445.

ESTOPPEL.

§ 1. Creation and Operation of Estoppel by Deed.

A wife, executing a deed of trust on property with her husband, is not estopped from asserting her title in fee to the property by a recital in the deed of trust that she owned only a life estate in the property when it appears that she did not know of the recital in the deed of trust, that she paid off the mortgage, and that no one relied on the recital to his injury, or was misled thereby. *Cartwright v. Jones*, 108.

Party having deed executed absolute in form with full knowledge of equities *held* estopped from setting up parol trust. *Sansom v. Warren*, 432.

Husband and wife executed mortgage on lands owned by him in fee. The mortgage was foreclosed prior to the time the power of sale therein became

ESTOPPEL—*Continued.*

absolute, and the land was purchased at the foreclosure sale by the wife. Thereafter the husband joined with his wife in executing a deed of trust upon the lands with full covenants of title. *Held:* The wife by accepting deed as purchaser at the foreclosure sale of the mortgage, and the husband in joining in executing the deed of trust with full covenants of title are estopped from attacking the validity of the mortgage foreclosure. *Land Bank v. Moss*, 445.

Mortgagee later obtaining title in fee to one-third undivided interest *held* estopped by his deed to purchaser at the foreclosure sale from asserting title to the undivided interest. *Land Bank v. Moss*, 445.

§ 3. Nature and Essentials of Estoppel by Record. (Estoppel by judgment, see Judgments §§ 32, 33.)

The fact that the *cestui que trust* accepts a note and deed of trust executed by the purchaser at the foreclosure sale of the original mortgage does not estop the *cestui* from claiming under the original mortgage when the foreclosure thereunder is set aside and the subsequent encumbrances declared void, the validity of the original deed of trust not being attacked. *Sutton v. Woolard*, 389.

Agreement based upon consent of parties that verdict be set aside is not binding when the setting aside of the verdict is held erroneous on appeal. *Ibid.*

§ 6a. Nature and Grounds of Equitable Estoppel in General.

An equitable estoppel arises when a party's words or conduct amount to a misrepresentation or concealment of material facts, with knowledge actual or implied, of their falsity, and with intent that they should be relied on by the other party or the public generally, and the party asserting the estoppel must have been ignorant of the falsity of the representations at the time they were made and at the time they were acted upon, and must have acted in reliance on the representations and have placed himself in a position in which he would be prejudiced if the party estopped were permitted to deny the truth thereof. *Self Help Corp. v. Brinkley*, 615.

Charge *held* for error in failing to instruct that party asserting estoppel must have been ignorant of falsity of representations at the time of acting upon them. *Ibid.*

§ 6g. Acceptance and Retention of Benefits.

A person accepting checks with knowledge that they were tendered in full settlement is estopped from asserting the contrary. *Durant v. Powell*, 628.

EVIDENCE.

V. Credibility and Examination of Witnesses

17. Rule that Party May Not Impeach Own Witness. In re Will of Williams, 259.

VII. Competency of Evidence

29. Evidence at Former Trial or Proceedings. Warren v. Ins. Co., 402.
32. Transactions or Communications with Decedent. Wilson v. Williams, 407; Wilder v. Medlin, 542; Collins v. Lamb, 719.
37. Best and Secondary Evidence. Chatham v. Chevrolet Co., 88.

IX. Parol or Extrinsic Evidence Affecting Writings (Requirement of Statute of Frauds see Frauds, Statute of).

39. Parol or Extrinsic Evidence in General. Cheek v. Ins. Co., 36; Ins. Co. v. Guin, 92; Grocery Co. v. R. R., 223; Pack v. Katzin, 233.

XII. Expert and Opinion Evidence

45a. Competency of Opinion Evidence in General. Pack v. Katzin, 233; Warren v. Ins. Co., 403.
47. Subjects of Expert Testimony. George v. R. R., 773.
51. Competency and Qualifications of Experts. Aydlett v. By-Products Co., 700.

XIII. Weight and Credibility of Evidence (Sufficiency of Evidence see Trial sec. 22).

56. Positive and Negative Evidence. Carruthers v. R. R., 675.

EVIDENCE—*Continued.*

§ 17. Rule That Party May Not Impeach Own Witness.

The trial court has the discretionary power to permit a party to cross-examine his own witness. *In re Will of Williams*, 259.

§ 29. Evidence at Former Trial or Proceedings.

In an action to recover double indemnity under the terms of a life insurance policy the record and judgment in a criminal prosecution of another for murder of deceased insured is incompetent, plaintiff beneficiary not being bound by the verdict and judgment therein or estopped thereby to show that in fact the death of insured was caused by accidental means. *Warren v. Ins. Co.*, 402.

§ 32. Transactions or Communications with Decedent or Lunatic.

Upon counterclaim to establish a resulting trust against the estate of a decedent, testimony of disinterested witnesses as to declarations made by decedent tending to establish that defendant furnished the purchase price for the property is relevant and admissible. *Wilson v. Williams*, 407.

Testimony of agreement between administrator and distributee in regard to settlement of estate *held* incompetent in action by distributee's administrator to recover assets. *Wilder v. Medlin*, 542.

Witness may testify in regard to independent facts and circumstances not involving personal transaction or communication between the witness and deceased. *Ibid.*

C. S., 1795, does not preclude a witness from testifying to independent facts and circumstances within her observation and knowledge or from giving evidence of what she saw or heard take place between the deceased and another or others, not involving personal transactions between herself and the deceased. *Collins v. Lamb*, 719.

§ 37. Best and Secondary Evidence in General.

In an action between lessor and the alleged assignee of lessee to recover on the written assignment of the lease, the admission of parol evidence as to the substance of the alleged written assignment of the lease, without the laying of proper foundation for the admission of the secondary evidence, is error. *Chatham v. Chevrolet Co.*, 88.

§ 39. Parol or Extrinsic Evidence Affecting Writings.

Parol representations of the soliciting agent that the policy would be immediately effective upon the payment of two weeks premium and the delivery of the premium receipt is not competent to contradict the written provisions of the receipt that the insurance would not be effective until the application was approved by insurer at its home office. *Cheek v. Ins. Co.*, 36.

In an action on a note, parol evidence which tends to show a supplemental agreement between the parties that the note was to be paid only out of commissions due or to become due from the payee to the maker, is competent. *Ins. Co. v. Guin*, 92.

When a contract is not ambiguous, the meaning of its terms must be ascertained from the writing itself, and inferences from extraneous facts may not be considered in aid of its interpretation. *Grocery Co. v. R. R.*, 223.

Testimony of acts constituting subsequent modification and abandonment of contract does not violate parol evidence rule. *Pack v. Katzin*, 233.

§ 45a. Competency of Opinion Evidence in General.

In this action on a contract for the construction of a dwelling, plaintiff's witnesses were permitted to testify that certain work constituted a change

EVIDENCE—*Continued.*

from the original plans and specifications. *Held:* The testimony is competent as "short-hand" expressions of fact. *Pack v. Katzin*, 233.

In an action to recover double indemnity under the terms of a life insurance policy, testimony of a witness that the person inflicting the fatal injury was a stranger to deceased insured *is held* incompetent as being of a fact beyond the personal knowledge of the witness, and prejudicial to the insurer as tending to support plaintiff beneficiary's contention that the shooting of the insured was accidental rather than intentional. *Warren v. Ins. Co.*, 403.

In an action to recover double indemnity under the terms of a policy of life insurance, testimony of a witness that the assailant who fatally shot deceased insured first pointed the gun in her face and that if she had not struck up her arm the bullet would have struck her, *is held* incompetent, since she could not testify to her own knowledge that the assailant would have shot her or that he intended to do so. *Ibid.*

§ 47. Subjects of Expert Testimony.

A physician qualified as an expert may testify from his examination of the wounds of deceased that deceased was lying prone upon the track at the time he was struck and killed by defendant's train. *George v. R. R.*, 773.

§ 51. Competency and Qualification of Experts.

The exclusion of expert opinion testimony cannot be held for error when appellant fails to show that the witnesses were qualified to testify upon the matter. *Aydlett v. By-Products Co.*, 700.

§ 56. Positive and Negative Evidence.

The rule governing the competency and admissibility of negative evidence tending to show the failure of an engineer to give proper signals of the train's approach to a grade crossing, as laid down in *Johnson v. R. R.*, 214 N. C., 484, approved. *Carruthers v. R. R.*, 675.

EXECUTION.

§ 4. Limitations on Issuance of Execution.

The present actions, consolidated for trial, were instituted to revive and establish the balances due on certain judgments and to subject certain lands to their payments. Defendant pleaded the ten and three-year statutes of limitations. *Held:* The granting of the judgment as of nonsuit on the plea of the bar of the statutes is error, since the first cause of action was not barred, and it is not necessary on the appeal to determine whether the bar of the statute applied to other aspects of the action. *Metcalf v. Ratcliff*, 243.

§ 11. Procedure to Stay, Quash or Recall Execution.

A motion in the cause to recall execution against the person is the proper remedy when there is no affirmative finding by the jury of express or actual malice to support the order of execution against the person, and the motion to recall is made in apt time when execution against the person is issued under the judgment, since defendant's rights are threatened by the attempted enforcement of the order and not by the rendition of the judgment. *Crowder v. Stiers*, 123; *Calhoun v. Stiers*, 126.

§ 25. Nature and Grounds of Remedy of Execution Against the Person.

In order to warrant execution against the person in tort actions jury must find actual malice, and order for execution against the person without such finding by the jury is irregular and motion to recall execution should be allowed. *Crowder v. Stiers*, 123; *Calhoun v. Stiers*, 126.

EXECUTION—*Continued.*

In an action to recover for malpractice of defendant, execution against the person of defendant may not issue in the absence of allegation and evidence of actual malice. C. S., 673, 768. *Olinger v. Camp*, 340.

EXECUTORS AND ADMINISTRATORS.

§ 4. Removal and Revocation of Letters.

The clerk of the Superior Court is not compelled to remove an administrator for failure to file promptly the required inventory and accounts, nor for delay in winding up the estate, and a petition for removal is addressed to his discretion, since the statute makes removal mandatory only when, upon a hearing, the objections are found valid, which implies a finding of their sufficiency to justify the removal as endangering the estate or disclosing a refusal to obey promptly the supervisory orders of the clerk. *Jones v. Palmer*, 696.

Judgment affirming clerk's order denying removal of administrator affirmed upon facts of this case. *Ibid.*

§ 9. Assets of the Estate.

Where a person executes a deed attempting to convey a remainder in personalty after a reservation of a life estate therein, and subsequently dies intestate, the limitation over is void, and he dies owning the personalty, which must be distributed to his heirs at law according to the statutes of distribution. *Nixon v. Nixon*, 377.

§ 15a. Claims Against the Estate.

Claimant contended that he took out and paid the first premiums on a policy of life insurance on his brother to secure sums advanced for his brother's education, that by mistake his brother's estate was named beneficiary instead of himself, that he surrendered the policy for collection to his brother's executrix. *Held:* The executrix could collect the proceeds of the policy only in her representative capacity, and the claim constitutes a claim against the estate and not against the executrix personally. *Strayhorn v. Aycock*, 43.

§ 19. Actions Against the Estate.

Action against estate for proceeds of insurance policy on ground that plaintiff took out policy and paid premiums and had agreement with insured's executrix that she should collect policy and pay plaintiff proceeds *held* barred by laches, the entire estate having been used to pay creditors. *Strayhorn v. Aycock*, 43.

§ 22. Distribution to Devisees and Legatees.

The will in question provided for the distribution of the personal and real assets among testator's children, with provision that the share of each should be charged with any indebtedness owed by such beneficiary to any of the other beneficiaries. *Held:* All the beneficiaries of the estate were properly joined as defendants in the action brought in the name of the executor and the beneficiary to whom it was alleged the other beneficiaries were indebted, in order that there might be a complete determination of all matters involved in the settlement of the estate. *Robertson v. Robertson*, 562.

§ 24. Distribution Under Agreement of Parties.

Even though all parties are *sui juris* and before the court, the court may not, ordinarily, ignore the provisions of the will and compromise the estate in accordance with the agreement of the parties, since the courts may not "make a will" for the decedent. The exception to this rule when the agreement is a family settlement, in which instances the jurisdiction of the court is extended, is pointed out. *Bailey v. McLain*, 150.

FOOD.

§ 8. Nature and Grounds of Liability of Retailer to Consumer.

Plaintiff bit into a sausage in a casing sold by defendant retailer and was injured when his teeth were broken by a piece of metal in the sausage. It was conceded that the sausage was thus in a sealed container. *Held:* Defendant retailer may be held liable upon the doctrine of implied warranty that the food sold by him was merchantable and fit for human consumption. *Rabb v. Covington*, 572.

The contention that the enforcement of the common law rule of implied warranty in the sale of food by a retailer to a consumer would result in spurious litigation cannot be entertained, since the processes of the courts cannot be denied to those having meritorious causes of action because others might abuse such processes. *Ibid.*

The common law rule of implied warranty in the sale of food by a retailer to a consumer, even though the food may be sold in a sealed container, has not been rendered obsolete by the changes in the manner and method of the manufacture, preparation and distribution of food. *Ibid.*

FRAUD.

§ 5. Deception and Reliance Upon Misrepresentation.

Plaintiffs having equal knowledge with defendants of facts forming basis of agreement may not maintain that execution of agreement was obtained by fraud. *Holland v. Whittington*, 330.

FRAUDS, STATUTE OF.

§ 9. Contracts Affecting Realty in General.

An uncertain description in a deed may be aided by parol to fit the description to the land when the deed itself refers to the sources from which evidence *aliunde* may be sought to render the description certain, and when the description in the deed is not patently ambiguous. *Self Help Corp. v. Brinkley*, 615.

Description in this deed *held* sufficiently certain to render evidence *aliunde* competent to fit the description to the land. *Ibid.*

§ 12. Parol Trusts.

Resulting trusts, which arise by operation of law, do not come within the statute of frauds, and may be proved by parol evidence. *Wilson v. Williams*, 407.

FRAUDULENT CONVEYANCES.

§ 1. Nature of Remedy in General.

In a creditor's action to establish its debt and to have a subsequent conveyance by the debtor set aside as fraudulent as to creditors, the fact that plaintiff's debt is tainted with usury entitles defendant debtor to invoke the forfeiture of interest, C. S., 2306, but does not defeat plaintiff's action, or estop plaintiff from asserting the equitable remedy of setting aside the fraudulent conveyance under the doctrine that he who seeks equity must come into court with clean hands. *Trust Co. v. Realty Corp.*, 526.

The complaint in this action by a creditor alleged the amount of the debt and sought to have a subsequent conveyance in trust by the debtor set aside as fraudulent on the ground that the debtor was insolvent and the conveyance covered virtually all the property of the debtor. *Held:* The creditor was entitled to establish its claim in the suit, the remedy sought being incidental and supplemental thereto, and upon proper procedure, might be entitled to an

FRAUDULENT CONVEYANCES—*Continued.*

equitable levy, and therefore the suit is one to enforce the alleged usurious notes, and the debtor is entitled to set up the defense of usury, and demand the forfeiture of all interest, without tender of the principal with legal interest. *Ibid.*

GAMES AND EXHIBITIONS.

§ 3. Injuries to Patrons.

Where patrons are given choice between screened and unscreened seats, patron of bleachers may not recover for injury from foul ball. *Cates v. Exhibition Co.*, 64.

GUARDIAN AND WARD.

§ 13. Investment and Management of Property.

A guardian is not an insurer of loans and investments of guardianship funds, but is required only to act in good faith and in the exercise of due care and diligence. *Robinson v. Ham*, 24.

A loan of guardianship funds on good and sufficient real estate security, within the jurisdiction of the court, is a proper investment. *Ibid.*

Evidence *held* insufficient to show lack of good faith and want of due diligence on part of guardian investing funds in mortgage notes. *Ibid.*

§ 17b. Period of Lease of Wards' Realty.

The provisions of C. S., 2172, constitute limitations upon the discretionary power of guardians in leasing their wards' real estate, and the statute does not preclude guardians from leasing realty belonging to the wards for a period extending beyond the minority of the wards with the approval and under the orders of a court of general equity jurisdiction. *Coxe v. Charles Stores Co.*, 380.

Superior Courts in their equity jurisdiction have plenary power to order lease of wards' estates beyond period of their minority. *Ibid.*

§ 25. Actions on Bonds and to Recover Guardianship Property.

When the amounts due a ward are admitted or not controverted, the ward may maintain suit to follow the guardianship funds and to hold the bondsmen liable for any deficiency without making the personal representative of the insolvent deceased guardian a party, and defendants' demurrers for misjoinder of parties and causes for want of a necessary party are property overruled. *Morgan v. Morgan*, 725.

HIGHWAYS.

§ 12. Abandonment of Public Highways.

Held: The allegations and evidence disclosed an abandonment of the roadway claimed as a public highway, and the subsequent maintenance of the roadway by members of the community upon their own responsibility and initiative, is not a "maintenance by the public" such as to constitute it a public road. *Cahoon v. Roughton*, 116.

§ 13. Nature of Neighborhood Public Roads and Right to Establishment.

Plaintiffs' allegations and evidence tendend to show that the alleged public way to an old wharf had been abandoned by the Highway Commission when it took over the county roads, and that plaintiffs did not reside along the alleged public road, and that it was not necessary to them as a way of egress and ingress to their homes, but that they used same in getting to the old wharf to their boats for hunting and fishing parties. *Held:* Plaintiffs failed to establish their right to the use of the passway as a neighborhood public road. *Cahoon v. Roughton*, 116.

HIGHWAYS—*Continued.*

§ 15. Appeals from Clerk to Superior Court.

Appeal will lie to Superior Court from judgment of clerk that petitioner is not entitled to establishment of cartway. *Dailey v. Bay*, 652.

§ 18. Civil Liability for Obstructing Highway.

Plaintiffs instituted this action to restrain defendant from blocking a passway across his land to an old wharf at which plaintiffs kept their boats. Plaintiffs' allegations and evidence established that if the passway had ever been a public highway, it had been abandoned, and failed to establish same as a neighborhood public road, and failed to establish a public easement over defendant's lands. *Held:* Defendant's motion to nonsuit should have been granted. *Cahoon v. Roughton*, 116.

HOMICIDE.

I. Homicide in General
2. Parties and Offenses. S. v. Burney, 598.
II. Murder in First Degree
4c. Premeditation and Deliberation. S. v. Burney, 598; S. v. Alston, 713.
4d. Murder in Perpetration or Attempt to Commit Robbery. S. v. Alston, 713.
III. Murder in Second Degree
5. Definition. S. v. Bright, 537.
IV. Manslaughter
7. Definition. S. v. Bright, 537.
VII. Evidence in Homicide Prosecutions
16. Presumptions and Burden of Proof. S. v. Bright, 537; S. v. Cureton, 778.
18a. Dying Declarations. S. v. Aiken, 317; S. v. Bright, 537.
18b. Threats. S. v. Bright, 537.
20. Evidence of Motive and Malice. S. v. Burney, 598.
23. Demonstrative Evidence. S. v. Cade, 393.
VII. Trial of Homicide Cases
25. Sufficiency of Evidence, Nonsuit and Directed Verdict for Defendant. S. v. Cade, 393; S. v. Burney, 598; S. v. Cureton, 778; S. v. Caper, 670.
26. Peremptory Instructions and Directed Verdict for the State. S. v. Maxwell, 32.
27. Instructions in Homicide Prosecutions.
b. On Presumptions and Burden of Proof. S. v. Bright, 537; S. v. Cureton, 778.
c. On Questions of Premeditation and Deliberation. S. v. Burney, 598.
f. On Question of Self-Defense. S. v. Cureton, 778.
g. On Question of Parties and Offenses. S. v. Burney, 598.
h. On Less Degrees of the Crime. S. v. Maxwell, 32; S. v. Dixon, 438; S. v. Burney, 598.
29. Judgment and Sentence. S. v. Day, 566.
30. Appeal and Review. S. v. Cade, 393; S. v. Alston, 713; S. v. Aiken, 317; S. v. Cureton, 778.

§ 2. Parties and Offenses.

Where party kills one person while intending to kill another, he is guilty in the same degree as though he had killed the person intended. *S. v. Burney*, 598.

§ 4c. Premeditation and Deliberation.

Length of time elapsing between formation of fixed intent to kill and the execution of the intent is immaterial. *S. v. Burney*, 598.

In this prosecution of defendant for murder committed in the perpetration of a robbery, defendant's contention that at the time he was too drunk to premeditate or deliberate or to form a fixed intent to kill or rob *is held* conclusively determined adversely to the defendant by the verdict of the jury upon the evidence. *S. v. Alston*, 713.

§ 4d. Murder in Perpetration of or Attempt to Commit Robbery.

Where murder is committed in the perpetration of a robbery from the person, it is murder in the first degree, C. S., 4200, irrespective of premeditation or deliberation or malice aforethought. *S. v. Alston*, 713.

§ 5. Murder in the Second Degree.

Murder in the second degree is the unlawful killing of a human being with malice, but without premeditation and deliberation. *S. v. Bright*, 537.

HOMICIDE—*Continued.*

§ 7. Manslaughter.

Manslaughter is the unlawful killing of a human being without malice and without premeditation and deliberation. *S. v. Bright*, 537.

§ 16. Presumptions and Burden of Proof.

When the intentional killing of a human being with a deadly weapon is admitted or established, the law implies malice, constituting the offense murder in the second degree, nothing else appearing, and places the burden upon the defendant to establish matters in mitigation or excuse. *S. v. Bright*, 537; *S. v. Curcton*, 778.

§ 18a. Dying Declarations.

An alleged dying declaration, even when proper predicate is laid for its admission, is not competent unless it relates to the act of the killing, or to the circumstances so immediately attendant thereon as to constitute a part of the *res gestæ*. *S. v. Aiken*, 317.

Alleged dying declaration *held* not to relate to the *res gestæ* and its admission in evidence was error, but since the subject matter of the declaration related to a fact which the State was not required to prove, its admission was harmless. *Ibid.*

Testimony of a dying declaration is competent when the declarant, at the time he makes the statement, is in actual danger of impending death, has full apprehension of such danger, and death ensues. *S. v. Bright*, 537.

The fact that declarant entertains a hope of recovery subsequent to the time of making the declarations does not render the declarations incompetent. *Ibid.*

When proper predicate is laid for the admission of testimony of dying declarations, the statements are not rendered incompetent by the fact that immediately thereafter declarant made a statement to another disclosing that declarant did not feel certain that death impended. *Ibid.*

§ 18b. Threats.

The remoteness of a threat goes to its weight and not to its competency. *S. v. Bright*, 537.

Evidence in this case *held* sufficient to show continuing threats from the time of the threat made by defendant two years prior to the homicide, and defendant's objection to testimony of the prior threat is not sustained. *Ibid.*

§ 20. Evidence of Motive and Malice.

Evidence of immoral relations between members of defendant's household and that defendant attempted to exercise control over the women living in his house *is held* competent in this prosecution of defendant for the murder of one of the women following an altercation with her over defendant's accusation of misconduct on the part of her daughter with a man other than defendant, the evidence being competent to show the setting and motive. *S. v. Burney*, 598.

§ 23. Demonstrative Evidence: Photographs.

The admission of photographs of the body of deceased as it was lying at the spot where he was found, identified by the photographer as taken by him and as being a true picture of the body and the premises before the body was moved, will not be held for error, there being no request that their use be limited or restricted. *S. v. Cade*, 393.

HOMICIDE—*Continued.*

§ 25. Sufficiency of Evidence, Nonsuit and Directed Verdict for Defendant.

The court's refusal of defendant's request of a directed verdict of "Not guilty" in this prosecution for homicide *is held* not error upon the evidence in the case. *S. v. Cade*, 393.

Evidence *held* sufficient for jury on question of defendant's guilt of murder in the first degree. *S. v. Burney*, 598; *S. v. Cureton*, 778.

Evidence that defendant borrowed a rifle in the afternoon, went to the home of the deceased about 8:00 p.m., called him to the porch of his house and shot him, and returned the rifle to the owner before daylight the following morning, *is held* sufficient to show premeditation and deliberation and to support a verdict of guilty of murder in the first degree. *S. v. Caper*, 670.

The proper procedure to test the sufficiency of the evidence to support a verdict of guilty of first degree murder is by motions to nonsuit aptly made, or by a motion for a directed verdict on the capital charge with apt exception if overruled, and a motion to set aside the verdict as against the weight of the evidence does not properly present the question upon appeal. *Ibid.*

§ 26. Peremptory Instructions and Directed Verdict for the State.

It is error for the court to instruct the jury that they might render one of two verdicts, guilty of murder in the first degree or of murder in the second degree, but that in no event might they return a verdict of guilty of manslaughter or not guilty, even though defendant testifies that he shot and killed deceased, since on defendant's plea of not guilty the presumption of innocence attaches until removed by the verdict of the jury, and the credibility of the testimony is for the jury to determine. *S. v. Maxwell*, 32.

§ 27b. Instructions on Presumptions and Burden of Proof.

An instruction that upon the admission or proof of the intentional killing of a human being with a deadly weapon, the burden is on defendant to prove from "all the evidence" matters in mitigation or excuse to the satisfaction of the jury, *is held* not error, the court having fully and correctly charged the jury on the law relating to defendant's plea of self-defense. *S. v. Bright*, 537.

The failure of the court to charge that when an intentional killing with a deadly weapon is admitted or established the defendant may rely upon the State's evidence to mitigate the offense from murder in the second degree to manslaughter, is not error when none of the State's evidence tends to show matters in mitigation and, defendant having admitted the intentional killing with a deadly weapon, an instruction that the burden was upon defendant to establish matters in mitigation to the satisfaction of the jury is correct. *S. v. Cureton*, 778.

A charge, in stating defendant's contentions, that the burden was not upon the State to satisfy the jury beyond a reasonable doubt that defendant was guilty of murder in the second degree *is held* not prejudicial in view of the fact that defendant admitted the intentional killing of deceased with a deadly weapon and the fact that, immediately following, the court charged as to the presumptions arising therefrom. *Ibid.*

§ 27c. Instructions on Question of Premeditation and Deliberation.

An instruction correctly defining premeditation and deliberation and instructing the jury that if defendant formed a fixed design to kill a certain person at a subsequent time, no matter how soon, and pursuant to such fixed design kills such other person, the killing would be premeditated and deliberated, is without error, since it is not necessary to constitute premeditation and deliberation that the fixed design to kill be formed on an occasion prior to the fatal encounter. *S. v. Burney*, 598.

HOMICIDE—*Continued.*

§ 27f. Instructions on Question of Self-Defense.

The failure of the court to charge with particularity upon the principles of the right of self-defense in the preliminary portion of the charge defining the various kinds of homicide, lawful and unlawful, is not erroneous when in subsequent portions of the charge the court repeatedly instructs the jury that defendant would have the right to kill in self-defense if it reasonably appeared to him at that time necessary to save himself from death or great bodily harm. *S. v. Cureton*, 778.

§ 27g. Instructions on Question of Parties and Offenses.

Where defendant, intending to kill a certain person, by mistake inflicts fatal injuries on another, he is guilty in the same degree as though he had killed the person intended, and therefore an instruction that if the jury should be satisfied beyond a reasonable doubt that defendant intended to kill a certain person with malice and with premeditation and deliberation and that by mistake he shot and killed deceased, defendant would be guilty of murder in the first degree, is without error. *S. v. Burney*, 598.

§ 27h. Instruction on Less Degrees of Crime.

It is error for the court to instruct the jury that they might render one of two verdicts, guilty of murder in the first degree or of murder in the second degree, but that in no event might they return a verdict of guilty of manslaughter or not guilty, even though defendant testifies that he shot and killed deceased, since on defendant's plea of not guilty the presumption of innocence attaches until removed by the verdict of the jury, and the credibility of the testimony is for the jury to determine. *S. v. Maxwell*, 32.

In this prosecution for homicide defendant's confessions, properly admitted in evidence, tended to show that defendant killed his wife with premeditation and deliberation an hour or more after having formed a fixed intent to commit the act. *Held:* The refusal of the court to submit to the jury the question of defendant's guilt of manslaughter is not error and the instruction limiting the jury's consideration to the questions of murder in the first and second degrees and acquittal is without error. *S. v. Dixon*, 438.

In this prosecution for homicide the State contended and offered evidence to show that defendant killed deceased after premeditation and deliberation and with malice. Defendant made conflicting contentions that he intended to shoot deceased's daughter or that he intended to shoot a man who had made threats against him, and that in the dark he shot deceased through mistake. *Held:* The evidence, in no aspect, presents the question of defendant's guilt of manslaughter, and the failure of the court to submit the question of manslaughter to the jury will not be held for error. *S. v. Burney*, 598.

§ 29. Judgment and Sentence.

Upon conviction of defendant of murder in the first degree, the jury's voluntary recommendation for mercy is properly treated as surplusage and sentence of death must be rendered as the law commands. *S. v. Day*, 566.

§ 30. Appeal and Review.

Verdict of guilty of murder in the second degree renders immaterial the action of the court in overruling defendant's motion for directed verdict on the capital charge. *S. v. Cade*, 393.

The court correctly instructed the jury that defendant's failure to testify in his own behalf should not be considered against him. Thereafter the court, in instructing the jury in the weight to be given the testimony of an interested witness, inadvertently referred to testimony given by defendant, but thereafter corrected this instruction and charged the jury that he meant to refer to

HOMICIDE—*Continued.*

testimony of defendant's wife. *Held:* The inadvertent error thus corrected was not prejudicial, nor was it necessary for the court to have repeated the rule governing the consideration of testimony of an interested witness. *Ibid.*

Where the evidence would justify the court in confining the jury's inquiry to the question of murder in the first degree or acquittal, any error in the charge on the issue of manslaughter would seem to be harmless. *S. v. Alston*, 713.

Since the State in a prosecution for homicide is not required to negative the mere possibility that deceased received his fatal wound other than at the hands of the defendant, the admission of testimony of a declaration of deceased that he had not been struck by a train has no bearing on the question of the guilt or innocence of the defendant and its admission, though erroneous, is harmless. *S. v. Aiken*, 317.

Error in the charge in regard to the burden of proof upon the question of defendant's guilt of murder in the second degree is rendered harmless by the jury's verdict of guilty of murder in the first degree upon a charge repeatedly and correctly charging the burden of proof upon this degree of homicide. *S. v. Cureton*, 778.

HUSBAND AND WIFE.

§ 18b. Actions Involving Wife's Separate Estate.

This action was instituted to determine the rights and liabilities of the beneficiaries under the provision of the will of their common ancestor that the share of each should be charged with any indebtedness owed to the other beneficiaries. *Held:* Under the provision of C. S., 2507, 2513, the married beneficiaries might be sued alone as to their independent debts and the joinder of their husbands might be treated as surplusage but for the allegations of the complaint demanding a personal judgment against them, but since personal judgment is sought against the husbands, their demurrers for misjoinder of parties and causes were properly allowed. *Robertson v. Robertson*, 562.

§ 23. Nature and Elements of Offenses of Abandonment.

Abandonment of wife by husband is his willful separation from her without providing adequate support. *Hyder v. Hyder*, 239.

INDICTMENT AND WARRANT.

§ 22. Sufficiency of Indictment to Support Conviction of Less Degree of Crime Charged.

An indictment charging a felonious assault with intent to kill as defined in C. S., 4213, embraces as a lesser degree of the crime charged the offense of assault with a deadly weapon, and where the evidence is sufficient to sustain a verdict of the offense charged, defendant may not complain of a verdict of guilty of the lesser offense. *S. v. High*, 244.

INFANTS.

§ 1. Supervision and Protection of Courts of Equity.

The Superior Courts of the State in their equity jurisdiction have inherent authority over the property of infants, since they stand *in loco parentis* and have the same jurisdiction in this respect as that of the English High Courts of Chancery. *Coxe v. Charles Stores Co.*, 380.

§ 11. Damages and Recovery in Actions by Infants for Negligent Injury.

In an action by an infant to recover damages for negligent personal injury, any right of action which plaintiff's father may have to recover for loss of

INFANTS—*Continued.*

time, diminished earning capacity, and hospital bills being preserved, it is error to admit evidence of the amount of the hospital bills incurred, even as tending to show the extent of the injuries, especially when the hospital expenses incurred include expenses for another separate injury. *Parker v. Belotta*, 87.

INJUNCTIONS.

§ 6a. Enjoining Commission of Trespass.

Where defendant's use of the right of way granted by plaintiff is within the provisions of the contract of conveyance granting the easement, and there is no allegation that the easement was negligently used nor that in its use defendant maliciously damaged plaintiff's property, plaintiff's application for injunctive relief is properly denied. *Grocery Co. v. R. R.*, 223.

INSURANCE.

IV. The Contract in General
13. Construction and Operation. Allen v. Ins. Co., 70; Weiss v. Ins. Co., 230.
VI. Life Insurance
27. Effective Date of Policy. Cheek v. Ins. Co., 36.
29. Inconstestability Clauses. Weiss v. Ins. Co., 230.
30a. Forfeiture of Policy for Nonpayment of Premiums. Allen v. Ins. Co., 70.
31b. Avoidance or Forfeiture of Policies Issued upon Medical Examination for Misrepresentation or Fraud. Assurance Society v. Ashby, 280.
31c. Knowledge and Waiver by Insurer. Cheek v. Ins. Co., 36; Assurance Society v. Ashby, 280.
36a. Persons Entitled to Proceeds in General. Strayhorn v. Aycock, 43; Wilson v. Williams, 407.
VII. Double Indemnity, Accident and Health Provisions
38. Construction of Policies of Accident and Health Insurance as to Risks covered. Blake v. Hospital Care Assn., 703.
41. Actions on Double Indemnity Clauses. Warren v. Ins. Co., 402.
VIII. Liability and Indemnity Insurance
44. Provisions Limiting Liability or Constituting Conditions Precedent Thereto. Person v. Tyson, 127; Manheim v. Surety Co., 693.

§ 13. Construction and Operation of Insurance Contracts in General.

An insurance contract is of the making of the parties, and they agree upon its terms, provisions and limitations. *Allen v. Ins. Co.*, 70.

The rule that any ambiguity in an insurance contract should be resolved in favor of insured does not justify the creation of ambiguity by strained construction of ordinary words, when no ambiguity would otherwise exist. *Weiss v. Ins. Co.*, 230.

§ 27. Effective Date of Policy.

Under terms of receipt given for payment of two weeks premium, insurance contract was not consummated until application was accepted by home office, and there was no evidence of arbitrary refusal of application by insurer; and verbal representations of agent in conflict with written terms of receipt cannot alter its provisions. *Cheek v. Ins. Co.*, 36.

§ 29. Incontestability Clauses.

Since insurer may exempt all provisions relating to disability benefits from the incontestability clause of the policy, the extent to which it does so is to be determined by the language used in the excepting phrase of the incontestability clause. *Weiss v. Ins. Co.*, 230.

Language of incontestability clause *held* not to preclude insurer from seting up fraud as defense to liability for disability benefits. *Ibid.*

§ 30a. Forfeiture of Policy for Nonpayment of Premiums.

Insurance companies are dependent upon the collection of premiums for successful operation and existence, and failure of insured to pay premiums when due or within the grace period allowed automatically avoids the policy in the absence of waiver. *Allen v. Ins. Co.*, 70.

Held: Under the terms of the contract the policy lapsed as of the due date of the premiums upon failure to pay the premium prior to the expiration of the grace period, and tender or payment on the twentieth of the month does not put the policy in force as to illness beginning on the seventh of the month, the acceptance of premiums after the expiration of the grace period, if in fact insurer did accept same, having the effect under the terms of the contract of reinstating the policy prospectively only. *Ibid.*

§ 31b. Avoidance or Forfeiture of Policies Issued Upon Medical Examination for Misrepresentations or Fraud.

Written representations in answer to written questions in regard to previous hospitalization, treatment by a physician within the prior five years, and certain specified diseases, which induce insurer to assume the risk, are deemed material representations as a matter of law. *Assurance Society v. Ashby*, 280.

A policy not issued under the provisions of C. S., 6460, may be avoided for material misrepresentations which induced insurer to take the risk which it would not otherwise have taken, even in the absence of fraud, and therefore insurer need not prove that the misrepresentations were intentionally made. *Ibid.*

Insured may not defeat forfeiture on ground that he was ignorant of misrepresentations in application signed by him. *Ibid.*

§ 31c. Knowledge and Waiver by Insurer.

Parol representations of the soliciting agent that the policy would be immediately effective upon the payment of two weeks premium and the delivery of the premium receipt is not competent to contradict the written provisions of the receipt that the insurance would not be effective until the application was approved by insurer at its home office. *Cheek v. Ins. Co.*, 36.

Insured contended that he was ignorant of the misrepresentations in the examiner's statement, that they were written by the examiner and that insured signed same without reading it because he was in a hurry. *Held:* The misrepresentations were material as a matter of law and insurer is entitled to forfeiture upon insured's admission that they were false, there being no evidence that insurer's examiner had any personal knowledge as to the truth or falsity of the representations, and it appearing that insured signed same and adopted the statements as his own, carelessly and negligently without reading it. *Assurance Society v. Ashby*, 280.

§ 36a. Persons Entitled to Proceeds in General.

A policy payable to insured's estate, nothing else appearing, vests upon delivery in insured, and upon his death, in his personal representative, who may collect same only in her representative capacity. *Strayhorn v. Aycock*, 43.

Ordinarily, the beneficiary named in a life insurance policy has a vested interest therein which may not be destroyed without her consent in the absence of conditions or stipulations to the contrary. *Wilson v. Williams*, 407.

Where wife predeceases husband without surviving children, husband's estate is entitled to proceeds of policy on his life in which she was named beneficiary. *Ibid.*

§ 38. Construction of Policies of Accident and Health Insurance as to Risks Covered.

Cause remanded for findings sufficient to determine claim that insurer waived provision excluding hospitalization for maternity care. *Blake v. Hospital Care Assn.*, 703.

INSURANCE—*Continued.*

§ 41. Actions on Double Indemnity Clauses.

Where, in an action to recover double indemnity under the terms of a policy of life insurance, plaintiff shows the unexplained death of insured by violence, insurer seeking to avoid liability on the ground that death resulted from bodily injuries intentionally inflicted by another, has the burden of going forward with the evidence, but the burden of the issue of death by accidental means remains upon plaintiff. *Warren v. Ins. Co.*, 402.

The instruction of the court on the question of the burden of proof in this action to recover double indemnity under the terms of a life insurance policy *is held* not error in view of the pleadings. *Ibid.*

In an action to recover double indemnity under the terms of a life insurance policy the record and judgment in a criminal prosecution of another for murder of deceased insured is incompetent, plaintiff beneficiary not being bound by the verdict and judgment therein or estopped thereby to show that in fact the death of insured was caused by accidental means. *Ibid.*

In an action to recover double indemnity under the terms of a life insurance policy, testimony of a witness that the person inflicting the fatal injury was a stranger to deceased insured *is held* incompetent as being of a fact beyond the personal knowledge of the witness, and prejudicial to the insurer as tending to support plaintiff beneficiary's contention that the shooting of the insured was accidental rather than intentional. *Ibid.*

In an action to recover double indemnity under the terms of a policy of life insurance, testimony of a witness that the assailant who fatally shot deceased insured first pointed the gun in her face and that if she had not struck up her arm the bullet would have struck her, *is held* incompetent, since she could not testify to her own knowledge that the assailant would have shot her or that he intended to do so. *Ibid.*

In an action to recover double indemnity under the terms of a policy of life insurance the issue is whether insured's death resulted "from external, violent, and accidental means" within the policy provisions, and an issue as to whether death resulted from bodily injuries intentionally inflicted by another does not determine insurer's liability. *Ibid.*

§ 44. Provisions Limiting Liability or Constituting Conditions Precedent Thereto.

Construing the policy according to its terms, *it is held* the policy does not cover any loss from injury sustained beyond the territorial limits of the municipality, and defendant insurer's demurrer to the complaint was properly sustained, the provisions of the policy with respect to territorial limitations being valid, and there being no law which, read into the contract, would have the effect of modifying its express provisions. *Person v. Tyson*, 127.

Indemnity bond for taxi corporation *held* not to cover liability for injuries inflicted prior to the execution of the bond. *Manheim v. Surety Co.*, 693.

INTOXICATING LIQUOR.

§ 2. Construction and Operation of Control Acts.

The Alcoholic Beverage Control Acts do not repeal the provisions of the Turlington Act in regard to the possession and transportation of intoxicating liquors except in so far as the control acts are inconsistent with the Turlington Act. *S. v. Carpenter*, 635.

§ 4a. Possession in General.

Provision of Turlington Act permitting possession for personal use applies solely to structure used exclusively as dwelling, and this provision is not repealed by A. B. C. Acts. *S. v. Carpenter*, 635.

JUDGMENTS.

III. Judgments by Default
9. Judgments by Default Final. Land Bank v. Davis, 100.
11. Time of Default and Rendition of Judgment. Bank v. Derby, 669.
VI. Judgments on Trial of Issues
17a. In General. Troxler v. Bevill, 640.
VIII. Validity and Attack of Judgments
22b. Procedure; Motion in the Cause and Independent Action. Horne v. Edwards, 622; Woodruff v. Woodruff, 685; Steele v. Beaty, 680.
22f. Attack for Fraud. Horne v. Edwards, 622; Woodruff v. Woodruff, 685.
24. Modification and Correction. Land Bank v. Davis, 100; Crowder v. Stiers, 123.
X. Operation of Judgments as Bar to Subsequent Action
32. Identity of Parties and Matters in Scope of Pleadings in Prior Action. Grant v. Long, 186; Gibbs v. Higgins, 201; Sutton v. Woolard, 389; Leary v. Land Bank, 501.
33c. Judgments of Retraxit and Dismissal. Pridgen v. Lynch, 672; Steele v. Beaty, 680.
33d. Criminal Judgments as Bar to Subsequent Civil Action. Briggs v. Briggs, 78; Warren v. Ins. Co., 402.
35. Plea of Bar, Hearings and Determination. Steele v. Beaty, 680.
XI. Assignment of Judgments
37b. Right to Assignment upon Payment by One of Parties Jointly and Severally Liable. Hoft v. Mohn, 397.

§ 9. Judgments by Default Final.

The failure to file answer admits the allegations of fact set out in the complaint and entitles plaintiff to the relief justified by the facts alleged, but the judgment by default final may not grant relief in excess of, or different from the case stated in the complaint. C. S., 606. *Land Bank v. Davis*, 100.

§ 11. Time of Default and Rendition of Judgment.

Defendant made a special appearance and moved to dismiss the action for want of proper service. Later plaintiff moved to dismiss defendant's motion and for judgment by default. The clerk heard both the motions together; denied defendant's motion and granted plaintiff's motion, and upon appeal the Superior Court affirmed the judgment of the clerk as a whole. *Held:* Defendant was entitled to appeal from an adverse ruling by the clerk and to a final determination of his motion prior to the hearing of plaintiff's motion for judgment by default, since he could not resist plaintiff's motion without making a general appearance, and since he is entitled to answer or demur within 30 days after the final determination of his motion to dismiss upon a special appearance, C. S., 509, and the cause is remanded by the Supreme Court for further proceedings according to law. *Bank v. Derby*, 669.

§ 17a. Form and Requisites of Judgments in General.

A plaintiff is entitled to that relief within the jurisdiction of the court warranted by the facts alleged and proven, or, in courts where written pleadings are not required, to the relief warranted by the facts established, but the form of the action determines the course of judicial investigation and plaintiff will be bound in the appellate court by the theory of trial in the lower court. *Troxler v. Bevill*, 640.

§ 22b. Procedure: Motion in the Cause and Independent Action.

Independent action will not lie to set aside judgment for intrinsic fraud. *Horne v. Edwards*, 622.

A motion in the cause is the proper remedy to attack a judgment for intrinsic fraud. *Horner v. Edwards*, 622; *Woodruff v. Woodruff*, 685.

A judgment upon a *retraxit* is a complete bar to a subsequent action between the same parties upon the same subject matter so long as it remains in full force and effect, and it can be attacked on the grounds of mental incapacity only by motion in the cause. *Steele v. Beaty*, 680.

§ 22f. Attack for Fraud.

This action was instituted to set aside a prior judgment in ejectment upon allegation that it was obtained by fraud in that the plaintiff therein pointed out a fictitious corner of the tract of land in dispute and that the court surveyor, with knowledge of its falsity and the fraud intended to be perpetrated,

adopted such corner and built up a fictitious plat and that the verdict of the jury was based upon such false and manufactured evidence. *Held:* Perjury or the use of false or manufactured evidence is intrinsic fraud, and defendant's demurrer to the complaint was properly sustained, since an independent action will not lie to set aside a judgment for intrinsic fraud. *Horne v. Edwards*, 622.

Defendant wife in this action for divorce on the ground of two years separation made this motion in the cause to set aside the divorce decree on the ground of fraud, and offered evidence that at the time plaintiff alleged in his affidavit that the parties had agreed to a separation she was mentally incompetent and confined to a sanatorium. *Held:* The court's finding that there was no evidence of fraud in obtaining the divorce decree is error, and the cause is remanded for specific findings as to the mental status of defendant at the time plaintiff alleged the legal separation had taken place and as to whether plaintiff had knowledge of the facts at the time of making the statutory affidavit and at the time he offered evidence of a legal separation. *Woodruff v. Woodruff*, 685.

The fact that subsequent to a decree of divorce the plaintiff remarries does not preclude defendant from attacking the decree for fraud, since defendant is no less innocent than the person whom plaintiff subsequently married. *Ibid.*

§ 24. Modification and Correction.

The rule that after adjournment of the term a judgment rendered during the term is no longer *in fieri* and may not be altered, relates to the merits of the controversy, and until the judgment is satisfied it is still pending for certain purposes, including correction for apparent and proved clerical errors upon motion in the cause. *Land Bank v. Davis*, 100.

A judgment by default final for want of an answer does not deprive defendant of the right to move for a correction of the judgment by motion in the cause to have the judgment conform to the relief to which plaintiff is entitled upon the facts alleged in the complaint. *Ibid.*

Decree of foreclosure by default final is modified to order foreclosure of land and interests therein as described in the deed of trust. *Ibid.*

The court, upon proper application, has the power to modify a judgment for irregularity, and to properly define the limits of authority under the judgment. *Crowder v. Stiers*, 123.

§ 32. Identity of Parties and Matters in Scope of Pleadings in Prior Action in General.

An administrator executed an option on lands of the estate and thereafter sold same to defendant. Defendant instituted action against the purchaser in the option contract and others, for the possession of the lands and final judgment was entered that defendant was the owner of the lands and awarding damages for wrongful detention. Thereafter the purchaser in the option contract instituted suit against the administrator and recovered judgment for the amount paid under the contract. Thereafter he instituted this action against defendant to recover possession of the lands. *Held:* The record justifies the judgment of the lower court that the present action is barred by the judgments in the prior proceedings. *Grant v. Long*, 186.

Judgment in partition proceedings in which title has been put in issue is conclusive on the parties on the issue of title, and operates as a bar to a subsequent action between the parties as to matters which were adjudicated or which were within the scope of the issue and might have been litigated. *Gibbs v. Higgins*, 201.

Judgment in partition proceeding upholding validity of deed of party claiming sole seizin *held* to bar later action attacking the deed. *Ibid.*

A judgment setting aside foreclosure under a deed of trust and reëstablishing the lien and the amount secured thereby, the validity of the instrument not being attacked, constitutes *res judicata* as to the rights of the parties with respect to the subject matter involved, and a subsequent action to restrain foreclosure under the instrument is properly dismissed. *Sutton v. Woolard*, 389.

Ordinarily, in order for a judgment to bar a subsequent action there must be identity of subject matter and of issues, and the parties to the subsequent action must be the same or in privity with those in the former action, and the estoppel must be mutual. *Leary v. Land Bank*, 501.

Judgment in favor of employee *held* to bar subsequent action by third person against employer upon the doctrine of *respondeat superior*, and, although the chauffeur and the employee were joint tort-feasors upon the allegations so that the judgment in favor of the employee would not be *res judicata* as to the chauffeur, the estoppel in favor of the employer will inure to the chauffeur's benefit, since the chauffeur was also an employee. *Ibid.*

The operation of a judgment as a bar is not affected by the fact that the action in which it was rendered was instituted subsequent to the action in which the estoppel is pleaded, priority of adjudication being the basis of an estoppel by judgment. *Ibid.*

§ 33c. Judgments of Retraxit and Dismissal.

Where, upon appeal from a justice of the peace, the Superior Court dismisses the action, but not the appeal, by consent of the parties and without prejudice to their rights, such judgment will not bar a subsequent action between the parties involving the same subject matter. *Pridgen v. Lynch*, 672.

The judgment pleaded as a bar to the present suit recited that the plaintiff therein did not care to further prosecute the action and had agreed that the same be dismissed, and upon motion and agreement it was ordered that the action be dismissed and that the summons and complaint be withdrawn from the records. The judgment was consented to in writing by plaintiff personally, and it further appeared by uncontradicted evidence that the judgment was signed in consequence of a release theretofore executed by plaintiff and upon a consideration paid to her at the very time of the entry of the judgment. *Held:* The judgment was one upon a *retraxit*, which constitutes a bar to a subsequent action on the same subject matter between the parties, and defendants' motion to nonsuit the second action should have been granted. *Steele v. Beaty*, 680.

§ 33d. Criminal Judgment as Bar to Subsequent Civil Action.

A judgment for defendant in a criminal action for abandonment is not *res judicata* as to the wife's right to counsel fees and support pending litigation of a suit for divorce thereafter instituted by the husband, the defendant in the criminal action. *Briggs v. Briggs*, 78.

In an action to recover double indemnity under the terms of a life insurance policy the record and judgment in a criminal prosecution of another for murder of deceased insured is incompetent, plaintiff beneficiary not being bound by the verdict and judgment therein or estopped thereby to show that in fact the death of insured was caused by accidental means. *Warren v. Ins. Co.*, 402.

JUDGMENTS—*Continued.*

§ 35. Plea of Bar, Hearings and Determination.

If, upon the plea of estoppel by judgment, the nature of the judgment does not clearly appear upon its face, the court may hear evidence to determine whether the judgment is one of nonsuit or one upon a *retraxit*, which determines the cause upon its merits and constitutes a bar to a subsequent action. *Steele v. Beaty*, 680.

§ 37b. Right to Assignment of Judgment Upon Payment by One of Parties Jointly and Severally Liable.

Where a person jointly and severally liable on a judgment pays same, he extinguishes the judgment and is not entitled to an assignment thereof against the other judgment debtors, since the judgment itself is not a proper instrument for the adjustment of the equities between them, the exclusive remedy for such adjustment being by transfer of the judgment to a trustee under the provision of C. S., 618, and a substantial compliance with the statute is necessary in order to invoke its protection. *Hoft v. Mohn*, 397.

Commissioner of Banks paying judgment against bank out of its assets *held* not entitled to assignment as against other judgment debtors. *Ibid.*

JUDICIAL SALES.

§ 3. Time and Conduct of Sales.

Tax sale not had on a Monday or on one of the first three days of term of court *held* void. *Caswell County v. Scott*, 185.

JURY.

§ 1. Competency, Qualification and Challenges for Cause.

The court has the discretionary power to allow a venireman to become one of the panel, notwithstanding that he has testified on the *voir dire* that he has formed and expressed an opinion as to defendant's guilt when he also testifies that he can disabuse his mind of such opinion and give the defendant a fair and impartial trial on the evidence produced. *S. v. Dixon*, 438.

Defendant's exception to the refusal of a denial of a challenge for cause cannot be sustained when he does not exhaust his peremptory challenge before the panel is completed. *Ibid.*

§ 3. Challenges to the Array.

A challenge to the array on the ground that the sheriff and his deputies selected for the special venire, under instructions by the sheriff, freeholders of good character, who had not served on the jury within the past two years and who lived in townships in the county other than the township in which the crime was committed and townships contiguous thereto, is properly refused, the instructions of the sheriff being in compliance with C. S., 2338, and the action of the sheriff and the deputies showing no partiality, misconduct or irregularity in making out the list. *S. v. Dixon*, 438.

JUSTICES OF THE PEACE.

§ 3. Civil Jurisdiction. (Jurisdiction of Superior Courts on appeal, see Courts § 2d.)

Magistrates have no jurisdiction of suit for reformation. *Cheek v. Ins. Co.*, 36.

LANDLORD AND TENANT.

§ 6. Tenancies at Will and at Sufferance.

A lease for the period of time during which a filling station on the premises is occupied by lessee, with provision that if for any reason lessee vacates the

property the lease should terminate, is a lease for an uncertain duration terminable at the will of the lessee, and is, therefore, a lease at will terminable at the will of lessor also. *Sappenfield v. Goodman*, 417.

When the lessor notifies his tenants at will of his election to terminate the lease and demands possession of the premises, the lessees holding over and continuing in possession after such notice become tenants at sufferance, and this result is not affected by the fact that thereafter judgment is entered for lessee in summary ejectment upon payment of the rents accrued, from which judgment lessor fails to perfect his appeal. *Ibid.*

§ 11. Liability of Lessor for Injuries from Defective or Unsafe Conditions.

Plaintiff was injured when she fell on the sidewalk in front of defendant's filling station. Plaintiff alleged that defendant lessee in washing the cement floors of the station forced the water across the pavement provided by the city for pedestrians, that plaintiff fell on a thin coating of ice on the sidewalk formed by the freezing of the waste water. Plaintiff introduced in evidence ordinances of the city prohibiting the drainage of water from any motor machinery or refrigerator on the sidewalk, open ditches or the street, and requiring drains from buildings to empty into ditches between the street and sidewalk. *Held:* The water alleged to have caused the injury in suit did not come from a drain or from any motor machinery or refrigerator, and there was no evidence that failure to provide any drain required by ordinances in anywise caused the condition of the sidewalk complained of. *Hudson v. Oil Co.*, 422.

Ordinarily, the lessor is not liable for injuries to a third person resulting from any defective condition in the leased premises unless he contracts to repair, knowingly demises the premises in a ruinous condition or in a state of nuisance, or unless he authorizes a wrong. *Wilson v. Dowtin*, 547.

The premises in question were leased as a store, and thereafter, upon application of lessee, lessor built a store room in the rear in which a stairway, which had entered the basement from the outside, was included, and an open, unprotected well for the stairway was left in the room. *Held:* Lessor could not have reasonably anticipated that a customer of the store would be injured by falling into the open stair well in the part of the premises reserved for the lessee and its employees so as to be liable to the customer under the exception to the general rule that the lessor is liable when he knowingly demises the premises in a ruinous condition or in a state of nuisance, and, there being no evidence that lessor contracted to repair or that he authorized a wrong, his motion to nonsuit was properly granted. *Ibid.*

LARCENY.

§ 5. Presumptions.

There is no presumption that a person in the wrongful possession of property acquired such possession by the commission of the crime of larceny. *S. v. Norggins*, 220.

§ 7. Sufficiency of Evidence and Nonsuit.

The evidence, viewed in the light most favorable to the State, tended to show that defendant's possession of the property in question was wrongful, but there was no evidence that the warehouse in which the property was stored had been broken into, or that defendant, who was a truck driver for the company owning the property, had access to the key to the warehouse except when with other employees, and no evidence that any property had

LARCENY—*Continued.*

been taken from the warehouse except for delivery to purchasers. *Held:* The evidence is insufficient to show that the crime of larceny had been committed, and defendant's motion to nonsuit should have been allowed. *S. v. Norggins*, 220.

LIBEL AND SLANDER.

§ 2. Words Actionable Per Se.

Our courts adhere to the common law rule that words, to be actionable *per se*, must affect one's business or occupation or tend to hold him up to public hatred or contempt, etc. *Scott v. Harrison*, 427.

The complaint alleged that defendant's manager spoke of and concerning plaintiff employee words which, under the circumstances, amounted to a charge that plaintiff was untruthful and was an unreliable employee. *Held:* Even conceding that the words were susceptible to the meaning attributed to them in the complaint, they are not actionable *per se*, and defendant's demurrer to the complaint was properly sustained in the absence of allegation of special damage. *Satterfield v. McLellan Stores*, 582.

§ 5. Publication.

Dictation of memorandum by corporate officer to stenographer *held* not a publication. *Satterfield v. McLellan Stores*, 582.

§ 7a. Privilege in General.

This action was instituted by the wife of a high school principal against the chairman of the county board of education, for slander alleged to have been uttered by defendant in connection with the employment of plaintiff's husband. It was alleged that the slander was uttered by defendant to persons who had called by defendant's office in a bank. *Held:* It does not appear from the complaint that the relation between the defendant and the persons to whom the alleged declarations were made was such as to bring the declarations within the rule of privilege or qualified privilege, and defendant's demurrer on the ground of privilege was properly overruled. *Scott v. Harrison*, 427.

§ 11. Pleadings.

Where the alleged words are not actionable *per se*, the complaint must allege special damage. *Scott v. Harrison*, 427.

Plaintiff alleged that defendant, who was the chairman of the county board of education, made declarations to the effect that plaintiff, who was the wife of a high school principal, had been forbidden to go upon the school grounds and that the reason he was not reëlecting plaintiff's husband to his position as principal was due to the character and reputation of the plaintiff. *Held:* The words alleged are not actionable *per se* in their ordinary meaning, and in the absence of allegation of any special meaning or "innuendo," the complaint is insufficient to charge that the words were actionable *per se*. *Ibid.*

Held: Complaint failed to allege words actionable *per se* or special damage, and demurrer should have been sustained. *Scott v. Harrison*, 427; *Satterfield v. McLellan Stores*, 582.

§ 15. Verdict and Judgment.

In order to warrant execution against the person in an action for slander, as well as in actions for other torts, it is necessary that there be an affirmative finding by the jury upon a separate issue of express or actual malice, as distinguished from the malice implied by law from the utterance of words which are actionable *per se*. *Crowder v. Stiers*, 123.

LIMITATION OF ACTIONS.

I. Statutes of Limitation
1. Nature and Construction in General. Edwards v. Hair, 662.
2e. Actions Barred in Three Years. Howard v. White, 130.
II. Computation of Period of Limitation
3b. Accrual of Right of Action on Accounts. Tew v. Hinson, 456; Hammond v. Williams, 657.
3c. Accrual of Right of Action to Establish Trust. Wolfe v. Smith, 286.
3e. Accrual of Right of Action for Deficiency Judgment. Building & Loan Assn. v. Black, 400; Albright v. Pearce, 796.
6. Continuing and Separable Trespass. Ivester v. Winston-Salem, 1; Hooper v. Lumber Co., 308.
III. Matters Effecting Waiver of Plea and Estoppel
12a. Part Payment. Edwards v. Hair, 662.
IV. Actions
16. Burden of Proof. Hooper v. Lumber Co., 308; Edwards v. Hair, 662.
18. Sufficiency of Evidence and Nonsuit. Metcalf v. Ratcliff, 243; Hooper v. Lumber Co., 308; Fleming v. Land Bank, 414.

§ 1. Nature and Construction of Statutes of Limitation in General.

The fact that the notes secured by the instrument are not under seal and are barred does not in itself render the right of foreclosure inoperative under C. S., 2589, since the bar of the statute affects the remedy but not the right. *Edwards v. Hair*, 662.

§ 2e. Actions Barred in Three Years.

An action on a note under seal against an endorser on the note is ordinarily barred after three years from maturity of the note, C. S., 441 (1), even though the endorsement is itself also under seal, an endorser not being a principal to the note so as to come within the provisions of C. S., 437 (2), prescribing a ten-year period "upon a sealed instrument against the principal thereto." *Howard v. White*, 130.

§ 3b. Accrual of Right of Action on Accounts.

Facts *held* insufficient to establish mutual, open, and current accounts, and statute began to run from date of each item. *Tew v. Hinson*, 456.

Plaintiffs, copartners, contended that the last item in the mutual, open and current account with defendant was entered within three years next preceding the institution of the action. Defendant contended that this item was entered after the partnership had been incorporated and that therefore it was not an item in the mutual, open and current account with the partnership. Plaintiff contended that notwithstanding the granting of a charter of incorporation the partnership continued to do business until some time after the item in question was entered. *Held:* Conflicting evidence as to whether the item in question was entered in dealings with the partnership or with the corporation was properly submitted to the jury. *Hammond v. Williams*, 657.

§ 3c. Accrual of Right of Action to Establish Trust.

This action was instituted by heirs of the wife, against the husband and the grantees in encumbrances on the land executed by him, to declare plaintiffs the owners of the land under a resulting trust upon evidence that the total purchase price for the land was furnished by money belonging to the wife's separate estate. *Held:* Since defendant husband was in lawful possession of the lands as tenant by the curtesy at the time of the institution of the action, neither the three nor ten-year statutes of limitation bars the actions, there being no disavowal of the trust by the husband and nothing sufficient in law to put plaintiffs on notice of a claim adverse to them, the mere registration of the deeds of trust being insufficient for this purpose, and there being no competent evidence sufficient to show a foreclosure of any of the instruments. *Wolfe v. Smith*, 286.

§ 3e. Accrual of Right of Action for Deficiency Judgment.

An action for a deficiency judgment after foreclosure is not barred by chapter 529, section 1, Public Laws 1933, Michie's N. C. Code, 437 (a), when it is

instituted less than one year after the expiration of the ten-day period for an increase in bid, even though it is instituted more than one year after the date the property is exposed for sale. *Building & Loan Assn. v. Black*, 400; *Albright v. Pearce*, 796.

§ 6. Continuing and Separable Trespass.

This action was instituted against a municipality to recover damages to private lands resulting from a continuing or recurring nuisance in the operation of its sewage disposal plant, incinerator and abattoir. *Held:* Each successive act constitutes a distinct and separate renewal of the wrong, and only damages suffered prior to the bar of the statute are affected thereby, and plaintiff is entitled to recover for such partial taking of his land the difference in the value of his land at the time of the institution of the action and its value at the time the statute ceased to bar his claim. *Ivester v. Winston-Salem*, 1.

Plaintiff instituted this action to recover damages resulting from the overflow of waters of a river alleged to have been caused by the negligent acts and omissions of defendant in its logging operations in the improper construction of bridges across the river, the leaving of tree laps and debris along the river bank and the negligent failure to remove the bridges after cessation of logging operations, which negligent acts and omissions transpired over a period of years. *Held:* While ordinarily a cause of action in tort does not accrue until some injury results from the negligence of defendant, the running of the statute of limitation in the present case must be computed from the time of the alleged wrongful acts or omissions. *Hooper v. Lumber Co.*, 308.

Plaintiff instituted this action to recover for damages resulting from the overflow on his lands of waters of a river alleged to have resulted from the negligent acts and omissions of defendant in its logging operations. *Held:* Even if it be conceded that the alleged negligence constituted a continuing omission of duty toward the plaintiff by defendant, plaintiff must show that defendant was in possession and control of the upper lands within the statutory period, C. S., 441. *Ibid.*

§ 12a. Part Payment.

Payment on the notes secured by the instrument by a maker repeals the bar of the statute of limitations as to a comaker of the notes and the mortgage so that an action to foreclose the mortgage within ten years from such payment is not barred as to such comaker by C. S., 2589. *Edwards v. Hair*, 662.

§ 16. Burden of Proof.

Where defendant pleads the appropriate statute of limitations the burden is upon plaintiff to prove that the action is not barred. *Hooper v. Lumber Co.*, 308.

Mortgagor attacking foreclosure deed on the ground that at the time of the foreclosure sale the power of sale was barred has the burden of proving that the foreclosure deed was inoperative and an instruction that the burden was on the purchaser at the sale to prove that the power of sale was not barred at the time of foreclosure is error. *Edwards v. Hair*, 662.

§ 18. Sufficiency of Evidence and Nonsuit.

Where one cause alleged is not barred by statute of limitations, nonsuit on ground of bar of statute is error. *Metcalf v. Ratcliff*, 243.

Nonsuit on ground of bar of statute *held* proper upon failure of plaintiff to prove that action was not barred. *Hooper v. Lumber Co.*, 308.

LIMITATION OF ACTIONS—*Continued.*

Where plaintiff fails to affirmatively show that her cause of action against a defendant is not barred, such defendant's motion to nonsuit upon his plea of the applicable statute of limitations is properly allowed. *Fleming v. Land Bank*, 414.

MASTER AND SERVANT.

I. The Relation
9. Compensation of Employee. Durant v. Powell, 628.
III. Employer's Liability for Injuries to Employee
16. Warning and Instructing Servant. McLaughlin v. Black, 85.
IV. Liability for Injuries to Third Persons
21b. Course of Employment; Scope of Authority. West v. Woolworth Co., 211; Vincent v. Powell, 336.
22. Liability of Employers of Independent Contractors for Negligence of Contractor's Employees. Hudson v. Oil Co., 422.
23. Negligence or Wrongful Act of Servant. Hudson v. Oil Co., 422.
V. Federal Employers' Liability Act
27. Negligence of Railroad Employer. Buie v. Powell, 67.
VII. Workmen's Compensation Act
40a. Injuries Compensable in General. Love v. Lumberton, 28; McGill v. Lumberton, 752.
40d. Whether Injury Result from an "Accident." Love v. Lumberton, 28; McGill v. Lumberton, 752.
40f. Whether Accident "Arises in Course of Employment." Lassiter v. Tel. Co., 227; Porter v. Noland Co., 724.
42b. Additional Hospitalization. Millwood v. Cotton Mills, 419.
52b. Evidence and Burden of Proof in Hearings Before Commission. McGill v. Lumberton, 752.
55d. Review of Award by Courts. Lassiter v. Tel. Co., 227; Millwood v. Cotton Mills, 519; Porter v. Noland Co., 724; McGill v. Lumberton, 752.
VIII. Unemployment Compensation Act
56. Validity, Nature and Construction in General. Unemployment Compensation Com. v. Ins. Co., 479; Unemployment Compensation Com. v. Trust Co., 491.
57. Employers and "Employing Units" within Meaning of the Act. Unemployment Compensation Com. v. Ins. Co., 479; Unemployment Compensation Com. v. Trust Co., 491.
58. Employees within Meaning of the Act. Unemployment Compensation Com. v. Ins. Co., 479.
59. Computation of Amount of Taxes. Unemployment Compensation Com. v. Trust Co., 491.

§ 9. Compensation of Employee.

The evidence tended to show that plaintiff was employed upon a regular eight-hour shift, that thereafter, due to unfavorable business conditions, the employer required him to work eight hours out of twelve hours each day, the employee to get four hours off during each 12-hour period, and that this change was fully explained to the employee and that he continued to work and draw his pay for an 8-hour day. The employee instituted this action contending that he had worked a 12-hour day and was entitled to 4 hours time and a half for each day he worked. *Held:* A contract is the agreement of both parties and its legal consequences are not dependent upon the impressions and understandings of one of them alone, and plaintiff employee could not accept the offer of employment with full knowledge and later insist on his secret mental reservations as to compensation. *Durant v. Powell*, 628.

§ 16. Warning and Instructing Servant.

Plaintiff, at the time of his injuries, was sixteen years old, and was injured on the second day of his employment at defendant's sawmill when he was caught in the unguarded saw. It appeared that plaintiff had had no previous experience in this work, and that defendant failed to warn and instruct him in regard to the dangers and hazards. *Held:* The evidence was sufficient to overrule defendant's motion to nonsuit, and should have been submitted to the jury on the question of whether defendant was negligent in failing to warn and instruct his young and inexperienced employee as to the dangers and hazards. *McLaughlin v. Black*, 85.

§ 21b. Course of Employment: Scope of Authority.

A principal is liable for the wrongful acts of the agent, not only if the acts are expressly authorized, but also if the acts are within the agent's implied authority. *West v. Woolworth Co.*, 211.

MASTER AND SERVANT—*Continued.*

An act is within the agent's implied authority, even though contrary to the expressed directions of the principal, when the act is done in furtherance of the principal's business and in the discharge of the duties of the employment, the principal being liable if the agent, in performing such duties, adopts a method which constitutes a tort and inflicts injury on a third person. *Ibid.*

Allegation that agent uttered slander "while on duty" *held* sufficient as against demurrer to charge that act was committed in scope of employment. *Vincent v. Powell*, 336.

§ 22. Liability of Employers of Independent Contractors for Negligence of Contractors' Employees.

Lease *held* to constitute lessee an independent contractor in the operation of filling station in question. *Hudson v. Oil Co.*, 422.

Evidence *held* not to show that contract constituting lessee an independent contractor had been modified or abandoned. *Ibid.*

§ 23. Negligence or Wrongful Act of Servant.

A defendant may not be held liable under the doctrine of *respondeat superior* when the jury finds that the alleged employee was not guilty of negligence proximately causing the injury in suit. *Hudson v. Oil Co.*, 422.

§ 27. Negligence of Railroad Employer.

Plaintiff may not recover for death of intestate when intestate's own acts are the basis for the doctrine of *respondeat superior* under which recovery is sought. *Buie v. Powell*, 67.

In an action to recover for the death of a railroad employee in charge of track maintenance, resulting when a dump car under his supervision derailed, the doctrine of *res ipsa loquitur* does not apply, since intestate himself was responsible for the condition of the track and the equipment under his control. *Ibid.*

The scintilla rule of evidence is not recognized in actions under the Federal Employer's Liability Act. *Ibid.*

§ 40a. Injuries Compensable in General.

Injuries to an employee are compensable under the Workmen's Compensation Act if they result from an accident which arises out of and in the course of the employment. *Love v. Lumberton*, 28.

In order for the death of an employee to be compensable it must result from an injury by accident arising out of and in the course of the employment. Public Laws of 1929, ch. 120, sec. 2 (j) (f). *McGill v. Lumberton*, 752.

§ 40d. Whether Injury Results from an "Accident."

An "accident" as defined in the Workmen's Compensation Act is an unlooked for and untoward event which is not expected or designed by the injured employee. *Love v. Lumberton*, 28.

Evidence that employee got lime in his eye in course of employment *held* to support finding that injury resulted from "accident." *Ibid.*

Evidence of violent death raises *prima facie* case that death resulted from an accident. *McGill v. Lumberton*, 752.

§ 40f. Whether Accident "Arises in Course of Employment."

Evidence tending to show that an employee was fatally injured while being transported from his home to the place of his work, and that such transportation was gratuitous and not furnished as a matter of right under the contract of employment, sustains the finding of the Industrial Commission that the injury did not arise in the course of the employment. *Lassiter v. Tel. Co.*, 227.

MASTER AND SERVANT—*Continued.*

Evidence that plaintiff, a traveling salesman, used his employer's car for a week-end pleasure trip and was injured in a wreck in returning *is held* to support the finding of the Industrial Commission that the accident did not arise out of and in the course of the employment, notwithstanding that the injured employee, at the destination of the trip, met and conversed with a representative of the employer without appointment or direction of the employer, primarily in regard to a personal matter. *Porter v. Noland Co.*, 724.

§ 42b. Additional Hospitalization.

Whether additional hospitalization and treatment will tend to lessen the period of an injured employee's disability so as to sustain an award of additional medical attention is a question for the Industrial Commission upon competent evidence. *Millwood v. Cotton Mills*, 419.

Evidence *held* not to sustain finding that additional hospitalization would tend to lessen the period of employee's disability caused by dementia præcox. *Ibid.*

The Industrial Commission may award additional hospitalization only upon proper finding that it would tend to lessen the period of employee's disability. *Ibid.*

§ 52b. Evidence and Burden of Proof in Hearings Before Commission.

Where the dependents of a deceased employee show that his death resulted from a bullet wound, such showing raises a *prima facie* case only of death by accident, placing upon the employer the burden of going forward with evidence to show that the employee killed himself within the exemption or forfeiture under sec. 13, ch. 120, Public Laws of 1929. *McGill v. Lumberton*, 752.

§ 55d. Review of Award by the Courts.

The findings of fact by the Industrial Commission are conclusive and not subject to review on appeal, either in the Superior Court or Supreme Court, if they are supported by competent evidence, even though the Court might have reached a different conclusion if it had been the fact-finding body. *Lassiter v. Tel. Co.*, 227.

A finding of fact by the Industrial Commission which is not supported by any competent evidence is not conclusive. *Millwood v. Cotton Mills*, 519.

Findings of fact of the Industrial Commission supported by competent evidence are conclusive on the courts. *Porter v. Noland Co.*, 724.

Where it appears that the Industrial Commission has found the facts under a misapprehension of the law, the cause will be remanded for findings by the Commission upon consideration of the evidence in its true legal light. *McGill v. Lumberton*, 752.

§ 56. Validity, Nature, and Construction of Unemployment Compensation Act in General.

The construction and interpretation of the North Carolina Unemployment Compensation Act is for our State courts. *Unemployment Compensation Com. v. Ins. Co.*, 479.

Our State Unemployment Compensation Act was passed pursuant to a plan national in scope, and therefore serious consideration is to be given to the construction placed upon similar language of the Federal statute by the Commissioner of Internal Revenue, but the interpretation of the act is finally for our courts, and neither the ruling of the Commissioner nor that of the State Unemployment Compensation Commission is conclusive. *Unemployment Compensation Com. v. Trust Co.*, 491.

Terms of Unemployment Compensation Act must be liberally construed to effectuate its purpose. *Unemployment Compensation Com. v. Ins. Co.*, 479.

MASTER AND SERVANT—*Continued.*

§ 57. Employers and "Employing Units" Within Meaning of Act and Liable for Tax.

Mere membership of an insurance company in a Federal Home Loan Bank does not constitute the insurance company a "Federal instrumentality" so as to exempt it from unemployment compensation taxes under the State law. *Unemployment Compensation Com. v. Ins. Co.*, 479.

Bank chartered by the State is liable for Unemployment Compensation taxes, even though it is a member of the Federal Reserve System. *Unemployment Compensation Com. v. Trust Co.*, 491.

A State bank which is a member of the Federal Reserve System is not exempt from taxation under the Unemployment Compensation Act because of its connection with the Federal Deposit Insurance Corporation nor may it claim such exemption because the tax would discriminate against it in favor of national member banks, since to relieve it from such taxation would discriminate in favor of it against nonmember State banks. *Ibid.*

The terms "employment," "employer," "employing unit," "wages," and "remuneration" as used in the State Unemployment Act must be liberally construed to effectuate the purpose of the act to relieve the evils of unemployment, and the definition of the terms as contained in the act are controlling and are broader than the common law meaning of the terms, and the act includes in its scope relationships which might be excluded by a strict common law application of the definition of an independent contractor. N. C. Unemployment Compensation Act, secs. 19 (e), (f), (g), (m), (n). *Unemployment Compensation Com. v. Ins. Co.*, 479.

§ 58. Employees Within Meaning of the Act.

Employer has burden of showing that services for remuneration are within the exemptions of the Unemployment Compensation Act. *Unemployment Compensation Com. v. Ins. Co.*, 479.

Insurance agents and managers, in their capacity as soliciting agents, are engaged in employment within the coverage of the Unemployment Compensation Act. *Ibid.*

§ 59. Computation and Amount of Taxes Under Unemployment Compensation Act.

Taxes levied for year 1936 under Unemployment Compensation Act *held* void as contravening Art. I, sec. 32. *Unemployment Compensation Com. v. Trust Co.*, 491.

MONEY RECEIVED.

(Actions to recover value of services or chattels under implied promise to pay, see Quasi-Contracts.)

§ 1. Nature and Essentials of Right of Action.

Person accepting payment must have actual or constructive notice that the funds were misappropriated in order to be responsible. *LaVecchia v. Land Bank*, 73.

Plaintiff's allegations were to the effect that defendant's agent represented that plaintiff owed a certain sum on an open account, when in fact no amount was due thereon, and that plaintiff paid said amount through fraud, inadvertence or mistake and that said amount in law and good conscience should be refunded to him. *Held:* The allegations are sufficient to state a cause of action for the recovery of money paid under a mistake of fact, and defendant's motion of nonsuit is erroneously granted notwithstanding the absence of allegations sufficient to support a cause of action for fraud. *Sparrow v. Morrell & Co.*, 452.

MONEY RECEIVED—*Continued.*

Evidence merely tending to show that intestate had in his safe deposit box a sum of money belonging to plaintiff, and that after intestate's death a much smaller sum belonging to plaintiff was found in the safe deposit box, is insufficient to support a recovery for money had and received, since the evidence is silent as to the reason for the diminution in the amount of money. *Troxler v. Bevill*, 640.

The complaint alleged in substance that plaintiff cotton broker paid for cotton by a cotton ticket showing the weight and number of bales and the amount due therefor, which ticket was paid by the bank under arrangement made by plaintiff with it, that defendant's tenant obtained a ticket for cotton sold which he took to the bank and had credited to defendant's account, that thereafter he obtained another ticket for the same cotton which plaintiff failed to mark "duplicate," which the tenant took to the bank for transmission to defendant in order to show the amount of cotton sold, and which through inadvertence the bank also credited to defendant and charged to plaintiff's account. *Held:* Defendant's demurrer to the complaint was properly overruled, since the facts alleged disclosed unjust enrichment of defendant at the expense of plaintiffs, and that in equity the money obtained on the second cotton ticket belonged to plaintiffs. *Harrington v. Lowrie*, 706.

MORTGAGES.

III. Construction and Operation
12. Registration, Lien and Priorities. Wolfe v. Smith, 286; Case v. Arnold, 593.
17. Rights and Liabilities of Mortgages and Cestuis Que Trust. Fleming v. Land Bank, 414.
VII. Discharge and Cancellation
27. Payment and Satisfaction. Bank v. Turner, 665.
28. Form, Methods and Validity of Cancellation. Hill v. Street, 312.
VIII. Foreclosure
30a. Default in General. Fleming v. Land Bank, 414; Land Bank v. Moss, 445.
30g. Parties who May Enjoin Foreclosure. Sappenfield v. Goodman, 417.
31d. Decree of Foreclosure. Bank v. Davis, 100.
32a. Power of Sale in General. Sutton v. Woolard, 389; Edwards v. Hair, 662.
32e. Limitations on Exercise of Power of Sale. Edwards v. Hair, 662.
34b. Rights of Bidders and Statutory Time for Increase of Bid. Building & Loan Assn. v. Black, 400.
36. Deficiency and Personal Liability. Building & Loan Assn. v. Black, 400; Albright v. Pearce, 796.
39a. Parties who May Attack Foreclosure. Land Bank v. Moss, 445.
39c. Waiver of Right to Attack Foreclosure and Estoppel. Land Bank v. Moss, 445.
39d. Rights upon Wrongful Foreclosure. Fleming v. Land Bank, 414.
39f. Actions to Set Aside Foreclosure. Edwards v. Hair, 662.
IX. Operation and Effect of Foreclosure
43b. Rights of Cestuis Que Trust upon Decree Setting Aside Foreclosure. Sutton v. Woolard, 389.

§ 12. Registration, Lien and Priorities.

Where trustee of resulting trust encumbered lands to secure his personal preëxisting debt, his grantee in the encumbrance is not a *bona fide* purchaser so as to defeat rights of *cestuis que trustent*. *Wolfe v. Smith*, 286.

Plaintiff instituted this action to reform a mortgage upon allegations that a certain lot belonging to mortgagor had been omitted from the description by mutual mistake and that the defendant who held a subsequent mortgage upon the property described in plaintiff's mortgage, including the lot omitted therefrom by mistake, had actual notice thereof and that he was not an innocent purchaser for value. *Held:* The allegation as to notice is unavailing, since no notice, however full and formal, will take the place of registration, but such defendant's demurrer *ore tenus* should not have been sustained, since the complaint alleges that he was not an innocent purchaser for value and the registration laws, C. S., 3309, 3311, protect only creditors and purchasers for value. *Case v. Arnold*, 593.

MORTGAGES—*Continued.*

§ 17. Rights and Liabilities of Mortgagees and Cestuis Que Trustent.

A mortgagee in possession is chargeable with a reasonable rental and with the value of wood and timber removed from the premises during its possession which must be applied to the mortgaged indebtedness. *Fleming v. Land Bank*, 414.

§ 27. Payment and Satisfaction.

Plaintiff instituted this action to recover balance due on a deed of trust and to foreclose the instrument. Defendants contended that they had deposited with plaintiff securities worth more than the amount of the mortgage debt, and plaintiff admitted the receipt of the securities and that it had sold same at private sale for less than face value and for less than defendant's mortgage notes. *Held:* While ordinarily the burden is upon the debtor to prove an affirmative defense or payment in whole or in part, where a pledgee admits the sale of the securities at private sale at a substantial loss, the burden is upon the pledgee to show reasonable diligence and good faith in the sale of the securities and the proper application of the proceeds, and an instruction that the burden was upon the pledgor to show that the pledgee failed to exercise reasonable diligence and good faith, is error. *Bank v. Turner*, 665.

§ 28. Form, Methods, and Validity of Cancellation.

Where infants own the debt secured by deed of trust, cancellation of the deed of trust by the trustee therein named is void in the absence of authorization by them or by their guardian duly appointed. *Hill v. Street*, 312.

§ 30a. Default in General.

Plaintiff's evidence tending to show that the mortgagee went into possession prior to foreclosure by making a direct rental contract with plaintiff's tenant, and that the reasonable rental of the property, plus the value of timber cut therefrom during the mortgagee's occupancy was sufficient to pay the installments of the mortgage notes, *is held* sufficient to entitle plaintiff to an accounting to ascertain whether at the time of foreclosure the mortgage indebtedness was in default in any sum. *Fleming v. Land Bank*, 414.

When deed of trust is foreclosed prior to time the power of sale becomes absolute the sale is voidable. *Land Bank v. Moss*, 445.

§ 30g. Parties Who May Enjoin Foreclosure.

A tenant at sufferance has no interest in the property which entitles him to pay the amount of the mortgage indebtedness against the property and have the note and mortgage transferred to him to prevent foreclosure. *Sappenfield v. Goodman*, 417.

§ 31d. Decree of Foreclosure.

Decree of foreclosure by default should be limited to foreclosure of interests conveyed by the mortgage as described in the instrument. *Land Bank v. Davis*, 100.

§ 32a. Power of Sale in General.

The power of sale under a deed of trust is not exhausted by a sale thereunder which is vacated and set aside by a judgment which also establishes the validity of the encumbrance and the amount due thereunder. *Sutton v. Woolard*, 389.

There is a presumption of law in favor of regularity in the exercise of the power of sale in a mortgage or deed of trust. *Edwards v. Hair*, 662.

MORTGAGES—*Continued.*

§ 32e. Limitations on Exercise of Power.

The fact that the notes secured by the instrument are not under seal and are barred does not in itself render the right of foreclosure inoperative under C. S., 2589, since the bar of the statute affects the remedy but not the right. *Edwards v. Hair*, 662.

Payment on the notes secured by the instrument by a maker repeals the bar of the statute of limitations as to a comaker of the notes and the mortgage so that an action to foreclose the mortgage within ten years from such payment is not barred as to such comaker by C. S., 2589. *Ibid.*

A foreclosure deed executed pursuant to a sale held after the power of sale is barred by C. S., 2589, is voidable and not void. *Ibid.*

§ 34b. Rights of Bidders and Statutory Time for Increase in Bid.

A last and highest bidder at a foreclosure sale is but a proposed purchaser or preferred bidder during the ten days allowed by statute for an increase in the bid, and the sale cannot be consummated until after the expiration of ten days after the public auction, C. S., 2591. *Building and Loan Assn. v. Black*, 400.

§ 36. Deficiency and Personal Liability.

An action for a deficiency judgment after foreclosure is not barred by chapter 529, section 1, Public Laws 1933, Michie's N. C. Code, 437 (a), when it is instituted less than one year after the expiration of the ten-day period for an increase in bid, even though it is instituted more than one year after the date the property is exposed for sale. *Building and Loan Assn. v. Black*, 400; *Albright v. Pearce*, 796.

§ 39a. Parties Who May Attack Foreclosure.

Where a deed of trust is foreclosed prior to the time the power of sale becomes absolute the sale is voidable, but only the trustors can assert the right to have the deed from the trustees declared void. *Land Bank v. Moss*, 445.

§ 39c. Waiver of Right to Attack Foreclosure and Estoppel.

Husband and wife executed mortgage on lands owned by him in fee. The mortgage was foreclosed prior to the time the power of sale therein became absolute, and the land was purchased at the foreclosure sale by the wife. Thereafter the husband joined with his wife in executing a deed of trust upon the lands with full covenants of title. *Held:* The wife, by accepting deed as purchaser at the foreclosure sale of the mortgage, and the husband in joining in executing the deed of trust with full covenants of title are estopped from attacking the validity of the mortgage foreclosure. *Land Bank v. Moss*, 445.

§ 39d. Rights Upon Wrongful Foreclosure.

If a mortgagee causes foreclosure when no sum is in default on the indebtedness upon a proper accounting by the mortgagee for rents collected by it while in possession prior to foreclosure, the mortgagor or trustor is entitled to redeem the land unless it has been transferred to an innocent purchaser, in which event the mortgagor or trustor is entitled to damages sustained by reason of such wrongful foreclosure. *Fleming v. Land Bank*, 414.

§ 39f. Actions to Set Aside.

Plaintiff mortgagor instituted this action to set aside foreclosure and recover possession of the land upon her contention that at the date of sale the power of sale was barred by C. S., 2589. *Held:* An instruction that the burden was on defendant, the purchaser at the sale, to prove that the power of sale was not barred at the time of foreclosure, is error, the burden being upon

MORTGAGES—*Continued.*

plaintiff to prove that the foreclosure deed, attacked by her, was inoperative. The cases in which plaintiff, upon the plea of the statute of limitations by defendant, must prove that he has brought a live claim into court, distinguished. *Edwards v. Hair*, 662.

§ 43b. Rights of Cestuis Que Trustent Upon Decree Setting Aside Foreclosure.

The fact that the *cestui que trust* accepts a note and deed of trust executed by the purchaser at the foreclosure sale of the original deed of trust does not estop the *cestui* from claiming under the original deed of trust when the foreclosure thereunder is set aside and the subsequent encumbrances declared void, the validity of the original deed of trust not being attacked. *Sutton v. Woolard*, 389.

An agreement of the parties, set out in the judgment, that the *cestui que trust* would not claim under the instrument in consideration of the trustor's consent that the verdict establishing the invalidity of the foreclosure of the instrument should be set aside as to the *cestui*, does not estop the *cestui* from claiming under the original instrument when the setting aside of the verdict is held erroneous on appeal, and a new trial on the merits is ordered. *Ibid.*

MUNICIPAL CORPORATIONS.

II. Powers of Municipal Corporations
5. In General. Kennerly v. Dallas, 532.
IV. Torts of Municipal Corporations
12. Exercise of Governmental and Corporate Functions in General. Ivester v. Winston-Salem, 1.
13b. Acts of Agents Ultra Vires the Municipality. Kennerly v. Dallas, 532.
13c. Agents or Employees of Municipality. Clinard v. Kernersville, 745.
14. Defects or Obstructions in Sidewalks. Finch v. Spring Hope, 246.
16. Injuries to Contiguous Lands by Sewerage Systems. Ivester v. Winston-Salem, 1; Clinard v. Kernersville, 745.
17b. Maintenance and Condition of Municipal Power Lines. Kennerly v. Dallas, 532.
VIII. Public Improvements
34. Nature of Lien. Priorities and Enforcement. Wadesboro v. Coxe, 708.
X. Fiscal Management
43. Funds Allocated by State from Intangible Personal Property Tax. Board of Education v. Wilson, 216.
XI. Claims and Actions against Municipalities
46. Notice and Filing of Claim. Ivester v. Winston-Salem, 1.
47. Limitation of Actions against Municipalities. Ivester v. Winston-Salem, 1.

§ 5. Powers and Functions in General.

A municipal corporation has the powers expressly granted in its charter, special and general statutes, and the organic law, and those powers necessarily and fairly implied in or incident thereto, and those essential and indispensable to the accomplishment of the declared objects of the corporation. *Kennerly v. Dallas*, 532.

A municipality has the power to purchase, generate, or distribute electricity for its own use and the use of its inhabitants, and is given legislative authority to extend its lines beyond its corporate limits for the purpose of selling electricity to nonresidents, C. S., 2807, 2808, and therefore a complaint in an action against a municipality alleging injury from negligent maintenance of power lines outside the corporate limits is not demurrable on the ground that the alleged negligence of its officers and employees was *ultra vires* the city. *Williamson v. High Point*, 213 N. C., 96, cited and distinguished in that the municipality in that case was proceeding under the Revenue Bond Act of 1935, which contains restrictions not incorporated in the general law. *Ibid.*

Chapter 136, Public Laws of 1917, as amended by chapter 285, Public Laws of 1929, conferring power upon municipalities to own and maintain electric power systems for the benefit of its inhabitants and those outside its limits desiring same where the service is available, is valid. *Ibid.*

MUNICIPAL CORPORATIONS—*Continued.*

§ 12. Exercise of Governmental and Corporate Powers in General.

The operation of a municipal sewage disposal plant, incinerator and abattoir, resulting in the discharge of noxious odors, ashes and cinders into the air, and the attraction and breeding of rats, mosquitoes and other vermin, to the extent that the value of contiguous private lands is depreciated, is a taking of such private lands to the extent of the damage, and the municipality may be required to pay just compensation therefor notwithstanding that the damage results from its discharge of a governmental function. *Ivester v. Winston-Salem*, 1.

§ 13b. Acts of Agents Ultra Vires the Municipality.

It must clearly appear upon the face of the complaint that the alleged negligence of the officers and employees of a municipality was committed by them in doing an act or conducting a business wholly *ultra vires* the municipality in order to sustain the municipality's demurrer on the plea of *ultra vires*. *Kennerly v. Dallas*, 532.

Maintenance of electric power lines outside its limits is not necessarily *ultra vires* the municipality. *Ibid.*

§ 13c. Agents or Employees of Municipality.

Evidence that WPA workers had cut brush along the stream upon plaintiff's land is insufficient to hold defendant municipality responsible for the alleged trespass. *Clinard v. Kernersville*, 745.

§ 14. Defects or Obstructions in Sidewalks.

In this action to recover for injury sustained by plaintiff when he fell over roots of trees growing above the surface of the sidewalk in defendant municipality, judgment as of nonsuit should have been granted under authority of *Watkins v. Raleigh*, 214 N. C., 644. *Finch v. Spring Hope*, 246.

§ 16. Injuries to Contiguous Lands by Sewerage Systems.

Damages to contiguous lands by municipal sewerage system constitutes a taking rendering municipality liable for just compensation. *Ivester v. Winston-Salem*, 1; *Clinard v. Kernersville*, 745.

Complaint *held* sufficient to allege cause of action for damages for partial taking of private property by creation of nuisance in operation of sewerage system, and not action for damages for its negligent operation. *Ivester v. Winston-Salem*, 1.

Measure of damages recoverable against municipality for pollution of stream by sewage disposal plant. *Clinard v. Kernersville*, 745.

§ 17b. Maintenance and Condition of Municipal Power Lines.

Complaint *held* sufficient to allege negligence in maintenance of power line in this action to recover for the wrongful death of intestate, who was killed when he came in contact with an uninsulated, heavily charged electric light wire. *Kennerly v. Dallas*, 532.

§ 34. Nature of Lien, Priorities and Enforcement.

An action by a municipality to collect assessments against property for improvements is a proceeding *in rem* and there is no personal liability on the part of the owners of the land or their grantees, and therefore allegations that in the sale of the land the grantees retained the amount of the unpaid assessments out of the purchase price, and that the grantors after petitioning for the improvements sought to defeat the payment of the assessments by failing and refusing to permit their grantees to pay the municipality the amount retained, is properly stricken out, C. S., 506, since such matter is

MUNICIPAL CORPORATIONS—*Continued.*

irrelevant and immaterial, and evidence in support thereof would be incompetent, and since defendants might be prejudiced if it were allowed to remain. *Wadesboro v. Coxe*, 708.

§ 43. Funds Allocated by State from Intangible Personal Property Tax.

County board of education *held* not entitled to recover from municipality funds allocated to it by State from intangible tax, even though municipality is in no wise liable for maintenance of constitutional school term. *Board of Education v. Wilson*, 216.

§ 46. Notice and Filing of Claim.

Substantial compliance with the provisions of a city charter requiring notice of claim as a condition precedent to an action against the city in tort, is sufficient, the provision being in derogation of common law, and the notice in this case *is held* in substantial compliance with the statute and sufficient. *Ivester v. Winston-Salem*, 1.

§ 47. Limitation of Actions Against Municipalities.

An action to recover for damages to private lands resulting from the operation by a city of its sewage disposal plant, incinerator and abattoir, constituting a continuing or recurring nuisance, is an action for the partial taking of land by imminent domain and is governed by the provisions of the city charter requiring actions against the city for the taking of private property to be instituted within two years of such taking (sec. 59, ch. 232, Private Laws of 1927), and not by the provisions of its charter prescribing a one-year limitation for actions against the city in tort (sec. 115, ch. 232, Private Laws of 1927), and the action being for a continuing or recurring nuisance, only damages sustained prior to the two-year limitation are barred. C. S., 442, 1330. *Ivester v. Winston-Salem*, 1.

NEGLIGENCE.

I. Acts and Omissions Constituting Negligence
1. In General. Templeton v. Kelley, 577; Stroud v. Transportation Co., 726.
3. Dangerous Substances, Machinery and Instrumentalities. Fox v. Army Store, 187; Stroud v. Transportation Co., 726.
4. Condition and Use of Lands and Building.
b. Licensees. Wilson v. Dowtin, 547.

II. Proximate Cause
6. Concurrent Negligence. Mason v. Johnston, 95; Smith v. Bonney, 183; Groome v. Davis, 510; Daniel v. Packing Co., 763.
9. Anticipation and Foreseeability of Injury. Fox v. Army Store, 187; Stroud v. Transportation Co., 726.
10. Last Clear Chance. Newbern v. Leary, 134; Redwine v. Bass, 467; Carruthers v. R. R., 675; George v. R. R., 773.

III. Contributory Negligence
11. Of Persons Injured in General. Templeton v. Kelley, 577.
12. Of Minors. Reid v. Coach Co., 469.
13b. Contributory Negligence of Parents. Reid v. Coach Co., 469.

IV. Actions
19a. Nonsuit on Issue of Negligence. Fox v. Army Store, 187; Stroud v. Transportation Co., 726.
19b. Nonsuit on Issue of Contributory Negligence. Newbern v. Leary, 134; Clarke v. Martin, 405; Templeton v. Kelley, 577.
19c. Res Ipsa Loquitur. Buie v. Powell, 67; Lippard v. Johnson, 384.
20. Instructions in Negligent Injury Action. Perry v. Sykes, 39; Stephens v. Johnson, 133; Smith v. Bonney, 183; Redwine v. Bass, 467; Carruthers v. R. R., 675.
21. Issues. Reid v. Coach Co., 470.

§ 1. Acts and Omissions Constituting Negligence in General.

In order to establish actionable negligence, plaintiff must show failure of defendant to exercise proper care in the performance of some legal duty which he owed plaintiff under the circumstances in which they were placed, and that such negligent breach of duty proximately caused the injury and was one from which any man of ordinary prudence could have foreseen that such result was probable under all the facts as they existed. *Templeton v. Kelley*, 577.

NEGLIGENCE—*Continued.*

The duty to exercise due care to avoid injuring another does not necessarily arise out of a contractual relationship, such as master and servant, bailor and bailee, but such duty obtains whenever the circumstances are such that a man of ordinary prudence would apprehend that his failure to use ordinary care and skill would endanger the person or property of another. *Stroud v. Transportation Co.*, 726.

§ 3. Dangerous Substances, Machinery and Instrumentalities.

Whether salesman in store negligently handled air-rifle, resulting in injury to customer in store from accidental shot *held* for jury on oral and physical evidence. *Fox v. Army Store*, 187.

A person in control of machinery, appliances or equipment is under duty to exercise reasonable care not to expose another to danger in their invited or permitted use for his benefit. *Stroud v. Transportation Co.*, 726.

The evidence tended to show that the drivers of a truck with dual wheels permitted plaintiff, a filling station employee, to attempt to service the inside tire with air, that the circumstances were such that the plaintiff had to put his hand between the tires, and that the flange of the inside wheel flew loose mashing plaintiff's hand and causing the injury in suit. *Held:* The evidence was sufficient to be submitted to the jury as to whether defendant's agents had created a dangerous situation and whether they knew, or should have known thereof, in the exercise of due care, and should have informed plaintiff before permitting him to service the tire. *Ibid.*

§ 4b. Licensees. (Liability of lessor for injuries to, see Landlord and Tenant § 11.)

A customer who enters a part of the premises reserved for the operator of a store and his employees, is a mere licensee therein, even though he is an invitee to other parts of the premises, and evidence that an invitee, in attempting to go to the office of the store in the rear of the building, entered a large, dimly lit room in the rear thereof with merchandise and boxes on the floor which he could dimly see, and fell through an open stairwell while attempting to traverse such room to the office discloses that at the time of injury he was a licensee, the darkness of the room and the merchandise on the floor being sufficient to give clear warning that he was not in the part of the store open to customers and other visitors, and there being a direct entrance from the front part of the store to the office. *Wilson v. Dowtin*, 547.

§ 6. Concurrent Negligence.

A passenger on a motorcycle injured in a collision between the motorcycle and an automobile may not recover of the driver of the car if the driver of the motorcycle was guilty of negligence constituting the sole proximate cause of the accident, but under the evidence in this case the question *is held* one for the jury. *Mason v. Johnston*, 95.

When case is tried on theory that defendant's negligence was sole proximate cause of injury, failure to charge on question of concurrent negligence is not error. *Smith v. Bonney*, 183.

Where collision is caused by negligence of the drivers of both cars, a guest in one of the cars may recover against either of the drivers without regard to liability as between the drivers. *Groome v. Davis*, 510.

A person is liable for an injury if his negligence is in any degree a proximate cause of the injury, since he may be exonerated from liability only if the total proximate cause of the injury is attributable to another or others. *Daniel v. Packing Co.*, 762.

NEGLIGENCE—*Continued.*

§ 9. Anticipation and Foreseeability of Injury.

Injury to store customer from accidental shot from air-rifle in salesman's hands, with oral and physical evidence that salesman was negligent in handling the dangerous instrumentality, *held* not so unforeseeable as to put it, as matter of law, beyond the range of proximate causation. *Fox v. Army Store*, 187.

Whether defendants should have foreseen that injury might result from condition of flange on inside dual wheel *held* for jury in this action by filling station employee injured while servicing tire with air. *Stroud v. Transportation Co.*, 726.

§ 10. Last Clear Chance.

The doctrine of last clear chance is the humane rule of law that imposes upon a person the duty to exercise ordinary or due care to avoid injury to another who has negligently placed himself in a situation of danger, and who he can reasonably apprehend is unconscious thereof or is unable to avoid the danger. *Newbern v. Leary*, 134.

Where the facts alleged in the complaint do not present the doctrine of last clear chance, and plaintiff fails to plead same by reply to the answer setting up a version of the accident which might require the application of the doctrine, it is not error for the court to fail to instruct the jury in regard to the doctrine in the absence of a request for a special instruction. *Redwine v. Bass*, 467.

In these actions to recover for the deaths of plaintiffs' intestates, killed in an accident at a railroad crossing, the charge of the court upon the doctrine of the last clear chance *is held* for error in that the facts recited in the charge as a basis for the application of the doctrine disclosed negligence on the part of the driver of the car continuing until the moment of impact, and in that the charge on this question conflicted with instructions theretofore given. *Carruthers v. R. R.*, 675.

Evidence that intestate was lying on track in apparently helpless condition and that track was straight and unobstructed *held* to take case to jury on question whether engineer saw or should have seen intestate and have avoided striking him. *George v. R. R.*, 773.

§ 11. Contributory Negligence of Persons Injured in General.

There is no essential difference between negligence and contributory negligence, contributory negligence being merely negligence on the part of the plaintiff, and the same standard applies to both. *Templeton v. Kelley*, 577.

§ 12. Contributory Negligence of Minors.

A child four and one-half years old is legally incapable of negligence, primary or secondary. *Reid v. Coach Co.*, 469.

§ 13b. Contributory Negligence of Parent.

In an action to recover for the wrongful death of a child, whether brought by one of its parents as administrator or not, the negligence of either or both of the parents will constitute contributory negligence barring recovery, since the parents would be the beneficiaries of any recovery as heirs of the child, and the law will not permit a person to benefit by his own tort. *Reid v. Coach Co.*, 469.

Evidence that parent permitted four-and-one-half-year-old child to go to entertainment two blocks away in company with ten-year-old child *held* not to show contributory negligence on part of parent in action to recover for death of child struck by bus while attempting to cross highway. *Ibid.*

NEGLIGENCE—*Continued.*

§ 19a. Nonsuit on Issue of Negligence.

Whether injury from air-rifle shot was the result of negligence of defendant's salesman *held* for jury. *Fox v. Army Store*, 187.

Evidence *held* for jury as to whether truck driver knew or should have known of dangerous condition of tire he permitted filling station employee to service. *Stroud v. Transportation Co.*, 726.

§ 19b. Nonsuit on Issue of Contributory Negligence.

Whether intestate's chauffeur gave proper signals before stopping on highway, and evidence that accident as his car was being backed on highway *held* to raise issue of contributory negligence for jury, and nonsuit on ground of contributory negligence was properly denied. *Newbern v. Leary*, 134.

Evidence *held* not to show contributory negligence as a matter of law on part of motorist hitting truck parked on highway at night without proper lights. *Clarke v. Martin*, 405.

Evidence that a pedestrian failed to observe statutory requirements in crossing a street at an intersection at which traffic control lights were maintained *held* not to establish contributory negligence as a matter of law. *Templeton v. Kelley*, 577.

§ 19c. Res Ipsa Loquitur.

In an action to recover for the death of a railroad employee in charge of track maintenance, resulting when a dump car under his supervision derailed, the doctrine of *res ipsa loquitur* does not apply, since intestate himself was responsible for the condition of the track and the equipment under his control. *Buie v. Powell*, 67.

Since, due to allergy and the varying conditions of human systems, the reaction of a particular person to a specific drug is, in a large measure, unpredictable, the doctrine of *res ipsa loquitur* does not apply to an unexpected, unanticipated, and unfavorable result of a treatment by a physician. *Lippard v. Johnson*, 384.

§ 20. Instructions.

An instruction to the effect that if the jury found by the greater weight of the evidence that appealing defendant's evidence did not concur in producing the injury in suit, to answer the issue in defendant's favor, *is held* erroneous as susceptible to the construction that the burden was on defendant to show by the greater weight of the evidence that its negligence did not contribute as a proximate cause to the injury. *Perry v. Sykes*, 39.

It is error for the charge on the issue of negligence involved in the case to omit any reference to proximate cause. *Stephens v. Johnson*, 133.

When case is tried on theory that defendant's negligence was sole proximate cause of injury, failure to charge on question of concurrent negligence is not error. *Smith v. Bonney*, 183.

Where the facts alleged in the complaint do not present the doctrine of last clear chance, and plaintiff fails to plead same by reply to the answer setting up a version of the accident which might require the application of the doctrine, it is not error for the court to fail to instruct the jury in regard to the doctrine in the absence of a request for a special instruction. *Redwine v. Bass*, 467.

In these actions to recover for the death of plaintiff's intestates, alleged to have been caused by the negligence of defendants, the form of the charge of the court *is held* for error as amounting to an expression of opinion by the court in repeatedly charging the duties owed by defendant to plaintiffs' intestates and the circumstances under which the jury should answer the first

NEGLIGENCE—*Continued.*

issues in the affirmative without charging upon what conditions the issues should be answered in the negative. *Carruthers v. R. R.*, 675.

Instruction on the doctrine of last clear chance *held* erroneous. *Ibid.*

§ 21. Issues.

The refusal of the trial court to submit an issue of contributory negligence in this action to recover for the wrongful death of a four-and-one-half-year-old child *is held* without error, there being no evidence of negligence on the part of the child's parents, and the child being incapable of contributory negligence. *Reid v. Coach Co.*, 470.

NUISANCE.

§ 3. Pollution of Air or Streams.

Pollution of air by municipal sewage disposal plant constitutes taking to extent of damage to contiguous lands. *Ivester v. Winston-Salem*, 1; *Clinard v. Kernersville*, 745.

In an action to recover damages resulting to plaintiff's land from the emanation of odors from a permanent, private manufacturing plant in the locality, the parties may agree to the assessment of permanent damages entitling defendant to an easement. *Aydlett v. By-Products Co.*, 700.

Plaintiff's evidence tending to show that his land, used for residential purposes, was damaged by the emanation of noxious odors from defendant's animal by-products manufacturing plant, *is held* sufficient to take the issue to the jury, notwithstanding defendant's evidence tending to show proper handling of its raw material and the absence of offensive odors, or that, if odors escaped occasionally, they were due to causes beyond defendant's control and were of short duration. *Ibid.*

In an action to recover damages to land resulting from noxious odors emanating from defendant's manufacturing plant, testimony of witnesses living near the plant, but not in the immediate locality of plaintiff's property, is competent to show that the noxious odors were in fact produced by defendant's operations and that they contaminated the air throughout the surrounding territory, in corroboration of plaintiff's testimony. *Ibid.*

In an action to recover damages to land resulting from noxious odors emanating from defendant's animal by-products plant, testimony of decomposing carcasses and animal matter exposed about or near the plant is competent as tending to show the origin of the odors complained of. *Ibid.*

In an action against a private corporation to recover damages resulting to plaintiffs land by the corporation's pollution of a stream running across the land, plaintiffs may not demand permanent damages entitling the corporation to a permanent easement unless the parties consent to trial upon this theory. *Clinard v. Kernersville*, 745.

Evidence *held* to show that private corporation was not responsible for drainage of waste products on plaintiffs' land. *Ibid.*

PARTITION.

§ 1. Right to Partition.

A husband died seized of an interest in the *locus in quo* as tenant in common. His widow's dower was allotted in a one-eighth interest in the property. Plaintiffs, owning an undivided interest in the property, instituted this action for partition, and it was admitted that actual partition of the property could not be had. The widow objected to the sale of her dower interest. *Held:* Plaintiffs are entitled to sale of the property for partition upon the

facts admitted, C. S., 3233, which right they could have enforced against the husband prior to his death, and which they are entitled to enforce against the widow's dower, since her estate in the land is but a continuation of his. *Trust Co. v. Watkins*, 292.

C. S., 4105, *et seq.*, providing a method for allotment of dower, does not preclude a court of equity from ordering a sale of the lands for partition, even though dower has been allotted in the husband's interest in the lands as tenant in common, since both remedies are equitable in their nature and the court may make such orders and decrees as become necessary to do justice between the partis. *Ibid.*

§ 4. Nature of Remedy and Procedure.

Where, in a special proceeding in the Superior Court for partition, C. S., 3213, 3215, tenancy in common is denied and there is a plea of sole seizin, *non tenent insimul*, the proceeding in legal effect is converted into an action in ejectment and should be transferred to the civil issue docket for trial at term on issue of title, the burden being upon petitioners to prove their title as in ejectment. C. S., 758. *Gibbs v. Higgins*, 201.

§ 5. Hearings and Evidence.

Where a party in proceedings for partition sets up a deed from the common source of title under his plea of sole seizin, petitioners may introduce parol evidence attacking the deed for mental incapacity without supporting allegation, but parol evidence on the question of undue influence must be supported by proper allegation. *Gibbs v. Higgins*, 201.

§ 10. Effect of Partition.

Judgment in partition proceedings in which title has been put in issue is conclusive on the parties on the issue of title, and operates as a bar to a subsequent action between the parties as to matters which were adjudicated or which were within the scope of the issue and might have been litigated. *Gibbs v. Higgins*, 201.

PAYMENT.

§ 9. Burden of Proof.

While ordinarily burden is on debtor to prove defense of payment, where it is admitted or established that debtor deposited securities as collateral and that creditor sold same for less than their face value, burden is on creditor to show reasonable diligence and good faith in the sale of the securities and the proper application of the proceeds. *Bank v. Turner*, 665.

PHYSICIANS AND SURGEONS.

§ 15c. Sufficiency of Evidence of Malpractice and Nonsuit.

Held: Even conceding that evidence of negligence of defendant in his operation on and treatment of plaintiff while in the hospital was insufficient, the evidence of defendant's negligence in failing to properly care for plaintiff in the subsequent treatment of the case, *is held* sufficient, and requires the submission of the cause to the jury. *Olinger v. Camp*, 340.

Evidence *held* insufficient to be submitted to jury in this action for malpractice for injury allegedly caused by local anaesthetic. *Lippard v. Johnson*, 384.

Since, due to allergy and the varying conditions of human systems, the reaction of a particular person to a specific drug is, in a large measure, unpredictable, the doctrine of *res ipsa loquitur* does not apply to an unexpected, unanticipated, and unfavorable result of a treatment by a physician. *Ibid.*

PLEADINGS.

II. Answer
10. Counterclaims and Set-Offs. Hoyle v. Carter, 90; Johnson v. Smith, 322.
IV. Demurrer
16. For Misjoinder of Parties and Causes. Holland v. Whittington, 330; Robertson v. Robertson, 562; Morgan v. Morgan, 725.
17. Form and Sufficiency of Demurrer. Ins. Co. v. McCraw, 105; Leary v. Land Bank, 501.
18. Defects Appearing on Face of Complaint and "Speaking Demurrers." Kennerly v. Dallas, 532.
20. Office and Effect of Demurrer. Ins. Co. v. McCraw, 105; Avery County v. Braswell, 270; Vincent v. Powell, 336; Sparrow v. Morrell & Co., 452; Leary v. Land Bank, 501; Harrington v. Lowrie, 706.
V. Amendment of Pleadings
23. Amendment after Decision on Appeal. Scott v. Harrison, 427; Bradshaw v. Warren, 442.
VII. Motions Relating to Pleadings.
29. Motions to Strike Out. Wadesboro v. Coxe, 702.

§ 10. Counterclaims and Set-Offs.

Held: Defendants' alleged cause of action in tort did not arise out of the same transaction as the contract sued on by plaintiff, and the alleged cause in tort accrued to the corporation and not to defendants as stockholders, and defendants' defense to the action on the notes was properly stricken from the answer, there being no mutuality of subject matter or of parties to support the alleged counterclaim. *Hoyle v. Carter*, 90.

An action for damages resulting from an automobile collision does not abate upon the death of the defendant, C. S., 461, but may be continued upon the joinder of defendant's personal representative as a party, and the personal representative may set up therein a counterclaim for damages for the death of her intestate arising out of the same accident, C. S., 521 (1). *Johnson v. Smith*, 322.

§ 16. Demurrer for Misjoinder of Parties and Causes.

Where the several causes do not affect all the parties and do not constitute a connected series of transactions, demurrer is proper. *Holland v. Whittington*, 330.

Held: All parties interested in the estate were properly joined in order to effect a complete determination of all matters involved in settlment of the estate. *Robertson v. Robertson*, 562.

When the amounts due a ward are admitted or not controverted, the ward may maintain suit to follow the guardianship funds and to hold the bondsmen liable for any deficiency without making the personal representative of the insolvent deceased guardian a party, and defendants' demurrers for misjoinder of parties and causes for want of a necessary party are properly overruled. *Morgan v. Morgan*, 725.

§ 17. Form and Sufficiency of Demurrer.

The sufficiency of the facts alleged in the answer to constitute a defense may be tested by demurrer *ore tenus*. *Ins. Co. v. McCraw*, 105; *Leary v. Land Bank*, 501.

§ 18. Defects Appearing on Face of Complaint and "Speaking Demurrers."

A defect complained of must appear upon the face of the complaint in order to be demurrable. *Kennerly v. Dallas*, 532.

§ 20. Office and Effect of Demurrer.

A demurrer to the answer on the ground that it fails to allege facts constituting a defense admits the allegations of fact therein contained and, ordinarily, relevant inferences of fact necessarily deducible therefrom, and the answer will be liberally construed upon demurrer, and must be fatally defective before it will be rejected as insufficient. C. S., 535. *Ins. Co. v. McCraw*, 105.

PLEADINGS—*Continued.*

A demurrer admits the truth of every material fact alleged in the complaint, and upon demurrer the complaint will be liberally construed with every reasonable intendment and presumption in favor of the pleader, and the demurrer will be overruled unless the complaint is fatally defective, C. S., 535. *Avery County v. Braswell*, 270.

The office of a demurrer is to test the sufficiency of a pleading, admitting for the purpose of the truth of the allegation of fact and, ordinarily, relevant inferences of fact necessarily deducible therefrom, but the complaint will be liberally construed upon demurrer and must be fatally defective before it will be rejected as insufficient. C. S., 535. *Vincent v. Powell*, 336.

Demurrer to a complaint on the ground that it fails to state a cause of action should be overruled if the complaint liberally construed alleges facts sufficient to constitute a cause of action or if facts sufficient for the purpose can be gathered from it. *Sparrow v. Morrell & Co.*, 452.

In determining the sufficiency of a pleading as against demurrer the facts alleged in the pleading will be taken and considered as true. *Leary v. Land Bank*, 501; *Harrington v. Lowrie*, 706.

§ 23. Amendment After Decision on Appeal.

Where, on appeal, the judgment of the lower court overruling defendant's demurrer is reversed, plaintiff may be allowed a reasonable time to amend her complaint. *Scott v. Harrison*, 427.

Where new trial is awarded on appeal, a motion to be allowed to amend is more properly made in the trial court after the certification of the opinion, rather than in the Supreme Court. *Bradshaw v. Warren*, 442.

A motion to be allowed to amend is addressed to the discretion of the trial court, but such discretion should be liberally exercised in aid of justice. *Ibid.*

§ 29. Motions to Strike Out.

Held: Motion to strike should have been allowed, the matter complained of being irrelevant and immaterial in proceeding to enforce lien for public improvements. *Wadesboro v. Coxe*, 702.

PLEDGES.

§ 2. Construction and Operation of Pledge.

A provision in a note that the collateral therewith deposited may be held by the payee to secure other indebtedness of the maker to the payee, due or to become due, is valid. *Tesh v. Rominger*, 52.

The pledgee holds the security pledged in trust, first for himself, and then for the pledgor, and the pledgor has the legal right to redeem the security pledged upon payment of the debt. *Ibid.*

§ 3. Actions.

A person claiming that property of another is subject to a pledge in his favor has the burden of establishing that fact. *Tesh v. Rominger*, 52.

A person claiming that collateral pledged as security for a note is also security for other obligations of the maker, has the burden not only of establishing such fact, but upon tender by the maker of the amount due on the principal note, has the burden of proving the status of such other obligations, that they are unpaid and the amount due thereon. *Ibid.*

Where the pledgee pleads ownership of the stock pledged as security and denies the right of pledgor to redeem, tender of payment by the pledgee is unnecessary and is deemed waived. *Ibid.*

PLEDGES—*Continued.*

Where pledgor offers evidence of ownership of security pledged, and tender is waived, nonsuit is erroneous. *Ibid.*

Plaintiff instituted this action to recover balance due on a note secured by a deed of trust and to foreclose the instrument. Defendants contended that they had deposited with plaintiff securities worth more than the amount of the mortgage debt, and plaintiff admitted the receipt of the securities and that it had sold same at private sale for less than face value and for less than defendants' mortgage notes. *Held:* While ordinarily the burden is upon the debtor to prove an affirmative defense or payment in whole or in part, where a pledgee admits the sale of the securities at private sale at a substantial loss, the burden is upon the pledgee to show reasonable diligence and good faith in the sale of the securities and the proper application of the proceeds, and an instruction that the burden was upon the pledgor to show that the pledgee failed to exercise reasonable diligence and good faith, is error. *Bank v. Turner*, 665.

PRINCIPAL AND AGENT.

§ 10a. Liability of Principal for Wrongful Acts of Agent.

A principal is liable for the wrongful acts of the agent, not only if the acts are expressly authorized, but also if the acts are within the agent's implied authority. *West v. Woolworth Co.*, 211.

An act is within the agent's implied authority, even though contrary to the express directions of the principal, when the act is done in furtherance of the principal's business and in the discharge of the duties of the employment, the principal being liable if the agent, in performing such duties, adopts a method which constitutes a tort and inflicts injury on a third person. *Ibid.*

Instruction *held* for error in failing to fully define "scope of authority." *Ibid.*

Complaint liberally construed *held* sufficient to charge that slander was uttered by agent within scope of authority. *Vincent v. Powell*, 336.

Corporate principal may not be held responsible for alleged libel when the evidence shows that the words were dictated by its officer to his stenographer, since in such instance there is no publication. *Satterfield v. McLellan Stores*, 582.

§ 10b. Liability of Agent for Wrongful Acts Committed by Him in Course of Employment.

Where the allegations of the complaint show that an alleged wrongful act of an agent was committed solely in his representative capacity and not in his individual capacity, the agent may not be held personally liable. *Satterfield v. McLellan Stores*, 582.

PRINCIPAL AND SURETY.

§ 5a. Construction and Operation of Bonds of Public Officers in General.

The liabilities of a surety on the bond of a public officer for the faithful performance of his official duties are coextensive with those of the officer himself, and the bond covers all the statutory duties of the officer as though expressly inserted in it. *Avery County v. Braswell*, 270.

Complaint alleging wrongful approval of county vouchers by county accountant *held* sufficient as against demurrer of accountant and his surety. *Ibid.*

Liabilities of public officer and surety on his bond may not be defeated by claim that other officer had also breached his duty. *Ibid.*

PRINCIPAL AND SURETY—*Continued.*

Where, in an action against the surety on a sheriff's bond, the bond does not appear in the record it will be presumed that the obligation of the bond conforms to the terms prescribed by the statute. C. S., 3930. *Davis v. Moore*, 449.

Sheriff's bond *held* not to cover negligent acts committed in incarcerating prisoner. *Ibid.*

PROCESS.

§ 6f. Service on Foreign Corporation by Service on Corporate Officer While Within the State.

Where a foreign corporation does not do business within the State, does not maintain a process agent or any other agent here, and has not domesticated, and owns no property in the State, service of process on its president while he is within the State on personal business in no wise connected with the business of the corporation, is not a valid service of process. C. S., 483 (1). *Cotton Mills v. Menefee*, 237 U. S., 189, cited as controlling. *Langley v. Warehouse*, 237.

§ 15. Abuse of Process.

Evidence tending to show that defendant's appeal from conviction in the municipal court to the Superior Court was continued five times extending over a period of 22 months, allegedly at the instance of the private prosecutor, and was finally *nolle prossed* with leave, *is held* insufficient to sustain an action for abuse of process against the private prosecutor, since it appears that the jurisdiction of the Superior Court was invoked by plaintiff and that the control of the appeal after it was docketed passed to the solicitor, and the continuances were ordered by the court, and since it does not appear that the continuances were ordered without the consent of the plaintiff. *Abernethy v. Morrison*, 454.

PUBLIC OFFICERS.

(Liability of sureties on official bonds, see Principal and Surety.)

§ 7a. Duties and Liabilities in General.

A public officer must use the same reasonable skill and diligence in the performance of his official duties for the benefit of the public that careful men usually exercise in the management of their own affairs. *Avery County v. Braswell*, 270.

QUASI-CONTRACTS.

(Actions to recover money received under mistake of fact, see Money Received.)

§ 2. Actions to Recover Quantum Valebat.

On the pleadings, evidence and issues in this action to recover of defendant the value of board furnished him, an instruction that if plaintiff undertook to board defendant at her table without definite arrangements as to payment, plaintiff would be entitled to recover the reasonable value thereof and that the jury might consider in extinguishment or reduction of the amount due, the value of the provisions furnished by defendant, *is held* without prejudicial error. *Sawyer v. Cox*, 241.

RAILROADS.

§ 2. Rights of Way.

Conveyance *held* to grant right of way, unrestricted as to its use, with right to relocate same to service grantor's land, and grantor's contention that the

RAILROADS—*Continued.*

use of the spur track across his lands to service other customers constituted a trespass, *held* untenable. *Grocery Co. v. R. R.*, 223.

§ 9. Accidents at Crossings.

The rule governing the competency and admissibility of negative evidence tending to show the failure of an engineer to give proper signals of the train's approach to a grade crossing, as laid down in *Johnson v. R. R.*, 214 N. C., 484, approved. *Carruthers v. R. R.*, 675.

Instruction on the doctrine of last clear chance *held* erroneous. *Ibid.*

§ 10. Injuries to Persons on or Near Track.

Evidence *held* for jury on question of defendant's negligence in failing to stop train before striking intestate lying in a helpless condition on the track. *George v. R. R.*, 773.

RAPE.

§ 7. Relevancy and Competency of Evidence.

In a prosecution for rape the issue is whether defendant committed the act charged upon the prosecutrix, and her testimony tending to show that she was widowed and had accepted employment as a model in a show in order to support herself and young son when the crime was alleged to have been committed by a Negro follower of the show, is irrelevant, and since the testimony might have aroused sympathy for the prosecutrix or prejudice against the defendant in the minds of the jurors, its admission must be held prejudicial. *S. v. Page*, 333.

REFERENCE.

§ 7. Form and Contents of Report.

While ordinarily the referee should enter his rulings on each objection to the evidence taken before him, either at the time of taking the testimony or subsequently in his report, where the exceptions are very numerous and relate to a single ground of objection, it is a sufficient compliance with this rule if the referee incorporates in his report a general statement of the rulings sufficient to give the parties and the reviewing judge full opportunity to consider the referee's rulings on, and findings from, the evidence reported. C. S., 577. *Pack v. Katzin*, 233.

REFORMATION OF INSTRUMENTS.

§ 1. Nature and Grounds of Remedy in General.

A deed absolute on its face may be corrected into a mortgage upon allegation and proof that the clause of redemption was omitted by reason of ignorance, mistake, fraud, or undue advantage. *Davenport v. Phelps*, 326.

§ 8. Burden of Proof.

In order to correct a deed absolute on its face into a mortgage on the ground of ignorance, mistake, fraud or undue advantage, plaintiff is required to prove the ground of reformation by clear, strong, and convincing proof. *Davenport v. Phelps*, 326.

§ 10. Sufficiency of Evidence and Nonsuit.

In order to correct a deed absolute on its face into a mortgage on the ground of ignorance, mistake, fraud or undue advantage, the grounds of relief must be established, not merely by the declarations of the parties or the unaided memory of witnesses, but by facts and circumstances *dehors* the instrument which are inconsistent with an absolute conveyance. *Davenport v. Phelps*, 326.

REFORMATION OF INSTRUMENTS—*Continued.*

Evidence *held* sufficient to overrule nonsuit in this action to reform deed into a mortgage. *Ibid.*

§ 13. Title, Rights and Remedies of Third Persons.

Plaintiff instituted this action to reform a mortgage upon allegations that a certain lot belonging to mortgagor had been omitted from the description by mutual mistake and that the defendant who held a subsequent mortgage upon the property described in plaintiff's mortgage, including the lot omitted therefrom by mistake, had actual notice thereof and that he was not an innocent purchaser for value. *Held:* The allegation as to notice is unavailing, since no notice, however full and formal, will take the place of registration, but such defendant's demurrer *ore tenus* should not have been sustained, since the complaint alleges that he was not an innocent purchaser for value and the registration laws, C. S., 3309, 3311, protect only creditors and purchasers for value. *Case v. Arnold*, 593.

SALES.

§ 3. Consideration.

Where seller knows purpose for which article sold is intended, and article is worthless for such purpose, buyer may recover purchase money for failure of consideration regardless of any warranty. *Pool v. Pinehurst, Inc.*, 667.

§ 21. Actions for Recovery of Goods.

Where the seller seeks to recover chattels from a third person which had been placed in the possession of the buyer under an alleged consignment agreement, he must identify the chattels as those subject to the agreement, and in the absence of such evidence, whether the transaction was a conditional sale or a consignment is immaterial. *McLean v. Pope*, 597.

§ 24. Remedies of Buyer.

Where a sale is effected by actionable fraud, the buyer may usually elect either to rescind, or to affirm and seek damages for the fraud by action or by counterclaim in the seller's action for the purchase price. *Buick Co. v. Rhodes*, 595.

§ 25. Rescission or Renunciation.

Ratification of a sale after the discovery of the alleged fraud bars an action or counterclaim based upon rescission or reunciation. *Buick Co. v. Rhodes*, 595.

Plaintiff's evidence tended to show that he purchased a boiler for use in his laundry, that defendant had knowledge of the purpose for which it was bought, that the boiler leaked before the steam pressure reached the necessary level, and that it was condemned and its use prohibited by the State authorities. *Held:* If the article was worthless for the use for which it was intended, and if defendant had knowledge of the purpose for which it was bought, plaintiff would be entitled to recover the purchase price paid and the notes given for the balance of the purchase price on the ground of failure of consideration, irrespective of any warranty, and the evidence, considered in the light most favorable to plaintiff, was sufficient to be submitted to the jury upon the issue. *Pool v. Pinehurst, Inc.*, 667.

§ 26. Actions for Damages.

Ratification of sale after discovery of fraud does not bar right to damages. *Buick Co. v. Rhodes*, 595.

SALES—*Continued.*

§ 27. Actions and Counterclaims for Breach of Warranty.

Plaintiff's evidence tended to show that she purchased from defendant a cosmetic sold for the purpose of clearing up pustules (blackheads), that after using the preparation her facial condition became worse, later requiring the attention of a physician. There was no evidence as to the cause or nature of the condition of the skin of plaintiff's face after she had used the preparation. *Held:* The evidence fails to show any damages proximately resulting from breach of warranty, express or implied, and defendant's motion as of nonsuit was properly granted. *Mauney v. Luzier's, Inc.*, 673.

SCHOOLS.

§ 27. State Aid and Allocation of Taxes Collected by State for School Purposes.

County board of education *held* not entitled to recover from municipality funds allocated to it by State from intangible tax, even though municipality is in no wise liable for maintenance of constitutional school term. *Board of Education v. Wilson*, 216.

SHERIFFS.

§ 6b. Liability of Sheriff for Acts of Deputy. (Liability of surety, see Principal and Surety § 5a.)

Where the evidence is sufficient to be submitted to the jury as to the negligence of a deputy in charge of a jail in causing injury to a prisoner in closing the cell door on the prisoner's thumb, it is sufficient to be submitted to the jury as to the liability of the sheriff, since the act of the deputy is within the scope of his authority and in the line of his duty, and the liability of the sheriff for acts of his deputy is governed by the law applicable to the law of principal and agent. C. S., 3944. *Davis v. Moore*, 449.

§ 6c. Liability of Deputy for Negligent Injury to Prisoner.

Evidence that deputy negligently injured prisoner *held* sufficient for jury. *Davis v. Moore*, 449.

SPECIFIC PERFORMANCE.

§ 3. Waiver and Defenses.

A party furnishing or causing to be furnished false representations procuring the contract is not entitled to enforce specific performance thereof, even though he is not guilty of fraud and was ignorant of the falsity of the representations. *Pate v. Duke University*, 57.

STATE.

§ 2b. Actions by the State.

The State Highway and Public Works Commission, as successor to the State Prison Department, chapter 172, sec. 32, Public Laws of 1933, C. S., 7698, has implied power to maintain an action in its corporate name on behalf of the State. *Highway Com. v. Cobb*, 556.

While the State may maintain an action in tort for injury to its property, it has no right of action in tort arising out of the commission of a crime against its sovereignty. *Ibid.*

The State may not recover of a prisoner moneys expended by it to recapture him after his escape from custody, since the escape does not invade any property right of the State, but the expenditure of the sums is voluntary and made by it for the protection of the people of the State in preserving the integrity of the penal system. *Ibid.*

STATUTES.

§ 2. Constitutional Provision Against Passage of Special Acts Relating to Specified Matters. (Constitutionality of statutes, see Constitutional Law.)

It is apparent from the provisions of the Real Estate License Act, ch. 292, Public Laws of 1937, that its purpose is to provide for the extensive and intensive regulation of the trade, and to provide for the licensing and the revocation of licenses for cause of real estate brokers and salesmen within the territory affected by the act. *S. v. Dixon*, 161.

Real estate brokers and salesmen are engaged in "trade" within the meaning of Art. II, sec. 29, of the State Constitution. *Ibid.*

Real Estate License Act is local statute regulating trade in contravention of Art. II, sec. 29, of the State Constitution. *Ibid.*

In determining whether a statute relating to matters enumerated in Art. II, sec. 29, of the State Constitution is a "local, private, or special" act inhibited by this section or a "general law" which the General Assembly has the power to enact the courts will look beyond the form of the act and ascertain whether the statute, in fact, is generally and usually applicable throughout the area comprising the State. *Ibid.*

§ 5a. General Rules of Construction.

To effectuate the intention of the lawmaking body is the cardinal rule in the construction of a statute. *Belk Bros Co. v. Maxwell, Comr.*, 10; *Unemployment Compensation Com. v. Ins. Co.*, 479.

The courts may not interpolate provisions which are wanting in a statute and thereupon adjudicate the rights of parties thereunder. *Board of Education v. Wilson*, 216.

The courts must construe a statute as it is written. *Unemployment Compensation Com. v. Ins. Co.*, 479.

§ 5c. Special, General, and Local Acts.

In determining whether a statute relating to matters enumerated in Art. II, sec. 29, of the State Constitution is a "local, private, or special" act inhibited by this section or a "general law" which the General Assembly has the "power to pass," the courts will look beyond the form of the act and ascertain whether the statute, in fact, is generally and usually applicable throughout the area comprising the State. *S. v. Dixon*, 161.

§ 10. Repeal and Revival by Implication and Construction.

All acts of the same session of the General Assembly on the same subject are to be construed as one act, and the Revenue Act of 1937, ch. 127, sec. 109, Public Laws of 1937, imposing a tax on real estate brokers and salesmen for a State-wide license, embodies the licensing policy of the State to be applied uniformly throughout the State, and ch. 292, Public Laws of 1937, imposing a further license tax on real estate brokers and salesmen within the restricted area specified in the act, is void as being in derogation of the general licensing policy of the State as expressed in the Revenue Act. *S. v. Dixon*, 161.

Repeals by implication are not favored. *Reid v. Coach Co.*, 469.

TAXATION.

I. Constitutional Requirements and Restrictions

2a. Classification of Trades and Professions for License and Privilege Taxes. Belk Bros. v. Maxwell, 10; S. v. Dixon, 161.

4. Necessary Governmental Expenses. Westbrook v. Southern Pines, 20.

8b. Retroactive Taxation. Unemployment Compensation Com. v. Trust Co., 491.

IV. Property Exempt from Taxation

19. Property and Agencies of State and Federal Government and Political Subdivisions. Warrenton v. Warren County, 342; Unemployment Com-

STATUTES—*Continued.*

pensation Com. v. Ins. Co., 479; Unemployment Compensation Com. v. Trust Co., 491.

V. Levy and Assessment of Taxes

23. Construction and Operation of Revenue Statutes in General. Belk Bros. v. Maxwell, 10.

30. Levy and Assessment of Franchise and License Taxes. Belk Bros. v. Maxwell, 10.

VI. Actions

38a. Enjoining Issuance of Bonds. Garrell v. Columbus County, 589.

IX. Sale of Property for Taxes

40b. Foreclosure of Certificates. Caswell County v. Scott, 185; Hill v. Street, 312.

41. Redemption of Land from Tax Sales. Gower v. Clayton, 82; Hill v. Street, 312.

§ 2a. Classification of Trades and Professions for License and Privilege Taxes.

The General Assembly has the right to classify businesses, trades and professions for the purpose of taxation, subject to the limitation that the classification must be reasonable and not arbitrary. *Belk Bros. v. Maxwell, Comr.*, 10.

Classification of chain stores for taxation *held* not unreasonable or arbitrary as applied to plaintiff corporation. *Belk Bros. Co. v. Maxwell, Comr.*, 10.

Real Estate Licensing Act *held* void as discriminating among those in a class. *S. v. Dixon*, 161.

§ 4. Necessary Expenses.

The erection, equipment and support of a public library is not a necessary municipal expense, and a municipality may not expend public moneys or pledge its faith and credit therefor without approval of a majority of its qualified electors. *Westbrook v. Southern Pines*, 20.

Fact that library financed wholly from funds other than taxes is included in municipal building does not invalidate bonds. *Ibid.*

Held: Taxpayers should not be precluded from restraining city if it should attempt to expend public moneys for support of library without approval of majority of qualified voters. *Ibid.*

§ 8b. Retroactive Taxation.

Taxes levied for year 1936 under Unemployment Compensation Act *held* void as contravening Art. I, sec. 32. *Unemployment Compensation Com. v. Trust Co.*, 491.

§ 19. Exemption of Property and Agents of State and Federal Governments and Political Subdivisions from Taxation.

Defendant municipality acquired a hotel within its corporate limits by purchase at the foreclosure sale of a deed of trust on the property in order to protect its investment which it had made in the hotel corporation, which investment had been ratified by a majority of its qualified voters. After acquiring the property the municipality rented it for use as a hotel at a stipulated monthly rental. *Held:* The provision of Art. V, sec. 5, of the State Constitution, exempting from taxation property belonging to the State or to municipal corporations, applies to property so owned which is used for governmental or public purposes, and the property of defendant municipality used for business purposes is not exempt from taxation by the county in which it is situated. *Warrenton v. Warren County*, 342.

Term "Federal instrumentality" should be strictly construed in determining immunity from State taxation. *Unemployment Compensation Com. v. Ins. Co.*, 479.

Mere membership of an insurance company in a Federal Home Loan Bank does not constitute the insurance company a "Federal instrumentality" so as to exempt it from unemployment compensation taxes under the State law. *Ibid.*

STATUTES—*Continued.*

Constitutionally authorized activities of Federal Government are necessarily governmental in nature and exempt from taxation. *Unemployment Compensation Com. v. Trust Co.*, 491.

Whether an agency is an instrumentality of the Federal Government so as to be exempt from taxation by the State will be determined in each case as it arises. *Ibid.*

Ordinarily, privately owned agency created for profit under State law is not an instrumentality of Federal Government. *Ibid.*

Ordinarily, any agency created and wholly owned by the Federal Government for the convenient prosecution of its governmental functions, and existing at the will of the Government, is an instrumentality of the Government; while privately owned corporations or associations organized primarily for profit and created by the State are not instrumentalities of the Government, notwithstanding they may have been granted incidental duties or privileges by the Federal Government to promote some governmental policy. *Ibid.*

In the determination of whether an agency is an instrumentality of the Federal Government so as to be exempt from taxation by State, whether it was created by the Federal Government, wholly owned by it, primarily engaged in the performance of some essential governmental function, whether it is created for profit, and whether the proposed tax will impose an economic burden upon the Government, are all elements to be considered, and while no one of these factors alone may be sufficient and the presence of all is not required for immunity, if the proposed tax places an economic burden upon the Government or if it constitutes an undue interference of the agency in the performance of the governmental functions, the agency may usually be classed as a governmental instrumentality. *Unemployment Compensation Com. v. Trust Co.*, 491.

Bank chartered by the State is liable for Unemployment Compensation taxes, even though it is a member of the Federal Reserve System. *Ibid.*

A State bank which is a member of the Federal Reserve System is not exempt from taxation under the Unemployment Compensation Act because of its connection with the Federal Deposit Insurance Corporation nor may it claim such exemption because the tax would discriminate against it in favor of national member banks, since to relieve it from such taxation would discriminate in favor of it against nonmember State banks. *Ibid.*

§ 23. Construction and Operation of Revenue Statutes in General.

In construing a revenue statute, a definition of those subject to its provisions may be interpolated above the tax-levying provision to give the statute meaning and effectuate the obvious intention of the Legislature. *Belk Bros. Co. v. Maxwell, Comr.*, 10.

§ 30. Levy and Assessment of Franchise and License Taxes.

"Belk" stores *held* a chain store as defined by statute and liable for chain store license tax. *Belk Bros. Co. v. Maxwell, Comr.*, 10.

§ 38a. Enjoining Issuance of Bonds.

Plaintiff taxpayers instituted this action attacking a bond order passed by the board of county commissioners on the ground that said commissioners had failed to comply with provisions of section 14 of the County Finance Act, requiring the filing of a true statement of the county debt. *Held:* The attack of the order is upon statutory as distinguished from constitutional grounds, and the action instituted more than 30 days after the first publication of the order cannot be maintained, such action being barred after the expiration of

STATUTES—*Continued.*

the 30-day period by express provision of the bond order and section 20 of the County Finance Act. *Garrell v. Columbus County*, 589.

§ 40b. Foreclosure of Certificates.

Tax sale not had on a Monday or on one of first three days of term of court *held* void. *Caswell County v. Scott*, 185.

Where it appears of record that the owner of land had executed a deed of trust on same which had not been validly canceled, the trustee and *cestui que trust* are necessary parties to an action to foreclose a tax sales certificate on the property, and the record is notice to those claiming under the tax foreclosure suit. *Hill v. Street*, 312.

§ 41. Redemption of Land from Tax Sales.

In action against taxing unit to redeem land, plaintiffs must pay all taxes due to date. *Gower v. Clayton*, 82.

Minors having a beneficial interest in lands will not be held guilty of laches in seeking to redeem the lands after judgment in the suit to foreclose the tax sales certificate, nor in failing to examine the docket to see that their interests appeared of record, nor will the laches of their father, to whom the lands were conveyed for their benefit, be attributed to them. *Hill v. Street*, 312.

Persons acquiring an interest in land subsequent to the tax sale are entitled to redeem same, even where the required notice has been duly advertised, at any time prior to the order that deed be made to the purchaser in the suit to foreclose the tax sale certificate, or within six months after notice. *Ibid.*

In a suit to foreclose a tax sale certificate, only the record owner was made a party defendant, although it appeared of record that she had mortgaged same prior to the tax sale and that the mortgage had not been properly canceled. Plaintiffs were minors who acquired a beneficial interest in the lands under an unrecorded deed to their father as trustee for them, executed subsequent to the tax sale but more than a year prior to the judgment in the suit to foreclose the tax sale certificate. Plaintiffs went into possession of the lands immediately upon the execution of their deed. It appeared that the purchaser at the tax sale had bid in the land for a grossly inadequate consideration. *Held:* Under the facts and circumstances of this case the right of plaintiffs to redeem the land from the sale under the foreclosure of the tax sales certificate is not barred, plaintiffs not having been parties and not having been served with summons in the tax foreclosure suit. The limitations on the right of redemption of lands sold for the nonpayment of taxes and the procedural changes made by the statutes, discussed by *Mr. Justice Devin*. *Ibid.*

Where plaintiffs have a right to redeem land sold for the nonpayment of taxes, judgment should be entered giving them a reasonable time to pay the purchaser at the tax sale the amount of the bid with interest plus taxes and penalties paid by him, with provision that upon compliance, the deed to the purchaser be set aside, and that upon noncompliance the right to redeem should be conclusively held to have been abandoned and the defendant adjudged to hold the land in fee simple, free of plaintiffs' claim. C. S., 8039. *Ibid.*

TENDER.

§ 2. Operation and Effect of Tender.

In this proceeding to acquire right to open or deepen a drainage ditch across defendant's land, petitioners tendered the amount awarded by the commissioners upon the calling of the case for trial *de novo* upon appeal to the Supe-

TENDER—*Continued.*

rior Court. *Held:* While not in the form of a tender of judgment under C. S., 896, the tender was offered by those seeking affirmative relief to obviate further litigation, and was not an admission of indebtedness to the extent of the tender, and therefore it was error for the court to adjudge that respondent recover the amount of tender notwithstanding the verdict of the jury finding that no damages had been sustained by respondent. *Long v. Townsend*, 723.

TORTS.

§ 6. Right to Contribution Among Joint Tort-Feasors.

When a defendant simply denies negligence on its part and alleges that the negligence of its codefendant was the sole proximate cause of the injury, and makes no demand for affirmative relief against its codefendant, such defendant is not in a position to complain of nonsuit granted upon motion of the codefendant, upon its contention that it was entitled to keep the codefendant in the case as a joint tort-feasor, from whom it would be entitled to contribution. C. S., 618. *Cheek v. Ins. Co.*, 39.

TRESPASS.

§ 3. Trespass Where Original Entry Was Lawful or for Acts Beyond Rights Embraced in Deeds or Easements.

This action was instituted by the grantor in a timber deed to recover for timber which he alleged had been cut from other of his lands not embraced in the timber deed. Plaintiff admitted that he had been paid for all timber cut from the land embraced in the deed. The description of the land in the timber deed required reference to other instruments as an aider to make certain the land therein described. Plaintiff's agent, who negotiated the sale of the timber, testified that he went upon the land with the grantee and pointed out the boundary, and that neither the grantee nor his assignee had cut any timber from land not embraced therein. *Held:* Defendant's motion of nonsuit was properly granted. *Michael v. Brown*, 655.

TRIAL.

I. Time of Trial and Notice
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29c. Charge as to Burden of Proof. Perry v. Sykes, 39.
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38. Conformity of Verdict to Pleadings and Evidence. Vandiford v. Vandiford, 461.
X. Motions after Verdict
45. Motions for Judgment Non Obstanti Veredicto. Buick Co. v. Rhodes, 595.
47. Motions for New Trial for Newly Discovered Evidence. Farris v. Trust Co., 466.
48. Motions for New Trial for Misconduct of or Matters Affecting Jury. Durham v. Lawrence, 75.
50b. Motions for New Trial for Defective Verdict. Vandiford v. Vandiford, 461.
XI. Trial by Court by Agreement
52. Agreements and Waiver of Jury Trial. Realty Corp. v. Koon, 459.

TRIAL—*Continued.*

§ 4. Continuance.

A motion for a continuance is addressed to the sound discretion of the trial court, and the refusal of the motion under the facts and circumstances of this case *is held* to show no abuse of the discretion. *Sykes v. Blakey*, 61.

Upon refusal of motion for continuance, court should order plaintiff to proceed to trial, and court may enter nonsuit only after plaintiff refuses to go to trial. *Ibid.*

§ 13. Order of Proof.

Objections to testimony tending to show modifications and abandonment of the contract in suit before the introduction of the contract in evidence are rendered untenable by the subsequent introduction of the contract. *Pack v. Katzin*, 233.

§ 18. Province of Court and Jury in General.

Where no issue of actual malice is submitted to jury in slander action, court may not make finding of actual malice and order execution against the person of defendant in absence of waiver of jury trial on issue of actual malice. *Crowder v. Stiers*, 123.

§ 22a. Office of Motion to Nonsuit.

A nonsuit under C. S., 567, is permissible only on demurrer to the evidence, and when the court refuses plaintiff's motion for a continuance, it is error for the court to enter an involuntary nonsuit, but the court should order plaintiff to proceed to trial, and if plaintiff should refuse to go to trial, the court may then dismiss the cause "as of nonsuit" under C. S., 602 (4), or in its inherent power. *Sykes v. Blakey*, 61.

§ 22b. Consideration of Evidence on Motion to Nonsuit.

Upon a motion to nonsuit, the evidence tending to support plaintiff's cause of action is to be considered in its most favorable light for plaintiff, and she is entitled to every reasonable intendment thereon and every reasonable inference therefrom. *Newbern v. Leary*, 134; *Fox v. Army Store*, 187; *Reid v. Coach Co.*, 469.

Only evidence favorable to plaintiff will be considered. *Fox v. Army Store*, 187.

The natural and physical evidence, in its relation to the oral testimony, is properly to be considered in determining the sufficiency of the evidence to overrule defendant's motion to nonsuit. *Ibid.*

The burden is on plaintiff to show the contract of bailment sued on, whether express or implied, by competent evidence, and the fact that the alleged bailee is dead, rendering incompetent testimony as to any transaction or communication with him to establish the bailments, C. S., 1795, is not a circumstance to be considered in passing upon the sufficiency of the evidence. *Troxler v. Bevill*, 640.

Upon demurrer, the evidence must be considered in the light most favorable to the plaintiff. *Pool v. Pinehurst, Inc.*, 667; *Aydlett v. By-Products Co.*, 700; *Daniel v. Packing Co.*, 762.

§ 23. Contradictions and Discrepancies in Evidence.

Contradictions and discrepancies in plaintiff's evidence do not warrant granting defendant's motion to nonsuit. *Fox v. Army Store*, 187.

§ 24. Sufficiency of Evidence to Overrule Nonsuit.

If reasonable men can draw different conclusions from the evidence, the issue must be submitted to the jury. *Newbern v. Leary*, 134.

Where there is more than a scintilla of evidence to sustain the allegations of the complaint, the case must be submitted to the jury, its sufficiency to warrant a verdict for plaintiff being for the determination of the jury, subject only to the discretionary power of the trial court to set the verdict aside in proper cases, and a strict adherence to this rule is necessary to preserve the right of trial by jury guaranteed by the Constitution, Art. I, sec. 19. *Fox v. Army Store*, 187.

§ 29b. Statement of Evidence and Explanation of Law Arising Thereon.

Charge *held* for error in failing to submit for jury's consideration plaintiff's contentions, supported by evidence, as to defendant's duty to minimize loss resulting from plaintiff's breach of contract, and other evidence of plaintiff bearing on measure of damages. *Chesson v. Container Co.*, 112.

It is the duty of the court to state and explain a material phase of the law applicable to the evidence without any special request for instruction. *West v. Woolworth Co.*, 211.

Instruction in this processioning proceedings *held* erroneous in failing to sufficiently state the evidence and explain law arising thereon. *Bradshaw v. Warren*, 442.

Where the facts alleged in the complaint do not present the doctrine of last clear chance, and plaintiff fails to plead same by reply to the answer setting up a version of the accident which might require the application of the doctrine, it is not error for the court to fail to instruct the jury in regard to the doctrine in the absence of a request for a special instruction. *Redwine v. Bass*, 467.

Charge *held* for error in failing to instruct jury as to substantive feature of case arising on the evidence. *Self Help Corp. v. Brinkley*, 615.

The failure of the court to explain the law arising on the evidence favorable to defendant is error, and mere silence of counsel upon the statement of the court after charging the law arising upon plaintiff's evidence that it would not recapitulate the evidence is not a waiver of the substantial rights conferred by C. S., 564. *Carruthers v. R. R.*, 675.

Charge *held* for error as presenting question of law not supported by the evidence. *Ibid.*

§ 29c. Charge as to Burden of Proof.

Instruction *held* for error as placing burden on defendant to show that its negligence was not proximate cause of injury. *Perry v. Sykes*, 39.

§ 31. Expression of Opinion by Court.

Instruction *held* not erroneous as containing expression of opinion by the court, it appearing that the exception related to the statement of evidence in the case. *In re Will of Williams*, 259.

In these actions to recover for the death of plaintiff's intestates, alleged to have been caused by the negligence of defendant, the form of the charge of the court *is held* for error as amounting to an expression of opinion by the court in repeatedly charging the duties owed by defendant to plaintiff's intestates and the circumstances under which the jury should answer the first issues in the affirmative without charging upon what conditions the issues should be answered in the negative. *Carruthers v. R. R.*, 675.

§ 36. Construction of Instructions and General Rules Upon Review.

A charge will be construed contextually as a whole, and an exception thereto will not be sustained when the charge, so construed, does not contain prejudicial error. *In re Will of Williams*, 259.

TRIAL—*Continued.*

§ 38. Conformity of Verdict to Pleadings and Evidence.

Held: It would seem the jury undertook to compromise the case and the verdict is at variance with the pleadings, evidence, charge of the court, and the theory of trial, and defendant's motion to set it aside should have been allowed. *Vandiford v. Vandiford*, 461.

§ 45. Motions for Judgment Non Obstante Veredicto.

A motion for judgment *non obstante veredicto* is, in effect, a belated motion for judgment on the pleadings, and is not properly made upon a party's contention that he is entitled to judgment upon the jury's answer to one of the issues notwithstanding its answer to a subsequent issue in favor of the adverse party. *Buick Co. v. Rhodes*, 595.

§ 47. Motions for New Trial for Newly Discovered Evidence.

Where the trial court grants plaintiff's motion, aptly made, for a new trial for newly discovered evidence but does so as a matter of law and not as a matter of discretion, the cause will be remanded on appeal in order that the court, at the next succeeding term, may determine the motion as a discretionary matter, the cause having been kept alive by defendants' appeal. *Farris v. Trust Co.*, 466.

§ 48. Motions for New Trial for Misconduct of or Matters Affecting Jury.

Motion for new trial for refusal of court to allow jury view of premises *held* addressed to discretion of trial court. *Durham v. Lawrence*, 75.

§ 50b. Motions for New Trial for Defective Verdict.

Verdict in this case *held* at variance with the pleadings, evidence, and theory of trial, and should have been set aside upon motion. *Vandiford v. Vandiford*, 461.

§ 52. Agreements and Waiver of Jury Trial.

The court may not hear evidence and find the facts, even with the consent of the parties, in the absence of pleadings properly filed. *Realty Corp. v. Koon*, 459.

TRUSTS.

§ 1d. Creation and Validity of Charitable Trusts.

While ordinarily equity will not permit a trust to fail for want of a trustee, and in a proper case may appoint the trustee, this principle does not extend to the expenditure of the trust funds for another purpose or for the benefit of those outside the territorial limits designated in the trust, or where the purpose of the trust has failed, the doctrine of *cy pres* not prevailing in this jurisdiction. *Board of Education v. Wilson*, 216.

Where land is conveyed to trustees and their successors for specified charitable purposes, the court may appoint trustees upon failure of the successors to the original trustees, since equity will not permit a trust to fail for want of a trustee, but said trustees should be appointed by the court upon proper application. *Lassiter v. Jones*, 298.

Limitation over after expiration of period prescribed *held* for charitable purposes and not subject to rule against perpetuities. *Williams v. Williams*, 739.

Limitation over for charitable uses *held* not invalid as being too indefinite as to purpose and beneficiaries intended. *Ibid.*

§ 15. Acts and Transactions Creating Resulting and Constructive Trusts.

Parol trust fails upon failure of proof that alleged constructive trustee received benefit of funds. *Strayhorn v. Aycock*, 43.

TRUSTS—*Continued.*

Where one person furnishes the consideration for land, but title is taken in the name of another, a resulting trust is engrafted upon the title in favor of the person furnishing the purchase price, in the absence of an intention to the contrary or a repugnant presumption of law. *Wilson v. Williams*, 407.

Party having deed executed absolute in form with full knowledge of equities *held* estopped from setting up parol trust. *Sansom v. Warren*, 432.

§ 17. Title and Rights of Transferee of Resulting Trustee.

All the evidence in this case *is held* to show that the trustee of a resulting trust encumbered the lands to secure his own personal preëxisting debt, and the evidence sustains an instruction that if the jury should find the facts to be as all the evidence tended to show, the grantees in the encumbrances would not be *bona fide* purchasers so as to defeat the rights of the *cestuis que trustent*. *Wolfe v. Smith*, 286.

§ 18c. Burden of Proving Resulting Trust.

A resulting trust must be established by clear, cogent, and convincing proof. *Wilson v. Williams*, 407.

§ 18d. Competency and Relevancy of Evidence in Actions to Establish Resulting Trusts.

Resulting trusts, which arise by operation of law, do not come within the statute of frauds, and may be proved by parol evidence. *Wilson v. Williams*. 407.

Upon counterclaim to establish a resulting trust against the estate of a decedent, testimony of disinterested witnesses as to declarations made by decedent tending to establish that defendant furnished the purchase price for the property is relevant and admissible. *Ibid.*

§ 18e. Sufficiency of Evidence and Nonsuit in Actions to Establish Resulting Trusts.

Evidence that defendant furnished the purchase price for the *locus in quo* and gave same to another to purchase the property for her, that such other took title in his own name, and that thereafter plaintiff furnished money for the construction of a dwelling on the land, *is held* sufficient to be submitted to the jury on defendant's counterclaim to establish a resulting trust against the property, the convincing character of the evidence being for the jury. *Wilson v. Williams*, 407.

USURY.

§ 4. Parties Who May Plead Usury.

The trustee and *cestui que trust* in a second deed of trust are not entitled to invoke the forfeiture of interest for usury as against the first lienor, since they are not parties to the alleged usurious contract between the first lienor and the debtor, but may only require that the debt be stripped of usury. *Trust Co. v. Realty Corp.*, 526.

This action was instituted by a creditor under a senior lien to have a junior lien on all the property of the trustor canceled as being fraudulent as to creditors. The trustee and *cestui que trust* in the second deed of trust claimed the right to invoke the forfeiture of interest on the prior debt for usury in order to establish the solvency of the trustor at the time of the execution of the second deed of trust. *Held:* The right to invoke the forfeiture of interest for usury is personal to the debtor, C. S., 2306, and the trustee and *cestui que trust* have no relation to the contract between the debtor and the first lienor entitling them to enter the plea. *Ibid.*

USURY—*Continued.*

§ 5. Necessity of Tender of Debt With Legal Interest.

A claim of forfeiture of all interest for usury may be properly set up as a defense in the creditor's action on the debt without a tender of the debt with legal interest, C. S., 2306, tender being required only when the debtor seeks affirmative equitable relief such as enjoining the collection of the debt or the foreclosure of the security therefor. *Trust Co. v. Realty Corp.*, 526.

When the creditor seeks to set aside a conveyance as being fraudulent, the creditor is entitled to establish his claim, the remedy sought being incidental thereto, and therefore the debtor not seeking to restrain the collection of the notes or to enjoin the foreclosure of the security therefor, is not required to tender the principal of the debt with legal interest, nor does the debtor's claim that the notes and deed of trust should be canceled for fraud require him to make such tender, since he seeks no affirmative equitable defense based on usury. *Ibid.*

VENDOR AND PURCHASER.

§ 17b. Extension of Time for Conveyance.

The purchaser's father may not extend the time for performance on the part of the vendor in the absence of evidence that he was the purchaser's agent or had authority to extend the time. *Trust Co. v. Toney*, 206.

§ 13. Rescission and Abandonment by Purchaser.

When it appears that the vendor agreed to give the purchaser an unconditional title insurance contract on the land, which policy should be satisfactory to and accepted by the purchaser, a delay of three months in furnishing the title policy, and its rejection by the purchaser as not being as stipulated in the agreement, justifies the purchaser's rejection of the policy and his repudiation and abandonment of the contract, when his action is not unreasonable or arbitrary. *Trust Co. v. Toney*, 206.

§ 21a. Parties in Actions for Purchase Money.

In the vendor's action to enforce the contract, its cashier is not a necessary party when it nowhere appears that he had any interest in the land, had any enforceable interest in the contract, or signed any paper comprising a part of the agreement. *Trust Co. v. Toney*, 206.

In the vendor's action to enforce the contract, the purchaser's father is not a necessary party when it appears that he was not the purchaser's agent, had no enforceable interest in the contract, and was not served with process. *Ibid.*

VENUE.

§ 1b. Actions Against Executors or Administrators.

Plaintiff instituted an action in the county of his residence to collect damages resulting from an automobile collision. C. S., 469. The defendant died prior to service of process and thereupon defendant's administratrix was joined as a party defendant. *Held:* The administratrix may not claim that the action is not properly pending because not instituted in the county in which she had given bond, C. S., 465, since venue is governed by the status of the parties at the commencement of the action, but defendant administratrix may move for a removal or the cause to the county of her residence and the scene of the collision involved for the convenience of witnesses and the promotion of the ends of justice. C. S., 470 (2). *Johnson v. Smith*, 322.

§ 2a. Actions Involving Realty.

Held: Action was one to determine amounts to be paid for extension of rights under timber deed and not one affecting realty. *Lumber Corp. v. Estate Corp.*, 649.

WATERS AND WATER COURSES.

(Pollution of streams by sewage disposal plants and by private corporations and right to permanent easement upon payment of permanent damages, see Nuisance § 3.)

§ 4. Mutual Rights of Contiguous Landowners in Regard to Surface Waters in General.

An upper landowner does not have an easement by necessity to drain his land by a ditch extending across the lower lands of another, even though this is the most convenient or the only way by which he can drain his land. *Darr v. Aluminum Co.*, 768.

A mere showing of the use of a drainage ditch across the lands of another is insufficient to establish a prescriptive right to the use of such ditch, since in the absence of evidence in rebuttal such use will be presumed permissive and not adverse. *Ibid.*

§ 6. Damages from Ponded Water.

Plaintiff's evidence tended to show that he had drained his land through a ditch which had been dug, beginning on his land and running through the lands of another and thence into a river, that subsequently defendant built and maintained a dam lower down upon the river which caused deceleration in the flow of the water resulting in the deposit of sand and the growth of vegetation along the river and the mouth of the drainage ditch upon the lands of the lower proprietor so that the drainage ditch failed to properly drain plaintiff's land. *Held:* Upon failure of plaintiff to establish that he had a vested legal right to use the drainage ditch on the lands of the lower proprietor by deed or prescription, defendant's motion to nonsuit was properly granted, since the evidence fails to show any interference with any vested legal right of plaintiff. *Darr v. Aluminum Co.*, 768.

WILLS.

II. Contracts to Devise or Bequeath
5. Actions on Contracts to Devise. Lamb v. Smith, 463.

IV. Holographic Wills
9. Handwriting of Testator. In re Will of Williams, 259.
10. Deposit Among Valuable Papers. Cartwright v. Jones, 108; In re Will of Williams, 259.

VIII. Caveat Proceedings
17. Nature of Proceedings in General. Bailey v. McLean, 150.
23d. Evidence on Question of Handwriting. In re Will of Williams, 259.
24. Sufficiency of Evidence, Nonsuit and Directed Verdict. In re Will of Williams, 259.
25. Instructions in Caveat Proceedings. In re Will of Williams, 259.
29. Agreements to Withdraw Objection to Will. Bailey v. McLain, 150.

IX. Construction and Operation of Wills
31. General Rules of Construction. Trust Co. v. Holt, 644; Tyer v. Meadows, 733; Rigsbee v. Rigsbee, 757.
33a. Estates and Interests Created in General. Hood v. McElvain, 568.
33b. Rule in Shelley's Case. Edwards v. Faulkner, 586.
33g. Termination of Particular Estate and Vesting of Remainder. Trust Co. v. Holt, 644; Rigsbee v. Rigsbee, 757.
33f. Devises with Power of Disposition. Hood v. McElvain, 568.
33h. Charitable Trusts. Williams v. Williams, 739.

X. Rights and Liabilities of Devisees and Legatees.
42. Lapsed and Adeemed Legacies. Tyer v. Meadows, 733.
47. Rights and Liabilities of Beneficiaries as Between Themselves. Robertson v. Robertson, 562.

§ 5. Actions on Contracts to Devise.

Evidence *held* insufficient to show a contract by testator to devise property to plaintiff and defendants' motion to nonsuit was properly granted upon authority of *Brown v. Williams*, 196 N. C., 247. *Lamb v. Smith*, 463.

§ 9. Handwriting of Testator.

Whether paper writing was in handwriting of deceased *held* for jury upon the evidence. *In re Will of Williams*, 259.

WILLS—*Continued.*

§ 10. Deposit Among Valuable Papers.

Husband and wife executed a joint will with subscribing witnesses disposing of all their property, which will contained a provision devising the home place to a son. Thereafter the husband, without the knowledge of the wife, added in his own handwriting after this devise, a provision that as he had sold the home place he wanted the son to have the store house in lieu thereof. *Held:* The failure of proper proof that the purported holograph codicil was found among deceased's valuable papers is a fatal defect, C. S., 4131, 4144, and the surviving wife has title to the store house and may convey same in fee simple. *Cartwright v. Jones*, 108.

Holograph will is found among valuable papers if it is found among papers regarded by decedent as valuable. *In re Will of Williams*, 259.

§ 17. Nature of Caveat Proceedings.

One interested person may caveat a will, C. S., 4158, and upon the filing of the caveat all other interested persons must be cited to "see the proceedings," C. S., 4159, and they may come in and align themselves as they will, and there is no basis, either statutory or arising out of interest, that the heirs at law, who are frequently beneficiaries under the will, make a common fight to set the will aside. *Bailey v. McLain*, 150.

A caveat to a will is a proceeding *in rem* to determine the validity of the paper writing probated in common form, and the validity of the will cannot be established by common consent of the parties, nor may it be renounced in part and upheld in part, but the proceedings establish either that the paper writing is valid *ab initio* and concludes all heirs and distributees who have been cited, or that it is void, in which event the heirs at law take, not because the will has been vacated, but because there never was a will. *Ibid.*

§ 23d. Evidence on Question of Handwriting.

Where the paper writing propounded as a holograph will is attacked mainly on the grounds that it was not in the handwriting of deceased and was not found among his valuable papers, the introduction of the paper writing in evidence for the purpose of comparison of handwritings, C. S., 1784, and the admission of the record solely to show that it was probated in common form, will not be held for error. *In re Will of Williams*, 259.

§ 24. Sufficiency of Evidence, Nonsuit and Directed Verdict.

Testimony of witnesses that the paper writing propounded as the holograph will of deceased was found in his home in a washstand or bureau drawer in which he also kept deeds and receipts, is sufficient to be submitted to the jury on the question of whether the paper writing was found among his valuable papers and effects as required by C. S., 4144 (2), since the requirement of the statute is met if the paper writing is found among papers and effects regarded by decedent as valuable. *In re Will of Williams*, 259.

Testimony of three witnesses that the paper writing propounded as the holograph will of decedent was in his handwriting, takes the case to the jury as to this requirement of the statute, C. S., 4144 (2), notwithstanding conflicting testimony of caveator. *Ibid.*

Upon the evidence in this case the refusal of the court to give the peremptory instruction requested by caveator *is held* not error. *Ibid.*

§ 25. Instructions in Caveat Proceedings.

An instruction of the court in stating the evidence that the propounder had offered three witnesses, beside herself, who had testified that they were familiar with the handwriting of deceased, and had compared the hand-

writing of the purported will, and had given it as their opinion that the paper writing and every part thereof is in the handwriting of the deceased, *is held* not erroneous as an expression of the opinion by the court on the weight of the evidence, C. S., 564, it appearing that the court, prior to this instruction, went into detail in citing caveators' testimony. *In re Will of Williams*, 259.

In caveat proceedings of a paper writing propounded as a holograph will, an inadvertent instruction of the court to the jury that it was necessary for them to find by the greater weight of the evidence that the name of the decedent was subscribed to the paper writing or inserted in some part thereof in his handwriting will not be held for error when it appears that the court repeatedly instructed the jury that it was necessary that the paper writing and every part thereof be in the handwriting of the deceased. *Ibid.*

§ 29. Agreement to Withdraw Objection to Will.

Since an heir or distributee cited in caveat proceedings may take either side of the controversy or remain neutral, as he will, and since heirs, as a class, do not necessarily make a common fight to have the will vacated, an heir or distributee may withdraw objection to the will by agreement with the propounder either with or without a pecuniary consideration, and any monetary consideration for such agreement passes to him by virtue of the contract between himself and propounder and does not inure to the benefit of the heirs as a class. *Bailey v. McLain*, 150.

Heirs not contesting will and not entering into agreement *held* not entitled to share in sum received by caveating heirs for withdrawing objection to the will. *Ibid.*

§ 31. General Rules of Construction.

Where the terms of a will are plain and unambiguous, its express terms should be given effect, and there is no occasion for judicial interpretation or the presumption of an intention at variance with the language employed. *Trust Co. v. Holt*, 644.

Ordinarily, a will will be construed as though executed immediately prior to testator's death, and it is only when the will describes a specific subject of gift with sufficient particularity to show that an object in existence at the date of the execution of the will was intended that the general rule is excluded. C. S., 4165. *Tyer v. Meadows*, 733.

The intention of the testator as gathered from the four corners of the instrument is the cardinal rule in construing a will. *Ibid.*

The rule favoring the early vesting of estates and the presumption against partial intestacy cannot prevail against the expressed language of the will. *Rigsbee v. Rigsbee*, 757.

§ 33a. Estates and Interests Created in General.

A bequest of personal property with provision for defeasance if the legatee should die childless, with limitation over of the defeasible fee, vests the absolute title in the legatee, the limitation over being void. *Hood v. McElvain*, 568.

§ 33b. Rule in Shelley's Case.

The rule in *Shelley's case* obtains in this jurisdiction not only as a rule of law but also as a rule of property. *Edwards v. Faulkner*, 586.

Where the limitation over after a life estate is to the general heirs of the first taker the rule in *Shelley's case* applies, but where the limitation over designates specific heirs who are to take without including all those within that class, the rule does not apply. *Ibid.*

WILLS—*Continued.*

The will in question devised the *locus in quo* to plaintiff "for his lifetime, and to his heirs, if he dies without heirs, my property goes to" testatrix' brother and after his death to my "nephews children" H. T. and R. L. *Held:* It appearing that testatrix left her surviving heirs other than those named in the limitation over of the fee, the rule in *Shelley's case* does not apply and the devise conveys only a life estate to the first taker. *Ibid.*

§ 33g. Termination of Particular Estate and Vesting of Remainder.

Under terms of this will, upon death of widow, share held in trust for her should be paid directly to testator's children and not held in trust with ultimate disposition contingent. *Trust Co. v. Holt*, 644.

Remainders after life estate *held* to vest upon death of life tenants, unaffected by other provision for disposition of trust property. *Rigsbee v. Rigsbee*, 757.

§ 33f. Devises With Power of Disposition.

A devise of realty with provision that if the devisee dies childless the land should revert to testator's grandchildren "except so much as she may wish to will to Christian benevolence" conveys a defeasible fee to the devisee, the power of disposition being restricted. *Hood v. McElvain*, 568.

§ 33h. Charitable Trusts.

Charitable trusts are not subject to the rule against perpetuities, ch. 264, sec. 1, Public Laws of 1925, being merely declaratory of the existing law, and limitations over from one charity to another may be made to take effect after the period prescribed by the rule against perpetuities. *Williams v. Williams*, 739.

Limitation over after expiration of period prescribed *held* for charitable purposes and not subject to rule against perpetuities. *Ibid.*

Limitation over for charitable uses *held* not invalid as being too indefinite as to purpose and beneficiaries intended. *Ibid.*

§ 42. Lapsed and Adeemed Legacies.

Bequest of policies of insurance *held* not adeemed by change of beneficiary to estate. *Tyer v. Meadows*, 733.

§ 47. Rights and Liabilities of Beneficiaries as Between Themselves.

The will in question provided for the distribution of the personal and real assets among testator's children, with provision that the share of each should be charged with any indebtedness owed by such beneficiary to any of the other beneficiaries. *Held:* All the beneficiaries of the estate were properly joined as defendants in the action brought in the name of the executor and the beneficiary to whom it was alleged the other beneficiaries were indebted, in order that there might be a complete determination of all matters involved in the settlement of the estate. *Robertson v. Robertson*, 562.

WITNESSES.

§ 5. Mentality.

The competency of a witness of low mentality is for the determination of the court in its discretion, and the court's refusal to strike out the witness' testimony will not be held for error in the absence of abuse of discretion. *S. v. Cade*, 393.

CONSOLIDATED STATUTES AND MICHIE'S CODE CONSTRUED.

SEC.

7, 137 (8). Where wife predeceases husband without surviving children, husband's estate is entitled to proceeds of policy on his life in which she was named beneficiary. *Wilson v. Williams*, 407.

137 (5). Where intestate dies owning personalty and leaving as sole heirs at law children of deceased brothers and sister, the personalty must be equally divided among all the nephews and nieces, since each of the heirs are of equal degree of kinship. *Nixon v. Nixon*, 377.

218 (c). Commissioner of Banks is statutory receiver. *Hoft v. Mohn*, 397.

421. Facts *held* insufficient to establish mutual, open and current account, and statute began to run from date of each item. *Tew v. Hinson*, 456.

437 (a). Action for deficiency judgment is not barred until year after expiration of statutory time for increase of bid, even though instituted more than year after property was exposed for sale. *Building and Loan Assn. v. Black*, 400.

441 (1). Action on note under seal is barred in three years as against endorser, even though endorsement itself is under seal, an endorser not being a "principal" to the note so as to come within the provisions of C. S., 437 (2). *Howard v. White*, 130.

441 (3). Action against municipality for damages to private lands resulting from maintenance of sewage disposal plant is for continuing nuisance, and only damages for prior three years may be recovered. *Ivester v. Winston-Salem*, 1. Lower riparian owner alleging trespass from overflow of river from alleged negligent logging operations must show that upper proprietor was in possession and control within statutory period. *Hooper v. Lumber Co.*, 308.

463, 470. *Held:* Action was one to determine amounts to be paid for extension of rights under timber deed and not one affecting realty. *Lumber Corp. v. Estate Corp.*, 649.

465, 469. Where action for tort is instituted in proper county, and thereafter defendant dies, administrator joined as defendant may not claim that venue is county in which he qualified, venue being governed by the status of the parties at the time of the institution of the action. *Johnson v. Smith*, 322.

483 (1). Service of process on president of foreign corporation within the State on personal business is not valid service on the corporation. *Langley v. Warehouse*, 237.

506. In action to enforce lien for public improvements, allegations as to dealings between owner at time improvements were made and his subsequent grantee *held* irrelevant and immaterial and were properly stricken out. *Wadesboro v. Coxe*, 708.

507. Where the several causes do not affect all the parties and do not constitute a connected series of transactions, demurrer is proper. *Holland v. Whittington*, 330.

509. Defendant has thirty days in which to answer after final determination of his motion to dismiss for want of proper service, made upon special appearance. *Bank v. Derby*, 669.

511, 517. Objection on ground of another action pending may be taken by answer. *Johnson v. Smith*, 322.

CONSOLIDATED STATUTES—*Continued.*

SEC.

535. Complaint will be liberally construed upon demurrer, and facts therein alleged taken as true. *Ins. Co. v. McCraw*, 105; *Avery County v. Braswell*, 270; *Vincent v. Powell*, 336.

564. Instruction *held* not erroneous as containing expression of opinion by court, it appearing that the exceptions related to statement of evidence in the case. *In re Will of Williams*, 259. Charge *held* for error as containing expression of opinion by court in manner of stating the evidence. *Carruthers v. R. R.*, 675. Charge *held* for error in failing to charge jury upon substantive feature of case arising upon the evidence. *Self Help Corporation v. Brinkley*, 615; *Carruthers v. R. R.*, 675. Instruction in this processioning proceeding *held* erroneous in failing to sufficiently state the evidence and explain law arising thereon. *Bradshaw v. Warren*, 442.

567. Nonsuit under this section is permissible only upon demurrer to the evidence and should not be entered upon refusal of plaintiff's motion for continuance. *Sykes v. Blakey*, 61. On motion to nonsuit the evidence must be taken in the light most favorable to plaintiff. *Newbern v. Leary*, 134; *Fox v. Army Store*, 187; *Reid v. Coach Co.*, 469; *Daniel v. Packing Co.*, 762.

577. Referee's report must show his rulings on evidence with sufficient particularity to afford sufficient basis for review. *Pack v. Katzin*, 233.

602 (4). Upon refusal of motion for continuance, court should order plaintiff to trial, and upon plaintiff's refusal to go to trial, may then dismiss the cause under this section. *Sykes v. Blakey*, 61.

606. Judgment by default final may not grant relief in excess of, or different from the case stated in the complaint. *Land Bank v. Davis*, 100.

618. Defendant asking no affirmative relief against codefendant may not object to granting of codefendant's motion to nonsuit, and its contention that it is entitled to keep codefendant in the case as joint tortfeasor from whom it is entitled to contribution is untenable. *Perry v. Sykes*, 39. Mere payment of judgment by judgment debtor who is jointly and severally liable does not entitle him to assignment of judgment, since substantial compliance with provisions of statute is necessary in order to invoke its protection. *Hoft v. Mohn*, 397.

638. Appeal from denial of motion to dismiss on ground that action was barred by statute of limitation, C. S., 441, *held* premature and fragmentary. *Johnson v. Ins. Co.*, 120.

660. Judgment of the justice of the peace is vacated by appeal and thereupon cause is pending in Superior Court for trial *de novo*. *Pridgen v. Lynch*, 672.

673, 678. Execution against the person is improper in tort action in absence of finding by jury of actual malice. *Olinger v. Camp*, 340.

813. Bond in form substantially prescribed by this statute rather than that prescribed by C. S., 815, will not support summary judgment against surety in attachment proceeding to which surety was not a party. *Hoft v. Lighterage Co.*, 690.

896. Tender, while not in form of tender of judgment under the statute, *held* one to obviate further litigation and was not an admission of indebtedness. *Long v. Townsend*, 723.

CONSOLIDATED STATUTES—*Continued.*

SEC.

970. Common law rule that retailer of food is liable to purchaser on implied warranty that food is fit for human consumption obtains in this State. *Rabb v. Covington*, 572.

978. Record and findings *held* insufficient to support judgment for contempt for willful disobedience of court order to pay alimony. *Berry v. Berry*, 339.

1116. While incorporators become body corporate from date certificate of incorporation is filed in the office of the Secretary of State, there is no presumption that the corporation is organized and doing business as such from that time. *Hammond v. Williams*, 657.

1330. Action against municipality for damages to private lands from continuing nuisance is governed by provisions relating to eminent domain and not actions for tort. *Ivester v. Winston-Salem*, 1.

1334 (15), (53), (59), (60), (66), (67), (68), (75). Complaint alleging wrongful approval of county vouchers by county accountant *held* sufficient as against demurrer of accountant and his surety. *Avery County v. Braswell*, 270.

1659 (4). Separation as used in the statute means voluntary separation by mutual agreement, and separation caused by commitment of wife to asylum is not a separation within meaning of statute. *Woodruff v. Woodruff*, 685.

1660, 1666. In husband's action for divorce on ground of adultery, finding that wife denied charge of adultery under oath and was without means of defending the action justifies judgment for alimony *pendente lite*. *Covington v. Covington*, 569.

1737. Remainders after life estate *held* to vest upon death of life tenants. *Rigsbee v. Rigsbee*, 757.

1784. Introduction of instrument propounded as holographic will in evidence for purpose of comparison of handwriting *held* not error. *In re Will of Williams*, 259.

1795. Witness may testify in regard to independent facts and circumstances not involving personal transaction or communication between the witness and deceased. *Wilder v. Medlin*, 542; *Collins v. Lamb*, 719.

1802. Solicitor may not comment upon the failure of defendant's wife to testify in his behalf. *S. v. Watson*, 387.

2172, 2180. Superior Courts in their equity jurisdiction have plenary power to empower guardian to lease wards' estate beyond period of their minority. *Coxe v. Charles Stores Co.*, 380.

2306. Forfeiture of interest for usury may be set up without tender of debt with legal interest unless affirmative equity based on usury is demanded. *Trust Co. v. Realty Corp.*, 526. Junior lienor is not entitled to invoke forfeiture of interest for usury as against senior lienor. *Ibid.* Usury entitles debtor to declare forfeiture of interest, but does not bar creditor's action to set aside prior conveyance as fraudulent, nor may transferee plead forfeiture of interest for usury in order to establish solvency of debtor transferror. *Ibid.*

2338. Challenge to the array *held* properly denied in absence of showing of misconduct, partiality or irregularity in making up jury list. *S. v. Dixon*, 438.

CONSOLIDATED STATUTES—*Continued.*

SEC.

2507, 2513. In action involving wives separate estates, joinder of husbands as party defendant may be treated as surplusage unless personal judgment against husbands is demanded. *Robertson v. Robertson*, 562.

2589. Party asserting that power of sale was barred at time of foreclosure has burden of proof. *Edwards v. Hair*, 662. Foreclosure executed after power of sale is barred is voidable and not void. *Ibid.* Fact that notes secured by instrument are barred does not in itself bar power of sale. *Ibid.* Payment on the notes by maker repeals bar as to comaker of the notes and mortgage. *Ibid.*

2591. Last and highest bidder at foreclosure sale under mortgage is but proposed purchaser until expiration of statutory time for increase of bid. *Building and Loan Assn. v. Black*, 400.

2621 (46) (c), (63). Right of driver to assume that motorist approaching intersection from servient highway will observe stop signal is not absolute. *Groome v. Davis*, 510.

2621 (287), (301) (a), (278), (293). Evidence of contributory negligence in stopping on highway without observing statutory provisions *held* properly submitted to the jury. *Newbern v. Leary*, 134.

2787 (36). Indemnity bond for taxi corporation *held* not to cover liability for injury inflicted prior to the execution of the bond, although judgment was obtained against the taxi corporation subsequent to the execution of the bond. *Manheim v. Surety Co.*, 693.

2807, 2808. Maintenance of electric power lines outside its limits is not necessarily *ultra vires* a municipality. *Kennerly v. Dallas*, 532.

3213, 3215, 758. When sole seizin is pleaded in partition proceeding it becomes in effect an action in ejectment for trial upon the issue of title with the burden upon petitioners to prove their title as in ejectment. *Gibbs v. Higgins*, 201.

3233. Wife having a dower interest in property *held* by her husband as tenant in common may not defeat sale for partition. *Trust Co. v. Watkins*, 292.

3236. Court may not hear evidence and find additional facts in controversy without action, but may allow amendments concurred in by all parties to supply wanting necessary facts. *Realty Corp. v. Koon*, 459. Agreed facts with the required affidavits are necessary parts of record proper in appeal in controversy without action. *Ibid.*

3309, 3311. No notice takes place of registration as to purchaser for value, but only creditors and purchasers for value are protected. *Case v. Arnold*, 593. Person claiming as purchaser for value under Connor Act must show that very deed under which he claims is supported by consideration. *Sansom v. Warren*, 432.

3411 (j). Provision of Turlington Act permitting possession for personal use applies solely to structure used exclusively as dwelling. *S. v. Carpenter*, 635.

3835, 3836. Appeal will lie to Superior Court from judgment of clerk that petitioner is not entitled to establishment of cartway. *Dailey v. Bay*, 652.

CONSOLIDATED STATUTES—*Continued.*

SEC.

3930. Sheriff's bond relates to acts in "due execution and return of process," and does not cover acts committed in keeping of jail. *Davis v. Moore*, 449.

3944. Sheriff is liable for acts of deputy committed within scope of authority. *Davis v. Moore*, 449.

4035 (a). Limitation over for charitable uses *held* not subject to rule against perpetuities, and not too indefinite as to purpose and beneficiaries intended. *Williams v. Williams*, 739.

4105 *et seq.* Does not preclude court of equity from ordering sale of lands for partition although widow's dower is allotted in her husband's interest as tenant in common. *Trust Co. v. Watkins*, 292.

4131, 4144. Failure of proof that instrument was found among valuable papers *held* fatal to establishment of instrument as holographic codicil to statutory will. *Cartwright v. Jones*, 108.

4144 (2). Holographic will is found among valuable papers if it is found among papers regarded by decedent as valuable, and testimony of three witnesses that instrument was in decedent's handwriting takes case to jury on this issue. *In re Will of Williams*, 259.

4158. One interested person may caveat a will. *Bailey v. McLain*, 150.

4159. Persons cited to "see the proceedings" upon a caveat may come in and align themselves as they please, and may make an agreement to withdraw objections to the will. *Bailey v. McLain*, 150.

4165. Will will be construed as though executed immediately prior to testator's death unless it describes a specific subject of gift with sufficient particularity to show that an object in existence at the date of the execution of the will was intended. *Tyer v. Meadows*, 733.

4200. Murder committed in perpetration of robbery is murder in first degree. *S. v. Alston*, 713.

4213. Indictment charging felonious assault with intent to kill as defined in this section embraces as a lesser degree of the crime charged the offense of assault with a deadly weapon. *S. v. High*, 244.

4332. Definition of burglary in first and second degrees. *S. v. Morris*, 552.

4407. Evidence that deputy negligently injured prisoner *held* sufficient for jury. *Davis v. Moore*, 449.

4447. Abandonment of wife by husband is his willful separation from her without providing adequate support, and it is not necessary that failure to support should also be willful. *Hyder v. Hyder*, 239.

4483. Dog is useful animal within provision of this statute. *S. v. Dickens*, 303. Prior offenses committed by useful animal does not justify killing of the animal. *Ibid.*

4641. Where all the evidence shows that dwelling house was occupied at the time, court need not submit question of second degree burglary. *S. v. Morris*, 552.

4649. The right of the State to appeal from a special verdict, a demurrer, a motion to quash or a motion in arrest of judgment obtains only to appeals from the Superior Court to the Supreme Court, and the State has no right of appeal even in such instances from the municipal court to the Superior Court. *S. v. Nichols*, 80.

CONSOLIDATED STATUTES—*Continued.*

SEC.

4650. Defendant may appeal to Supreme Court only from final judgment. *S. v. Cox*, 458.

6237, 6239. Court need not instruct jury that defendant would be confined in asylum if found not guilty on plea of insanity. *S. v. Bracy*, 248.

6460. Policy not issued under provisions of this section may be avoided for material misrepresentations which induce insurer to take the risk even in the absence of fraud. *Assurance Society v. Ashby*, 280.

7698. State Highway and Public Works Commission has implied power to maintain action in its corporate name on behalf of the State. *Highway Com. v. Cobb*, 556. But it may not recover of prisoner funds expended in apprehending him after his escape. *Ibid.*

8037. In an action against taxing unit to redeem land from tax sale, plaintiff must pay all taxes due to date, and not merely those for the years for which tax foreclosure was instituted. *Gower v. Clayton*, 82.

8039. Where right to set aside tax foreclosure is established, judgment should be entered that plaintiff have reasonable time to pay purchaser amount of bid with interest, with provision that upon compliance tax deed should be set aside, and upon noncompliance the right to redeem should be conclusively presumed abandoned. *Hill v. Street*, 312.

CONSTITUTION, SECTIONS OF, CONSTRUED.

ART.

I, sec. 29. Strict adherence to rule that more than scintilla of evidence takes case to the jury is necessary to preserve the right of trial by jury guaranteed by the Constitution. *Fox v. Army Store*, 187.

I, sec. 32. Taxes levied for year 1936 under Unemployment Compensation Act *held* void as contravening this section. *Unemployment Compensation Com. v. Trust Co.*, 491.

II, sec. 29. Real Estate License Act is local statute regulating trade in contravention of this section of the Constitution. *S. v. Dixon*, 161.

V, sec. 5. Property owned by municipal corporation and used for business purposes is not exempt from taxation. *Warrenton v. Warren County*, 342.

V, sec. 6; Art. IX, secs. 2 and 3. County board of education *held* not entitled to recover from municipality funds allocated to it by State from intangible personal property tax, even though municipality is in no wise liable for maintenance of constitutional school term. *Board of Education v. Wilson*, 216.