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NORTH CAROLINA REPORTS
VOL. 216

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

SPRING TERM, 1939
FALL TERM, 1939

REPORTED BY
JOHN M. STRONG

RALEIGH
BYNUM PRINTING COMPANY
PRINTERS TO THE SUPREME COURT
1940

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Rule 46 of the Supreme Court is as follows:

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

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9 Iredell Law	as	31	N. C.
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13 " "	"	35	"
1 " Eq.	"	36	"
2 " "	"	37	"
3 " "	"	38	"
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6 " "	"	41	"
7 " "	"	42	"
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Busbee Law	"	44	"
" Eq.	"	45	"
1 Jones Law	"	46	"
2 " "	"	47	"
3 " "	"	48	"
4 " "	"	49	"
5 " "	"	50	"
6 " "	"	51	"
7 " "	"	52	"
8 " "	"	53	"
1 " Eq.	"	54	"
2 " "	"	55	"
3 " "	"	56	"
4 " "	"	57	"
5 " "	"	58	"
6 " "	"	59	"
1 and 2 Winston	"	60	"
Phillips Law	"	61	"
" Eq.	"	62	"

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

From the 7th to the 62d volumes, both inclusive, will be found the opinions of the Supreme Court, consisting of three members, for the first fifty years of its existence, or from 1818 to 1868. The opinions of the Court, consisting of five members, immediately following the Civil War, are published in the volumes from the 63d to the 79th, both inclusive. From the 80th to the 101st volumes, both inclusive, will be found the opinions of the Court, consisting of three members, from 1879 to 1889. The opinions of the Court, consisting of five members, from 1889 to 1 July, 1937, are published in volumes 102 to 211, both inclusive. Since 1 July, 1937, and beginning with volume 212, the Court has consisted of seven members.

JUSTICES

OF THE

SUPREME COURT OF NORTH CAROLINA

SPRING AND FALL TERMS, 1939.

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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L. O. GREGORY,
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SUPREME COURT REPORTER:

JOHN M. STRONG.

CLERK OF THE SUPREME COURT:

EDWARD MURRAY.

MARSHAL AND LIBRARIAN:

DILLARD S. GARDNER.

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*Succeeded Robert H. Wettach, resigned, August 14, 1939.

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, JR.	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.

*Deceased.

SOLICITORS

EASTERN DIVISION

Name	*District*	*Address*
CHESTER R. MORRIS	First	Currituck.
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, FALL 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

Fall Term, 1939—Judge Nimocks.

Beaufort—Sept. 18* (A); Sept. 25†; Oct. 9†; Nov. 6* (A); Dec. 4†.
Camden—Oct. 2.
Chowan—Sept. 11; Dec. 11.
Currituck—July 17†; Sept. 4.
Dare—Oct. 23.
Gates—Nov. 20.
Hyde—Aug. 21†; Oct. 16.
Pasquotank—Sept. 18†; Oct. 9† (A) (2); Nov. 6†; Nov. 13*.
Perquimans—Oct. 30.
Tyrrell—Oct. 2 (A).

SECOND JUDICIAL DISTRICT

Fall Term, 1939—Judge Carr.

Edgecombe—Sept. 11; Oct. 16†; Nov. 13† (2).
Martin—Sept. 18 (2); Nov. 20† (A) (2); Dec. 11.
Nash—Aug. 28; Sept. 18† (A) (2); Oct. 9†; Nov. 27* (2).
Washington—July 10; Oct. 23†.
Wilson—Sept. 4; Oct. 2†; Oct. 30† (2); Dec. 4 (A).

THIRD JUDICIAL DISTRICT

Fall Term, 1939—Judge Thompson.

Bertie—Aug. 28; Nov. 13 (2).
Halifax—Aug. 14 (2); Oct. 2† (A) (2); Oct. 23* (A); Nov. 27 (2).
Hertford—July 31; Oct. 16 (2).
Northampton—Aug. 7; Oct. 30 (2).
Vance—Oct. 2*; Oct. 9†.
Warren—Sept. 18 (2).

FOURTH JUDICIAL DISTRICT

Fall Term, 1939—Judge Bone.

Chatham—July 31† (2); Oct. 23.
Harnett—Sept. 4; Sept. 18†; Oct. 2† (A) (2); Nov. 13* (2).
Johnston—Aug. 14*; Sept. 25† (2); Oct. 16 (A); Nov. 6†; Nov. 13† (A); Dec. 11 (2).
Lee—July 17; Sept. 11†; Sept. 18† (A); Oct. 30.
Wayne—Aug. 21; Aug. 28†; Sept. 4† (A); Oct. 9† (2); Nov. 27 (2).

FIFTH JUDICIAL DISTRICT

Fall Term, 1939—Judge Parker.

Carteret—Oct. 16; Dec. 4†.
Craven—Sept. 4*; Oct. 2† (2); Nov. 20† (2).
Greene—Dec. 4 (A); Dec. 11 (2).
Jones—Aug. 14†; Sept. 18; Dec. 11 (A).
Pamlico—Nov. 6 (2).
Pitt—Aug. 21†; Aug. 28; Sept. 11†; Sept. 25†; Oct. 23†; Oct. 30; Nov. 20† (A).

SIXTH JUDICIAL DISTRICT

Fall Term, 1939—Judge Williams.

Duplin—July 24*; Aug. 28† (2); Oct. 2*; Dec. 4; Dec. 11†.
Lenoir—Aug. 21; Sept 25†; Oct. 16; Nov. 6† (2); Dec. 11 (A).
Onslow—July 17‡; Oct. 9; Nov. 20† (2).
Sampson—Aug. 7 (2); Sept. 11† (2); Oct. 23; Oct. 30†.

SEVENTH JUDICIAL DISTRICT

Fall Term, 1939—Judge Frizzelle.

Franklin—Sept. 4†; Sept. 11† (A); Oct. 16*; Nov. 13† (2).
Wake—July 10*; Sept. 4* (A); Sept. 11*; Sept. 18† (2); Oct. 9*; Oct. 16† (A); Oct. 23† (2); Nov. 6*; Nov. 13† (A); Nov. 20† (2); Dec. 4* (2); Dec. 18†.

EIGHTH JUDICIAL DISTRICT

Fall Term, 1939—Judge Stevens.

Brunswick—Sept. 4†; Oct. 2.
Columbus—Aug. 21 (2); Oct. 9*; Nov. 20† (2).
New Hanover—July 24*; Sept. 11*; Sept. 18†; Oct. 16† (2); Nov. 13*; Dec. 4† (2).
Pender—July 17; Oct. 30 (2).

NINTH JUDICIAL DISTRICT

Fall Term, 1939—Judge Harris.

Bladen—Aug. 7†; Sept. 18*.
Cumberland—Aug. 28*; Sept. 25† (2); Oct. 23† (2); Nov. 20* (2).
Hoke—July 31†; Aug. 21; Nov. 13.
Robeson—July 10† (2); Aug. 14*; Aug. 28† (A); Sept. 4* (2); Sept. 25* (A); Oct. 9† (2); Oct. 23* (A); Nov. 6*; Nov. 13† (A); Dec. 4† (2); Dec. 18*.

TENTH JUDICIAL DISTRICT

Fall Term, 1939—Judge Burney.

Alamance—July 31†; Aug. 14*; Sept. 4† (2); Nov. 13† (A) (2); Nov. 27*.
Durham—July 17*; Sept. 4* (A); Sept. 11† (A); Sept. 18† (2); Oct. 9*; Oct. 23† (A); Oct. 30† (2); Dec. 4*.
Granville—July 24; Oct. 23†; Nov. 13 (2).
Orange—Aug. 21; Aug. 28†; Oct. 2†; Dec. 11.
Person—Aug. 7; Oct. 16.

WESTERN DIVISION

ELEVENTH JUDICIAL DISTRICT

Fall Term, 1939—Judge Alley.

Ashe—July 24† (2); Oct. 23*.
Alleghany—Sept. 25.
Forsyth—July 10 (2); Sept. 4 (2); Sept. 18†; Sept. 25 (A); Oct. 9 (2); Oct. 23† (A); Oct. 30†; Nov. 6 (2); Nov. 20† (2); Dec. 4 (2).

TWELFTH JUDICIAL DISTRICT

Fall Term, 1939—Judge Clement.

Davidson—Aug. 21*; Sept. 11†; Sept. 18† (A); Oct. 2† (A) (2); Nov. 20 (2).
Guilford—July 10*; July 17*; July 31*; Aug. 7† (2); Aug. 28† (2); Sept. 18* (2); Sept. 18† (A); Sept. 25†; Oct. 2† (2); Oct. 16* (A); Oct. 23*; Oct. 30† (2); Nov. 6* (A); Nov. 13*; Nov. 20† (A); Nov. 27†; Dec. 18*.

THIRTEENTH JUDICIAL DISTRICT

Fall Term, 1939—Judge Sink.

Anson—Sept. 11†; Sept. 25*; Nov. 13†.
Moore—Aug. 14*; Sept. 18†; Sept. 25 (A); Dec. 11†.
Richmond—July 17†; July 24*; Sept. 4†; Oct. 2*; Nov. 6†.
Scotland—Aug. 7; Oct. 30†; Nov. 27 (2).
Stanly—July 10; Sept. 4† (A) (2); Oct. 9†; Nov. 20.
Union—July 31*; Aug. 21† (2); Oct. 16 (2).

FOURTEENTH JUDICIAL DISTRICT

Fall Term, 1939—Judge Phillips.

Gaston—July 24*; July 31† (2); Sept. 11* (A); Sept. 18† (2); Oct. 23*; Nov. 27* (A); Dec. 4† (2).
Mecklenburg—July 10* (2); Aug. 14* (2); Aug. 28*; Sept. 4† (2); Sept. 4† (A) (2); Sept. 18† (A) (2); Sept. 18* (A) (2); Oct. 2† (A) (2); Oct. 2*; Oct. 9† (2); Oct. 16† (A) (2); Oct. 30† (A) (2); Oct. 30† (2); Nov. 13† (A) (2); Nov. 13*; Nov. 20† (2); Nov. 27† (A) (2); Dec. 4* (A) (2); Dec. 11† (A) (2).

FIFTEENTH JUDICIAL DISTRICT

Fall Term, 1939—Judge Gwyn.

Alexander—Aug. 28 (A) (2).
Cabarrus—Aug. 21*; Aug. 28†; Oct. 16 (2); Nov. 13† (A); Dec. 4† (A).
Iredell—July 31 (2); Nov. 6 (2).
Montgomery—July 10; Sept. 25†; Oct. 2; Oct. 30†.
Randolph—July 17 (2); Sept. 4*; Oct. 23† (A) (2); Dec. 4 (2).
Rowan—Sept. 11 (2); Oct. 9†; Oct. 16† (A); Nov. 20 (2).

SIXTEENTH JUDICIAL DISTRICT

Fall Term, 1939—Judge Bobbitt.

Burke—Aug. 7 (2); Sept. 25†; Oct. 2† (2); Dec. 11; Dec. 18†.
Caldwell—Aug. 21 (2); Nov. 27 (2).
Catawba—July 3 (2); Sept. 4† (2); Nov. 13*; Nov. 20†; Dec. 4† (A).
Cleveland—July 24 (2); Sept. 11† (A); Sept. 18† (A); Sept. 25† (A); Oct. 30 (2).
Lincoln—July 17; Oct. 16 (2).
Watauga—Sept. 18.

SEVENTEENTH JUDICIAL DISTRICT

Fall Term, 1939—Judge Armstrong.

Avery—July 3*; July 10† (2); Oct. 16*; Oct. 23†.
Davie—Aug. 28; Dec. 4†.
Mitchell—July 24† (2); Sept. 18 (2).
Wilkes—Aug. 7 (2); Oct. 4† (2); Oct. 30; Nov. 6†.
Yadkin—Aug. 21*; Dec. 11† (2).

EIGHTEENTH JUDICIAL DISTRICT

Fall Term, 1939—Judge Warlick.

Henderson—Oct. 9 (2); Nov. 20† (2).
McDowell—July 10† (2); Sept. 4 (2).
Polk—Aug. 21 (2).
Rutherford—Sept. 25† (2); Nov. 6 (2).
Transylvania—July 24 (2); Dec. 4 (2).
Yancey—Aug. 7 (2); Oct. 23† (2).

NINETEENTH JUDICIAL DISTRICT

Fall Term, 1939—Judge Rousseau.

Buncombe—July 10† (2); July 24; July 31; Aug. 7† (2); Aug. 21; Sept. 4† (2); Sept. 18; Oct. 2† (2); Oct. 16; Oct. 30; Nov. 6† (2); Nov. 20; Dec. 4† (2); Dec. 18.
Madison—Aug. 28; Sept. 25; Oct. 23; Nov. 27.

TWENTIETH JUDICIAL DISTRICT

Fall Term, 1939—Judge Pless.

Cherokee—Aug. 7 (2); Nov. 6 (2).
Clay—Oct. 2.
Graham—Sept. 4 (2).
Haywood—July 10 (2); Sept. 18† (2); Nov. 20 (2).
Jackson—Oct. 9 (2).
Macon—Aug. 21 (2); Dec. 4 (2).
Swain—July 24 (2); Oct. 23 (2).

TWENTY-FIRST JUDICIAL DISTRICT

Fall Term, 1939—Judge Nettles.

Caswell—July 3; Nov. 13 (2).
Rockingham—Aug. 7* (2); Sept. 4† (2); Oct. 23†; Oct. 30* (2); Nov. 27† (2); Dec. 11*.
Stokes—Aug. 21; Oct. 9*; Oct. 16†.
Surry—July 10† (2); Sept. 18*; Sept. 25† (2); Dec. 18*.

†For civil cases.
*For criminal cases.
‡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, eighth Monday after the first Monday in March and September; 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; ELIZABETH HENNESSEE, Deputy Clerk.

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

THERON L. CAUDLE, 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.

LICENSED ATTORNEYS

FALL TERM, 1939.

I, EDWARD L. CANNON, Secretary of the Board of Law Examiners of the State of North Carolina, do certify the following named persons have duly passed examinations of the Board of Law Examiners and that license has been issued to each as of 8 August, 1939:

ALLEY, ROBERT CLINE.....Waynesville.
BEACHUM, P. B., JR.....Wadesboro.
BEAL, FATE J.....Charlotte.
BETTS, WILLARD FURMAN, JR.....Raleigh.
BREWER, COY E.....Wake Forest.
BULWINKLE, ALFRED LEWIS.....Gastonia.
CARR, JAMES D.....Wilmington.
CLARK, EDWARD B.....Elizabethtown.
COLLIER, LACY S.....Linden.
COX, VIRGIL Q.....Mars Hill.
DALTON, WILLIAM REID, JR.....Reidsville.
DENEEN, RUSSELL S.....Bakersville.
FAIRLEY, FRANCIS H.....Monroe.
FERGUSON, FRANK D., JR.....Waynesville.
GAVIN, HAROLD W.....Sanford.
GILLAM, MOSES B., JR.....Windsor.
GLENN, JAMES.....Raleigh.
GRIFFIN, CLARENCE A., JR.....Rocky Mount.
HAMRICK, JAMES N.....Rutherfordton.
HARRIS, DAVID M.....Wake Forest.
HEMRIC, HARVEY C.....Cycle.
HIGHTOWER, EDWARD K.....Greensboro.
HOWELL, JAMES H., JR.....Waynesville.
HOWISON, ROBERT C., JR.....Raleigh.
KITTNER, JOSEPH M.....Weldon.
KNOTT, JAMES E., JR.....Oxford.
LASSITER, ROBERT, JR.....Charlotte.
LAWRENCE, JOHN E.....Scotland Neck.
LEWIS, WILLIAM A.....Durham.
LONDON, ALVIN A.....Belmont.
MADDRY, JOHN FRANKLIN.....Nazareth.
MANN, OLIVER DEWITT.....Whitakers.
MANNING, CHARLES H.....Williamston.
MAUPIN, ARMISTEAD JONES.....Raleigh.
MAXWELL, LYLTON E.....Pink Hill.
MINTZ, RUDOLPH I.....Southport.
MCCARTER, ASHLEY.....Wake Forest.
MCLEAN, JAMES D., JR.....Red Springs.
MCLEOD, MAX E.....Dunn.
PARKER, EZRA ALPHONSO.....Benson.
PARKER, LOUIS FRANCIS.....Elizabethtown.
PARKER, WYLIE FORT.....Goldsboro.
PENLAND, JOHN CECIL.....Hayesville.
POWELL, RUFUS H., III.....Durham.

ROBINSON, SAMUEL E.....Charlotte.
RUSS, WILLIAM M.....Raleigh.
SANDERS, RICHARD T.....Durham.
SHELTON, WILLIAM R.....Asheville.
SHIELDS, JOHN JASPER.....Greensboro.
SMITH, SAMUEL D.....Greensboro.
SPEIGHT, WILLIAM W.....Spring Hope.
STARR, SARAH.....Mooresville.
TUCKER, JAMES E.....Madison.
TURLINGTON, DAVID J., JR.....Clinton.
TYREE, OSCAR L.....Winston-Salem.
WARREN, STEWART BETHUNE.....Newton Grove.
WILLIAMS, LAFAYETTE.....Yadkinville.
WILLIAMS, ROBERT R., JR.....Asheville.
WOMBLE, WILLIAM F.....Winston-Salem.
WRIGHT, LENOIR CHAMBERS.....Charlotte.
WRIGHT, LUKE W.....South Mills.
WYATT, WILLIAM LUTHER, JR.....Raleigh.

Given under my hand and the seal of the Board of Law Examiners, this the 25th day of October, 1939.

(Signed) EDWARD L. CANNON, *Secretary.*
(Seal.) *Board of Law Examiners.*

CASES REPORTED

CASES CITED

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CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM, 1939

CITY OF WINSTON-SALEM v. THENIA SMITH (WIDOW), AND FORSYTH COUNTY (ORIGINAL PARTIES DEFENDANT); AND EDWARD HILL (DEVISEE OF THENIA SMITH, DECEASED) AND HIS WIFE, GENEVA HILL (ADDITIONAL PARTIES DEFENDANT).

(Filed 16 June, 1939.)

1. Municipal Corporations § 30—Where municipality owns fee in land between the street and the property assessed, assessment is void.

The agreed statement of facts disclosed that plaintiff municipality purchased the fee in a lot for street purposes and used a portion of the lot for a street and sidewalk, leaving a strip of the lot lying unused between the sidewalk and the defendants' lot. *Held:* Defendants' lot does not abut upon the improvements and an assessment against the lot therefor is void, C. S., 2703-2728, nor did the city's acquisition of its lot for street purposes amount to a dedication of the entire lot therefor, since a city has authority to purchase land for streets, C. S., 2791, and to sell off any surplus land so acquired, C. S., 2688, nor may the assessment be sustained on the ground that defendants' had the right of ingress and egress over the intervening lands to the improvements in view of the agreed facts that the city owned the fee simple title thereto.

2. Municipal Corporations § 33—

Where a municipality levies assessments for public improvements without statutory jurisdiction therefor, the owner of the land against which the levy is made may resist the enforcement of the assessments at any time, and is not precluded therefrom by his failure to follow the statutory remedy for making objection thereto.

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

Civil action to recover for street and sidewalk paving assessment on alleged abutting property of defendant Edward Hill, devisee of Thenia Smith, who died pending the action.

The case was heard below upon an agreed statement of facts. The parties agree that "the sole question to be determined is whether Lot No. 10 now belonging to the defendant is subject to this assessment made by the city of Winston-Salem for the construction and improvement of Cleveland Avenue and the construction of the sidewalk on Cleveland Avenue." With respect thereto, the agreed facts are substantially these:

In April, 1922, the city of Winston-Salem, contemplating the construction of a thoroughfare to be known as Cleveland Avenue, of more than a mile in length and crossing 12th Street, as a part of right of way, acquired title in fee simple to Lot No. 9, lying south of and fronting fifty feet on 12th Street and extending in depth one hundred feet between parallel lines as shown on plat of Maple Park. The conveyance is by warranty deed containing full covenants of seizin and against encumbrances, but containing no expression of restriction or reservation.

In August, 1922, Thenia J. Smith acquired Lot No. 10, which lies east of and contiguous to said Lot No. 9.

In April, 1925, the board of aldermen of the city of Winston-Salem, acting under authority vested in it by ch. 56, Public Laws 1915, and general statutes pertinent thereto, and by charter of the city, and amendment thereto, Public Laws 1921, Extra Session, ch. 37, sec. 2, passed a resolution authorizing and directing the improvement by grading and paving of that part of Cleveland Avenue between 26th Street and Belews Street, the actual cost of which, exclusive of that incurred at street intersection and of that to be borne by railroad and street railways, "shall be charged against the owner or owners of the abutting property, that is, one-half to the owner or owners of each side of said street." Notice of this resolution and of the time and place of a meeting of the board of aldermen when and where she might "be heard in respect to all matters relating to the proposed improvement and the manner and mode of doing the work" was duly served upon Thenia J. Smith.

The city constructed the Avenue on only a portion of said Lot No. 9. Subsequently, notice of the fact that the street had been paved and of the time and place of a meeting of the board of aldermen called for the purpose of hearing objections in respect to special assessments for the construction and improvement of Cleveland Avenue was published as required.

Thenia J. Smith did not appear at either of the meetings or object in any way to the street assessments levied against her real estate,

Lot No. 10, and the assessment was duly confirmed by resolution of the board of aldermen.

In June, 1925, the city caused to be served upon Thenia J. Smith notice of a resolution of its board of aldermen authorizing the construction of concrete sidewalks of the width of five feet, on each side of Cleveland Avenue from 7th Street to 26th Street, and directing the "owners of property abutting on the improvements . . . to make such improvements along their respective frontages according to certain plans and specifications, and to complete the same in a reasonable time, and in any event on or before July 7, 1925," and with notice that "if said improvement is not completed on or before the date named this board will cause such improvements to be made . . . and cause the cost thereof to be assessed against said owners . . ."

The sidewalk was constructed by the city. Subsequently, notice was served on Thenia J. Smith, by publication as required by law, of the date and place fixed for a meeting of the board of aldermen for the hearing of objection with respect to the assessment for the sidewalk. She did not appear or object in any way to the assessment, and same was duly confirmed by the board of aldermen, nor did she appeal from the assessment for either the construction and improvement of Cleveland Avenue or the construction of the sidewalk thereon.

It is further agreed that: "In the construction of the street, and in laying the sidewalk alongside thereof, only a portion of Lot No. 9, acquired by the city for the purpose, was utilized . . . The eastern portion thereof, having a frontage of five feet on 12th Street, a depth of one hundred feet along the east side of the sidewalk, and a width of seven and one-half feet on the south end of the lot, was not utilized in any way by the city for street purposes, and the fee simple title thereof is still vested in the city . . . unless the acquisition of the whole lot for street purposes and the construction of Cleveland Avenue and a sidewalk on a part thereof amounts to a dedication of the whole lot by the city for street purposes. No use whatsoever of the remaining portion of said lot has been made by the city or by the defendants, since the construction of the street and the sidewalk. The surface of such remaining portion is from three to seven feet above the level of the sidewalk and avenue that were constructed over the other part of the lot."

Thenia J. Smith and the defendant Edward Hill, her successor in title to Lot No. 10, prior to the construction of Cleveland Avenue, put up and have since maintained a wire fence along the western line of Lot No. 10, which is the eastern line of the said unused portion of

Lot No. 9. The dwelling house on Lot No. 10 fronts on 12th Street, and access to the house and to the lot is and always has been from 12th Street and the sidewalk alongside thereof.

Payment of no part of the street and sidewalk assessments has been made by the defendants.

Upon such findings of fact, the court below concludes and adjudges that Lot No. 10 does not abut upon Cleveland Avenue or the sidewalk alongside, and that, therefore, the assessments against said lot are null and void and uncollectible, and dismisses the action as of nonsuit.

Plaintiff appeals to the Supreme Court and assigns error.

Ratcliff, Hudson & Ferrell and Ransom S. Averitt for plaintiff, appellant.

Ingle, Rucker & Ingle for defendant, appellee.

WINBORNE, J. Upon the agreed facts presented in the record on this appeal these two questions arise in determining whether the assessment sued upon is valid: (1) Is the property of defendant an abutting property on Cleveland Avenue within the meaning of the statute, C. S., 2703-2728; Public Laws 1915, ch. 56?

(2) By failing to appear in response to notices required by the statutes with respect to proposed street and sidewalk improvements, and by failing to appeal from assessments therefor, is defendant now estopped to challenge the assessment?

On the factual situation shown, each question is answered in the negative.

(1) An assessment for street improvements "is a creature of the statute and its validity must flow from the statute which authorizes it." *R. R. v. Ahoskie,* 192 N. C., 258, 134 S. E., 653. By the statute imposing the assessment the Legislature has the power to determine what property is benefited by the improvement and "when it does its determination is conclusive upon the owners and the courts." *Gunter v. Sanford,* 186 N. C., 452, 120 S. E., 41; *Charlotte v. Brown,* 165 N. C., 435, 81 S. E., 611.

In the act in question the Legislature provides that the assessment for street or sidewalk improvements "shall be specifically assessed upon the lots and parcels of land abutting directly on the improvements, according to their respective frontage thereon . . .," C. S., 2710 (1); and with respect to sidewalks the assessment shall be "against the lots and parcels of land abutting on that side of the street upon which the improvement is made and directly on the improvement, according to their respective frontage thereon." C. S., 2710 (3).

In the case of *Lenoir v. R. R.,* 194 N. C., 710, 140 S. E., 618, speaking to this phase of the statute, and referring to *Anderson v. Albemarle,* 182 N. C., 434, 109 S. E., 262, *Brogden, J.,* states that this Court there held that: "The words 'abutting on improvement' mean 'abutting on the street that is improved,' and, further, 'by the term abutting property is meant that between which and the improvement there is no intervening and.'"

In the case in hand, the west line of defendant's property, Lot No. 10, is the east line of Lot No. 9. The answer, therefore, to the first question depends upon the extent to which the city has dedicated Lot No. 9 for street purposes. The agreed statement of facts shows that "in the construction of the street and in laying the sidewalk alongside thereof, only a portion of Lot No. 9, acquired by the city for the purpose, was utilized," and that a strip of land between defendant's property and the sidewalk on the east side of Cleveland Avenue was not used in any way by the city for street purposes, and the fee simple title thereto is still vested in the city. In the light of these facts and in the absence of a finding that the street lines as fixed by the city include the strip, it is apparent that there is intervening land between defendant's property and the improvement. Hence, defendant's property does not abut on Cleveland Avenue.

Nor do we think that the acquisition of the whole lot for street purposes and the construction of a street and a sidewalk on a part thereof amounts to a dedication of the whole lot by the city for street purposes. In this connection it is pertinent to note that the city has the authority to buy land for streets. C. S., 2791; Public Laws 1917, ch. 136, subchapter 4, sec. 1, Public Laws 1919, ch. 262, as well as authority to sell any surplus of such land so acquired. C. S., 2688. *Southport v. Stanly,* 125 N. C., 464, 34 S. E., 64; *Church v. Dula,* 148 N. C., 262, 61 S. E., 639.

Therefore, the fact that the city purchased a lot in fee simple and constructed a street thereon, without more, does not show that the entire lot is dedicated as a street.

Plaintiff contends that defendant's property is subject to the assessment for that defendant has the right in ingress and egress over the intervening land to the improvement, but in the light of the agreed fact that the fee simple title thereto is in the city and there being no evidence of a dedication to public purposes, we do not think the position tenable.

(2) Where the assessing board acts within the jurisdiction conferred by the act of the Legislature, *and not in violation of it,* ordinarily the rule requires the lot owner to assert any objection he had to the method of procedure in assessing his property. But where the board acts in violation of it, the assessment is void and jurisdictional, and can be

taken advantage of at any time when the assessment is sought to be enforced. *Charlotte v. Brown, supra.* In that case this pertinent headnote from *Bennett v. City of Emmetsburg* (Ia.), 115 N. W., 582, appears: "Lot owners would not waive jurisdictional defects in proceedings for assessing special assessments for failure to appear and object to the assessment, or failure to appeal from the order of the council adopting the assessment resolution."

The judgment below is

Affirmed.

UNEMPLOYMENT COMPENSATION COMMISSION v. CITY ICE AND COAL COMPANY, INC.; CITY DAIRY FARM, INC.; AND CAROLINAS ICE COMPANY.

(Filed 16 June, 1939.)

1. Master and Servant § 57—Separate corporations having substantially the same stockholders and identical management held but single employing unit.

The agreed statement of facts disclosed that the three defendant corporations have common officers and directors and substantially identical stockholders, and that they maintain a central business office where each keeps its records and handles all clerical matters. *Held:* The three corporations are owned and controlled directly or indirectly by the same interests within the meaning of section 19 (f) (4) of the North Carolina Unemployment Compensation Act (chapter 1, Public Laws of 1936), and constitute but a single employing unit within the meaning of the act.

2. Master and Servant § 56—

The General Assembly has the power to determine the scope of the Unemployment Compensation Act, and the definitions and tests therein prescribed will be applied by the courts in accordance with the legislative intent.

3. Master and Servant § 57—

The words in the provision of the North Carolina Compensation Act that enterprises "controlled" by the same "interests" shall be considered but a single employing unit will be given their distinct, definite, and commonly understood meaning.

4. Corporations § 8—

Ordinarily, the control of a corporation is held by the individual or group of individuals having the voting rights of a majority of the stock.

APPEAL by defendants, City Ice and Coal Company, Inc., City Dairy Farm, Inc., and Carolinas Ice Company, from *Olive, J.,* at September Mixed Term, 1938, of WAKE. Affirmed.

This is a controversy without action, under C. S., 626, to determine whether defendants are liable for contributions under the N. C. Unem-

ployment Compensation Act. Under the agreed statement of facts it appears that defendants are all North Carolina corporations, two of which are engaged in the coal and ice business while the third is engaged in the dairy business; that all three corporations have the same officers and the same directors, and, with the exception of two names, the lists of stockholders of the three defendants is identical; that the three defendants have a single central business office where all records are kept and all clerical matters handled; that the payment of all obligations of the three defendants is handled through a single office and the same individual acts as secretary, treasurer, and general manager of each corporation; that the same attorney is legal adviser to all three defendants; that, with the exception of a single individual, all shares of the three corporations are owned by members of the same family; and that only a single officer of each corporation, the secretary-treasurer, is paid a salary. It is further agreed that defendant City Ice and Coal Company, during 1936 and 1937, had more than eight employees in each of twenty weeks during each year, and, accordingly, such defendant is liable for contributions under the Unemployment Compensation Act. See chapter 1, sec. 19 (f), (1); Public Laws (Ex. Session) 1936. It is also agreed that, by the same test, the City Dairy Farm is not liable for contributions for the years 1936 and 1937, unless the three officers are counted as "employees" within the meaning of the act, and that the Carolinas Ice Company, during these years, even counting the officers as employees, was not liable for contributions under the act. However, plaintiff contended, on these facts, that the inter-relationship of the three defendants and the degree of control over each exercised by the same interests was such that the three defendants should be considered together as a single employing unit. The trial judge accepted this view. Accordingly, it became unnecessary to pass upon the secondary question, i.e., whether officers of a corporation who receive no salary are "employees."

From a judgment declaring that the defendants "are owned and controlled by legally enforceable means or otherwise, directly or indirectly by the same interests within the meaning and intent of section 19 (f), (4) of the Unemployment Compensation Law of North Carolina," and, so treating the three defendants as a single employing unit, holding defendants liable for contributions under the act, defendants excepted, assigned error and appealed to the Supreme Court.

Adrian J. Newton, Ralph Moody, and J. C. B. Ehringhaus, Jr., for plaintiff.

Oscar G. Barker for defendants.

CLARKSON, J. Are the three corporate defendants "owned and controlled . . . directly or indirectly by the same interests" within the meaning of section 19 (f), (4) of the N. C. Unemployment Compensation Act (chapter 1, Public Laws, Ex. Session, 1936)? We think they are. As this question is answered in the affirmative, it becomes unnecessary to pass upon the incidental question as to the status of nonsalaried, corporate officers as "employees" of said corporation.

The agreed statement of facts presents a clear picture of three affiliated corporate enterprises, whose stock is closely held in a family corporation. The corporations are directed from a central office and are operated under a single, central management. All the stockholders (with a single exception as to the ownership of ten shares of stock in one of the corporations) are members of the same family, and the same individuals are the officers and directors of each corporate defendant. Not only does the instant case present the familiar picture of interlocking directorates so frequently evident where allied commercial interests seek to bring several related enterprises within the scope of a common, central control, but the mutuality of interest is further accentuated by the fact that the number of stockholders in each enterprise is small and the same names recur, with substantial identity, in each of the three lists of stockholders. The case presents a typical example of a particular pattern of inter-related corporate organization made subject to contribution in the interest of the alleviation of unemployment. The section of the act under consideration is clear in its intent to bring within the meaning of the act those separate corporate enterprises which have voluntarily waived the benefits of their separate identities by surrendering their control to a common management. The General Assembly has declared that if the separate enterprises are "controlled . . . directly or indirectly by the same interests," the fiction of corporate identity is to be ignored in the face of a reality to the contrary and the affiliated enterprises are to be taxed as a single, employing unit. Here the direct, the intermediate, and the ultimate control of the individual enterprises is that of the "same interests": The corporations have a common secretary-treasurer and general manager; they have common officers and directors; and their lists of stockholders are substantially identical. At all times the clear and undisputed "control" of each of the corporate defendants is vested in the same, small, family group of individuals.

That the General Assembly has the power to determine the scope of the act and to lay down definitions and tests to be applied in administering it, has already been determined. *Unemployment Compensation Com. v. Ins. Co.*, 215 N. C., 479. The function of this Court is but to determine the legislative intent and, having done so, to apply to the

particular case the yardstick devised by the General Assembly. *United States v. Goldenburg,* 168 U. S., 85, 103; *Supply Co. v. Maxwell,* 212 N. C., 624 (627); *Belk Bros. v. Maxwell,* 215 N. C., 10 (13), (*certiorari* denied by Supreme Court of United States 5 June, 1939). The test of taxability of related enterprises under this act is whether the individual enterprises are "controlled" by the "same interests." These are words in common use normally conveying rather distinct and definite thought content. As such they are to be given their plain, natural and commonly understood meanings. *Manning v. R. R.,* 188 N. C., 648 (659); *Abernathy v. Comrs.,* 169 N. C., 631 (635). Corporate control normally is directed by the board of directors but the ultimate control is vested in the stockholders. Anderson, Limitations of Corporate Entity, sec. 326; Vartanian, Law of Corporations in North Carolina, sec. 236. Hence, control of a corporation is ordinarily held by that individual or group of individuals having the voting rights of a majority of the stock of the corporation. *Commonwealth v. Louisville & Nashville R. Co.,* 149 Ky., 829, 150 S. W., 37. Accordingly, when that individual or group having such control of a corporation likewise has similar control of one or more affiliated and related corporations (as in the instant case), these corporations—using the plain, natural and ordinarily accepted meanings of the words—are said to be "controlled by the same interests." When the inter-relationship existing between or among two or more business enterprises is such that a substantial unification of those enterprises emanating from a common source or fountain-head, the General Assembly has declared that, since the separate identity of the enterprises has in large measure been swallowed up in such unification, these affiliated enterprises are to be taxed under this act not as separate units but as a single, employing unit.

The view here presented is supported by, and is in keeping with, the general intent of the Unemployment Compensation Act. It regards corporate organization objectively and realistically, unencumbered by fictions of corporate identity, and thus, brushing aside form, deals with substance. 1 Fletcher, Cyclopedia Corporations, Perm. Ed., sec. 45. It tends to aid a more effective administration of the act in that the number of smaller units from which contributions are to be made will be reduced, while the benefits to be derived from the unemployment insurance will be extended to a larger number of individuals. See *Unemployment Compensation Com. v. Ins. Co., supra.*

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

Affirmed.

EUGENE WEBB v. IMPERIAL LIFE INSURANCE COMPANY, INC.

(Filed 16 June, 1939.)

1. Insurance § 26—Brothers have insurable interest in lives of each other.

The ties of blood alone are sufficient to give brothers an insurable interest in the life of each other, the relationship being sufficient to give each a natural desire for the continued life of the other, and therefore it is not against public policy for one brother to take out and pay for a policy on the life of the other and have himself named beneficiary therein, and such contract is valid in the absence of fraud.

2. Insurance §§ 13, 39—Insurer's liability is limited by the policy provisions.

The policy in suit provided that it should not cover injury or death suffered by insured while having "in his body, physically present, intoxicating liquor." *Held:* An instruction to the effect that insurer would be entitled to avoid the policy under this exception if insurer satisfied the jury by the greater weight of the evidence that at the time of the fatal accident insured had in his body intoxicating liquor to an extent sufficient to appreciably affect his mental or bodily faculties to any degree, however slight, is error, insurer being entitled to avoid the policy under its specific terms if insured had physically present in his body at the time any intoxicating liquor, regardless to whether he was intoxicated or not.

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

This was an action upon a policy of life and accident insurance. The issuance of the policy, the payment of premiums, and the accidental death of the insured, Charles Webb, as result of being struck by an automobile, were admitted. Plaintiff is the beneficiary named in the policy. Defendant set up as defense want of insurable interest on part of plaintiff, and breach of condition in the policy as to intoxicating liquor on the part of the insured.

Upon issues submitted to the jury there was verdict for plaintiff, and from judgment thereon defendant appealed.

Victor S. Bryant and John D. McConnell for plaintiff.
R. M. Gantt for defendant.

DEVIN, J. Two questions are presented by this appeal: (1) Did the plaintiff have an insurable interest in the life of the insured? (2) Was there error in the charge of the court relative to intoxicating liquor?

1. It was admitted that the plaintiff and the insured were brothers, and that the defendant executed and delivered the policy to the plaintiff

who paid the premiums thereon. It was also in evidence, uncontradicted, that the insured was married and had children, that the relation between the brothers was cordial and brotherly, and that the plaintiff had aided in the support of the insured during a recent illness. The trial judge charged the jury if they found the facts to be as testified to answer the issue addressed to the question of insurable interest in favor of the plaintiff. This is assigned as error.

Does one have an insurable interest in the life of his brother by virtue of that relationship alone? We do not find a definite answer to that question among the decided cases in this jurisdiction. The nearest approach was in *Crump v. Ins. Co.*, 204 N. C., 439, 168 S. E., 514, where it was held that the plaintiff in that case had no insurable interest in the life of the illegitimate daughter of plaintiff's father. In *Howell v. Ins. Co.*, 189 N. C., 212, 126 S. E., 603, citing Vance on Insurance, 147, insurable interest is defined as follows: "An insurable interest in the life of another has been defined to be 'such an interest, arising from the relation of the party obtaining the insurance, either as creditor of or surety for the assured, or from ties of blood or marriage, to him as will justify a reasonable expectation of advantage or benefit from the continuance of his life.'" May on Ins., sec. 102a; *Trinity College v. Ins. Co.*, 113 N. C., 244, 18 S. E., 175; *Hinton v. Ins. Co.*, 135 N. C., 314, 47 S. E., 474; *Slade v. Ins. Co.*, 202 N. C., 315, 162 S. E., 734.

The authorities from other jurisdictions where the point has been decided are not in harmony. 14 R. C. L., 923; 37 C. J., 393. The rule prevails in some states that in order to constitute insurable interest there must be some expectation of pecuniary advantages in addition to ties of blood. This seems to have been derived from the early English statute (14 Geo. III, c. 48), prohibiting wager policies. It has been held according to this doctrine that, in cases where the relationship of brother is established, an insurable interest, which will take the insurance policy out of the class of wagering contracts, is such an interest arising from ties of blood as will justify a reasonable expectation of advantage or benefit from the continuance of the life of the assured, though it is not necessary that the expectation of benefit should be always capable of pecuniary estimation. This is the principle stated in *Warnock v. Davis*, 104 U. S., 779, and followed in *Life Insurance Clearing Co. v. O'Neill*, 106 Fed., 800, 54 L. R. A., 225. To the same effect is *Abernathy v. Springfield Mut. Assn.*, 284 S. W., 198; *Miller v. Ins. Co.*, 81 Ind. App., 618; *Lewis v. Ins. Co.*, 39 Conn., 100; *Lee v. Equitable Life Assurance Soc.*, 195 Mo. App., 40; *Locher v. Kuechenmiester*, 120 Mo. App., 701; *Lord v. Dall*, 12 Mass., 115.

But we think the better reasoning supports the view that the close relationship by ties of blood between brothers is alone sufficient to con-

stitute insurable interest even when the beneficiary takes out the policy and pays the premiums thereon. One of the leading cases upholding this principle is *Ætna Life Ins. Co. v. France,* 94 U. S., 561, where it was said: "But as between brother and sister . . . presumed to be actuated by 'considerations of strong morals and the force of natural affection between near kindred operating often more efficaciously than those of positive law' the case is divested of that gambling aspect which is presented where there is nothing but a speculative interest in the death of another without any interest in his life to counterbalance it."

From the well considered case of *Rogers v. Atlantic Life Ins. Co.,* 135 S. C., 89, 133 S. E., 215, 45 A. L. R., 1172, holding that the mere relationship of brothers was sufficient to constitute an insurable interest, we quote the following language: "While in some jurisdictions it is held that a brother has no insurable interest in the life of his brother by reason of kinship alone, it does not seem unreasonable or against public policy, but more in keeping with an enlightened humanitarian view, that such insurable interest should exist, at least where the brother whose life is insured agrees to, and collaborates with the other in securing, the insurance. The natural laws of kinship and blood, the ties of affection and friendship which ordinarily exist between brother and brother, negative the idea and belief that one would desire the removal of the other by reason of the existence of such insurance." To the same effect is the holding in *Crosswell v. Connecticut Indemnity Assn.,* 51 S. C., 114.

In *Century Life Ins. Co. v. Custer,* 178 Ark., 304, 61 A. L. R., 914, where this question was considered for the first time by that Court, it was held that brothers have an insurable interest in the lives of each other by virtue of the relationship alone, citing in support of the doctrine *Ætna Life Ins. Co. v. France, supra; Hosmer v. Welch,* 107 Mich., 470; *Williams v. Fletcher,* 26 Tex. Civ. App., 85; *Trenton Mut. L. & F. Ins. Co. v. Johnson,* 24 N. J. L., 576; *Lane v. Lane,* 99 Tenn., 639; *Goodwin v. Mass. Mut. Life Ins. Co.,* 73 N. Y., 480; *Equitable Life Ins. Co. v. Hazelwood,* 75 Tex., 338; *Hahn v. Supreme Lodge, Pathfinder,* 136 Ky., 823. In the last cited case it was held that the relationship of brother to brother was so close as to preclude the idea of mercenary motives or wagering contract, and that the element of pecuniary consideration was not essential to sustain the validity of the policy. *Wood v. Wood,* 130 Ky., 162; *Hess v. Segenfelter,* 127 Ky., 348.

In *In re Phillips,* 238 Pa., 423, it was said: "The affection naturally to be regarded as prevailing between brothers and sisters, and the well grounded expectation that, in case of need, they will render each other pecuniary aid, is considered sufficient to support an insurable interest."

In the instant case there was no evidence or suggestion of fraud. The

defendant issued the policy and received the premiums. There is no reason to invalidate the contract on any ground of public policy. Hence, we conclude that for the reasons hereinbefore stated, and under the authorities cited, the instructions given by the trial judge to the jury that the evidence, if accepted as true, was sufficient to warrant the finding that the plaintiff had an insurable interest in the life of his brother, was in all respects proper.

2. Was there error in the charge of the court relative to intoxicating liquor?

The policy in suit contains this provision: "The policy does not cover . . . any injury or death which the insured may suffer while the insured has in his or her body, physically present, intoxicating liquor or narcotics." There was evidence offered by defendant tending to show that at the time of his death the insured had consumed intoxicating liquor and was intoxicated. Plaintiff's evidence tended to show the contrary. The trial judge in charging the jury upon the issue whether the insured had physically present in his body intoxicating liquor at the time of his injury and death, defined the meaning of intoxicating liquor and being intoxicated, and used this language: "The court further instructs you that an intoxicated person is a drunken person, a drunken person is an intoxicated person and that means—intoxicated means in law that the subject must have drunk of alcohol to such an extent as to appreciably affect and impair his mental or bodily faculties or both. The court instructs you further that to be under the influence or affected by the liquor means that the subject must have drunk a sufficient quantity to influence or affect, however slightly, his body and his mind, his mental and physical faculties, in other words, it all comes to this, that he has drunk, that he has intoxicating liquor in his body to the effect that it influences his conduct detrimentally. It means the question for you is whether the deceased at the time of his impact and death had in his body intoxicating liquor of sufficient quantity to be intoxicated or to affect his conduct and influence his conduct and action."

The court further instructed the jury: "The question for you is whether the deceased at the time of the impact and death had in his body intoxicating liquor of sufficient quantity to be intoxicated or to affect and influence his conduct and action."

The court further instructed the jury to answer the issue in favor of defendant if they found by the greater weight of the evidence that the deceased had present in his body at the time of the injury "intoxicating liquor as the court has just defined and explained intoxicating liquor"; and again, if they found the deceased "was under the influence of alcohol or intoxicating liquor." While the court followed this by charging the jury to answer the issue in favor of defendant if they found deceased

"had present in his body intoxicating liquor," this did not cure the previous instruction. Thus the learned judge inadvertently placed upon the defendant the burden not only to show the physical presence of intoxicating liquor in the body of the insured at the time of the injury, but also to show that he was intoxicated or under the influence of intoxicating liquor. The defendant by the language of the policy excluded from its coverage injury suffered by the insured while he had present in his body intoxicating liquor. This was the contract between the parties, and the defendant was entitled to avoid liability upon proof that the insured had in his body, physically present, any quantity of intoxicating liquor, regardless of whether he thereby became intoxicated or not. The defendant was entitled to have the instruction to the jury confined to the language of the policy. *Payne v. Stanton,* 211 N. C., 43, 188 S. E., 629.

The defendant's exceptions to the charge in the respects noted must be sustained, necessitating a

New trial.

STATE v. JIMMIE HOBBS.

(Filed 16 June, 1939.)

1. **Assault and Battery § 11—Evidence held sufficient for jury in this prosecution for assault with deadly weapon.**

   Evidence that each of two men, one of them identified as defendant, made a throwing motion in unison, that immediately thereafter the windshield of the oil truck driven by the State's witness was struck and broken by a rock or brick, and that defendant had cursed and threatened the driver of another oil truck, *is held* sufficient to overrule defendant's motion to nonsuit in this prosecution for assault with a deadly weapon.

2. **Assault and Battery § 8: Indictment § 20—Proof of assault with a brick or rock held not a fatal variance with a warrant charging assault with a brick.**

   Evidence that defendant committed the assault with a "brick or a rock or what" *held* not a fatal variance with a warrant charging that the assault was committed with a brick, C. S., 4623, the evidence being sufficient to justify the jury in inferring that the assault was committed with a brick as charged, and there being no element of surprise in the evidence, especially since defendant's defense was that of an alibi.

3. **Criminal Law § 48c—**

   The court has the discretionary power *ex mero motu* to permit additional evidence to be procured and introduced after argument begun, upon such evidence being brought to the attention of the court.

4. Criminal Law §§ 44, 81a—

A motion for a continuance made after the court has permitted additional evidence to be submitted after argument begun is addressed to the discretion of the court and its ruling thereon is not reviewable in the absence of abuse of discretion.

5. Criminal Law § 53g—

Objections to the charge on the ground of misstatement of evidence and contentions of the parties must be brought to the court's attention in time to afford opportunity for corrections in order for assignments of error based thereon to be considered on appeal.

6. Criminal Law § 53h—

The charge of the court will be construed contextually as a whole.

7. Assault and Battery § 7d—

A charge that if defendant intentionally threw a brick at a person and struck and broke the windshield of the truck such person was driving, defendant would be guilty of assault with a deadly weapon, even though he did not strike such other person, is without error.

8. Assault and Battery § 7f: Criminal Law § 8b—

An instruction upon supporting evidence that if defendant was present aiding and encouraging another who intentionally threw a brick at the prosecuting witness and broke the windshield of the truck he was driving, defendant would be guilty of an assault with a deadly weapon *is held* without error.

9. Assault and Battery § 12: Criminal Law § 53d—When there is no evidence of guilt of less degree of the crime court need not submit the question to the jury.

Where the uncontradicted evidence for the State tends to show that the assault was committed with a missile large enough and thrown with sufficient force to knock a large hole in the windshield of the truck driven by the prosecuting witness, and defendant relies solely upon an alibi, there is no evidence of simple assault, and the failure of the court to submit to the jury the question of defendant's guilt of this degree of the crime is not error. C. S., 4640.

10. Assault and Battery § 8: Criminal Law § 56—

The use of the word "feloniously" in a warrant charging an assault with a deadly weapon is surplusage and defendant's motion in arrest of judgment in the Supreme Court (Rule of Practice in the Supreme Court, No. 21) for insufficiency of the warrant is denied.

APPEAL by defendant from *Phillips, J.*, at January Term, 1939, of ANSON. No error.

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

C. P. Barringer for defendant, appellant.

SCHENCK, J. The defendant appealed from a conviction upon a warrant in the Anson County criminal court, and was tried and convicted in the Superior Court upon the same warrant which charged that the defendant "did unlawfully, willfully and feloniously assault Willard Jackson with a deadly weapon, to wit, a brick." From judgment of imprisonment imposed in the Superior Court defendant appealed to the Supreme Court, assigning errors.

The defendant assigns as error the refusal of the court to grant his motion for judgment of nonsuit made when the State had produced its evidence and rested its case and renewed after all the evidence in the case was concluded. C. S., 4643. These assignments of error cannot be sustained.

The prosecuting witness, Willard Jackson, testified that on the night of the alleged offense, 21 November, 1938, while he was driving an oil truck on the public highway between Wilmington and Charlotte he recognized the defendant, that he saw him in company with another man whom he did not recognize, that "they made a motion to throw something and just at that time I threw up my hand over my face, and something busted my windshield. I don't know whether it was a brick or a rock or what, but it broke the windshield to the right of the center. . . . I do not know which one actually threw the brick or rock or whatever it was; both motioned. Both men made a throwing motion with the arm. . . . I did not stop to investigate. They were about 12 or 15 steps in front of their car when the motion to throw was made. The car was not over 20 steps from the highway, and they stayed at the car until I got close enough to throw at me, and I saw them just as I got even with them. . . . The place broken in the windshield was about 6 or 7 inches across, and the windshield was of shatterproof glass." The witness W. K. Barnes, who was driving another oil truck just in front of the truck driven by Jackson, testified that he saw and recognized the defendant in a black Ford sedan twice, once in Lumberton and once near Rockingham, and that the defendant cursed and threatened him. This evidence was sufficient to deny the defendant's motion for a nonsuit.

We do not concur in the contention that since the evidence was that the missile thrown was "a brick or a rock or what" and the charge in the warrant was an assault with a "deadly weapon, to wit, a brick," was a fatal variance between *probata* and *allegata*. C. S., 4623, provides that, "Every criminal proceeding by warrant, indictment, information or impeachment is sufficient in form for all intents and purposes if it express the charge against the defendant in a plain, intelligible and explicit manner. . . ." The evidence, we think, and so hold, was sufficient to justify the jury in drawing the inference that the assault

was committed with a brick as charged, and the warrant was sufficient to enable the court to proceed to judgment. There was nothing in the evidence to take the defendant by surprise in the light of the charge in the warrant, and this is especially so since the defendant's defense was that of an alibi.

The defendant lays much stress upon exceptions to the court's suspending the trial after the evidence had been closed and while the argument was in progress, to allow the State to procure additional witnesses from another county, and allowing them to testify the following morning upon the reconvening of court. A similar exception was disposed of by *Stacy, C. J.*, in *S. v. Satterfield,* 207 N. C., 118, with these words: "Likewise, allowing the solicitor to offer additional evidence after the argument had begun, was a matter addressed to the sound discretion of the trial court, and there is nothing on the record to suggest any abuse of discretion in this respect." The same discretion which allows the court to permit the solicitor upon a motion to introduce additional evidence after argument is begun, allows the court of its own motion to permit additional evidence to be procured and introduced upon such evidence being brought to the attention of the court, when the solicitor had no knowledge of such evidence.

The defendant assigns as error the refusal of the court to grant his motion for a continuance made when the court overruled his objection to the evidence introduced after argument had commenced. A motion for a continuance is addressed to the sound discretion of the trial court and its ruling thereon is not subject to review on appeal, except in cases of manifest abuse. We cannot say, upon the record, that there has been an abuse of discretion in refusing the defendant's motion. *S. v. Whitfield,* 206 N. C., 696, and cases there cited.

The defendant assigns as error many portions of the charge which he contends are misstatements of the evidence, and also many portions of the charge in stating the contentions of the parties. However, it does not appear that any of these assigned errors were called to the attention of the court at the time they were made, in order to permit the court to make correction. The failure to so call such assigned errors to the attention of the court renders them untenable. *S. v. Baker,* 212 N. C., 233; *S. v. Sloan,* 199 N. C., 598; *S. v. Lea,* 203 N. C., 13; *S. v. Whitehurst,* 202 N. C., 631.

The defendant assigns as error portions of the charge defining an assault and battery. We have read the charge carefully and are of the opinion that when read contextually it is free from prejudicial error. The court charged the jury in effect that if the defendant intentionally threw a brick at the prosecuting witness and struck and broke the windshield of the truck he was driving, although he may not have stricken

the witness, the defendant was guilty of an assault with a deadly weapon, and further, that if the defendant was personally present aiding, abetting and encouraging another, who intentionally threw a brick at the prosecuting witness and broke the windshield of the truck he was driving, he was guilty of an assault with a deadly weapon. This was a correct statement of the law applicable to the facts which the evidence for the State tended to establish.

The defendant assigns as error the court's failure to submit to the jury the charge of a simple assault. This assignment is untenable for the reason that there is no evidence of simple assault. The State's evidence tended to show that the assault committed upon the prosecuting witness was committed with a missile large enough, and thrown with force enough, to knock a hole 6 or 7 inches long in the windshield of the truck driven by the witness. There was no element of simple assault shown by the State's evidence, and the defendant's evidence was all to the effect that the defendant was elsewhere at the time of the alleged assault. "Where all the evidence at the trial of a criminal action, if believed by the jury, tends to show that the crime charged in the indictment was committed as alleged therein, and there is no evidence tending to show the commission of a crime of less degree, it is not error for the court to fail to instruct the jury that they may acquit the defendant of the crime charged in the indictment and convict him of a crime of less degree. See *S. v. Ratcliff,* 199 N. C., 9, 153 S. E., 605, where the statute, C. S., 4640, is construed and applied." *S. v. Cox,* 201 N. C., 357.

The defendant moved in this Court for an arrest of judgment under Rule 21 of Rules of Practice in the Supreme Court. The exception to the rule that no exception will be considered in the Supreme Court which has not been made a part of the case of record, under which the defendant seeks to make his motion, reads: "motions in arrest for the insufficiency of an indictment." No insufficiency of the indictment appears in this record. The charge is plainly and concisely made in the warrant upon which the defendant was tried. The word feloniously is surplusage and was properly treated as such. *S. v. Edwards,* 90 N. C., 710; *S. v. Shine,* 149 N. C., 480.

We have read the record, and have carefully considered all of the sixty-one assignments of error, and are left with the impression that the evidence supports the verdict, and that no reversible error was committed in the trial.

No error.

IN THE MATTER OF PHILLIP A. ESCOFFERY, PRACTICING ATTORNEY OF NORTH CAROLINA.

(Filed 16 June, 1939.)

1. Attorney and Client § 11—Detention of money received in his professional capacity without bona fide claim thereto is ground for disbarment of attorney.

Charges that an attorney, in his capacity as such, received from his client sums of money which he detained without *bona fide* claim thereto and that he was guilty of willful deceit or fraud involving unprofessional conduct in his dealings with the client *is held* to sufficiently charge ground for disbarment, and the evidence in support of the charges considered by the Council of the State Bar and submitted to the jury upon appeal to the Superior Court, was amply sufficient to support the verdict of the jury and the judgment of disbarment.

2. Appeal and Error § 29—

Exceptions not set out in appellant's brief are deemed abandoned. Rule of Practice in the Supreme Court, No. 28.

3. Trial § 49—

Motions to set aside the verdict as being against the weight of the evidence and motions for a new trial on the ground that the verdict is against the weight of the evidence are addressed to the discretion of the trial court and are not reviewable.

4. Appeal and Error § 40a—

An exception to the signing of the judgment cannot be sustained when the judgment is supported by the verdict.

APPEAL by the respondent from *Spears, J.*, at October Term, 1938, of DURHAM. No error.

B. W. Parham and Edward L. Cannon for The North Carolina State Bar, appellee.

R. O. Everett for respondent, appellant.

SCHENCK, J. This was a proceeding prosecuted by The North Carolina State Bar against Phillip A. Escoffery, a practicing attorney of North Carolina, for the disbarment of the said respondent, under chapter 210, Public Laws 1933, secs. 11, *et seq.*, and acts amendatory thereof. N. C. Code of 1935 (Michie), secs. 215 (11) *et seq.*

The respondent was duly furnished with a statement of the charges against him to which statement he filed answer, and the cause came on to be heard by a trial committee, which committee heard the evidence, found the facts and concluded as a matter of law that the respondent was

"guilty of detention, without *bona fide* claim thereto, of moneys collected in the capacity of attorney," and was "guilty of willful deceit and fraud and unprofessional conduct, and has violated the canons of ethics of The North Carolina State Bar" and recommended "that the respondent be disbarred from the practice of law in the State of North Carolina."

The respondent duly excepted to the findings of fact and conclusions of law of the trial committee, and appealed to the Council of The North Carolina State Bar for trial upon issues tendered.

The cause came on for hearing before the Council of The North Carolina State Bar, at a regular quarterly meeting, upon report of the trial committee. After considering the entire record, and hearing counsel, the Council adopted the following resolution:

"Resolved, that the findings of fact and conclusions of law of the trial committee be affirmed and that the respondent Phillip A. Escoffery be and he is hereby disbarred from the practice of law in the State of North Carolina," and thereupon "ordered, adjudged and decreed that the said Phillip A. Escoffery be and he is hereby disbarred from the practice of law in the State of North Carolina."

To the foregoing judgment, signed by Chas. G. Rose, President of The North Carolina State Bar, the respondent excepted and appealed to the Superior Court.

The record was duly transmitted to the Superior Court of Durham County, and the cause came on for hearing before Spears, J., at the October Term, 1938, and was tried before a jury upon the following issues:

"1. Did Phillip A. Escoffery, in his capacity as attorney at law, receive from his client, Robert Lee Jeffers, the sum of $350.00, and detain without a *bona fide* claim thereto the said sum or any part thereof?

"2. Did Phillip A. Escoffery, in his capacity as attorney at law, receive from his client, Robert Lee Jeffers, the sum of $3.75 and detain without a *bona fide* claim thereto the said sum?

"3. Was Phillip A. Escoffery guilty of any willful deceit or fraud involving unprofessional conduct in his dealings with his client, Robert Lee Jeffers?"

The jury answered each of the issues in the affirmative. Whereupon the court entered judgment "that the respondent Phillip A. Escoffery be and he is hereby disbarred from the practice of law in the State of North Carolina." From this judgment the respondent appealed to the Supreme Court.

The respondent in this Court entered a demurrer *ore tenus* to the statement of charges upon which he was tried for that such statement

failed to state facts sufficient to constitute the cause or causes of action indicated by the issues submitted. This demurrer cannot be sustained.

Relative to the $350 mentioned in the first issue the statement of charges alleges, *inter alia,* "that the said Escoffery has kept and appropriated the said sum of $350, received by him as aforesaid, to his own use and purposes. That the acts and conduct of the said Escoffery, as hereinbefore set out, were and are in violation of law and in direct violation and contravention of the canons of ethics of The North Carolina State Bar in that the said Escoffery, (a) has committed a criminal offense, showing professional unfitness; (b) has detained without a *bona fide* claim thereto property received in the capacity of attorney; (c) has been guilty of unlawful deceit, fraud and unprofessional conduct; (d) has detained without a *bona fide* claim thereto property received in a fiduciary capacity; (e) has violated the canons of ethics adopted and promulgated by the Council of The North Carolina State Bar."

The $3.75 mentioned in the second issue was a portion of the $63.75 referred to in Charge No. 2, by the following words: ". . . and appropriated the balance, to wit, the sum of $63.75 to his own use and purposes. That the acts and conduct of the said Escoffery, as hereinbefore set out, were and are in violation of law and in direct violation and contravention of the canons of ethics of The North Carolina State Bar, in that the said Escoffery (a) has detained without a *bona fide* claim thereto property received in the capacity of attorney; (b) has detained without a *bona fide* claim thereto property received in a fiduciary capacity; (c) has been guilty of unprofessional conduct; (d) has violated the canons of ethics which have been adopted and promulgated by the Council of The North Carolina State Bar."

These allegations clearly constitute causes of action and likewise support the issues submitted.

The evidence taken before the trial committee, and considered by the Council, and submitted to the jury in the Superior Court was amply sufficient to support the verdict. In fact, the exceptions to the refusal of the court to sustain the demurrer to the evidence were abandoned by the respondent in that he failed to set them out in his brief. Rule 28, Rules of Practice in the Supreme Court, 213 N. C., 825.

There are three assignments of error. (1) The refusal of the court to set aside the verdict as being against the greater weight of the evidence. (2) Refusal to grant a new trial on the ground that the verdict is contrary to the weight of the evidence. (3) The signing of the judgment as appears in the record.

A motion to set aside a verdict as being against the weight of the evidence is addressed to the discretion of the court and is not reviewable.

Hardison v. Jones, 196 N. C., 712. The granting of a new trial upon the ground that the verdict is contrary to the evidence is likewise in the discretion of the trial court and not reviewable. *Redmond v. Stepp,* 100 N. C., 212 (220). An exception to the signing of the judgment cannot be sustained when the judgment is supported by the verdict, *Evans v. Ins. Co.,* 213 N. C., 539. The verdict in this case supports the judgment signed.

On the record we find

No error.

MABLE SMITH v. SAFE BUS COMPANY, INCORPORATED.

(Filed 16 June, 1939.)

1. Carriers § 21b—

Evidence that plaintiff passenger in going to her seat in the bus had turned around to take her seat when the bus jerked and threw her on her right side causing injury to her hip *is held* sufficient to take the case to the jury on authority of *Riggs v. R. R.,* 188 N. C., 366.

2. Negligence § 20—

An instruction which correctly defines and explains negligence and proximate cause in abstract terms but fails to apply the law to the facts adduced by the evidence fails to meet the requirements of C. S., 564, and a new trial will be awarded on appellant's exception.

STACY, C. J., concurs in part and dissents in part.

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

APPEAL by defendant from *Sink, J.,* at October Term, 1938, of FORSYTH. New trial.

Elledge & Wells for plaintiff, appellee.

Hosea V. Price and Ingle, Rucker & Ingle for defendant, appellant.

SEAWELL, J. This is an action for recovery of damages for a personal injury alleged to have been sustained by the plaintiff while a passenger on defendant's bus in Winston-Salem.

Two exceptions are taken by the appealing defendant in the course of the trial which we consider worthy of attention:

1. As to the negligence, the plaintiff testified: "I got on the front part of the bus, which was headed up Patterson. I paid the driver five cents. The bus was full of passengers at the time I got on there. *I was on my way to the long seat in the back to take a seat, and just as I went to take a seat the bus driver pulled off, and jerked or throwed me against the back seat. He jerked. I had not sit down when he pulled*

off and jerked. I had gotten just about ready to sit down. I had turned around on the right side. As I turned to the right side the bus jerked and throwed me on the right side and back. I injured my hip at the point I indicate."

There was some corroboration as to the location and nature of the injury.

The defendant contends that this is not sufficient evidence of negligence to sustain plaintiff's case, pointing out that the simple word "jerked," as applied to the occurrence, is not sufficient to give to the jury any idea as to the extent or violence of the movement; and that it must be taken into consideration that irregular and sudden movements are, to a certain extent and as a matter of common knowledge, necessarily incident to the operation of a bus. It does, however, indicate a sudden and precipitous starting of the car and a movement of the floor upon which plaintiff was standing sufficiently to throw her off balance and cause her to come in contact with the seat in a manner calculated to cause her bodily harm. In this respect the factual situation cannot be fairly distinguishable from that in *Riggs v. R. R.,* 188 N. C., 366, 124 S. E., 749, and under that authority the evidence takes the case to the jury. The nonsuit was properly overruled.

2. The trial court, with admirable precision and with apt illustration, defined and explained negligence which, proximately resulting in injury, is compensable at law. The defendant objects that these definitions are entirely abstract and that they do not comply with the requirements of C. S., 564, that the law be applied to the evidence.

The courts have been rather meticulous, especially in the matter of negligence, in requiring that the law be explained in its connection with the facts in evidence. We feel that the court was inadvertent to this necessity and the fact that perhaps the jury, being laymen, would not be so apt to see the connection between the principles of law laid down and the facts in the case which so clearly appears to an experienced lawyer or judge. We understand the requirement of the statute to be based upon this reasoning. We do not regard the instruction as adequately meeting the requirements of the statute, and in this respect there is error entitling defendant to a new trial. *Robinson v. Transportation Co.,* 214 N. C., 489; *Farrow v. White,* 212 N. C., 376, 193 S. E., 386; *Williams v. Coach Co.,* 197 N. C., 12, 147 S. E., 435.

New trial.

STACY, C. J., concurs in the ruling on the exception to the charge and dissents from the ruling on the motion to nonsuit.

The case is grounded on the decision in *Riggs v. R. R.,* 188 N. C., 366, 124 S. E., 749. There, it was held that "a sudden and violent jerk" of a train which threw the *feme* plaintiff, a passenger, against

the iron frame of a seat and severely injured her was sufficient to carry the case to the jury. It is a far cry from the evidence in the *Riggs case, supra,* to the evidence in the instant case.

The law is well settled and to the effect that a carrier is not liable for the result of ordinary jolts or jerks incident to the starting or stopping of its conveyances in the usual and customary manner. *Usury v. Watkins,* 152 N. C., 760, 67 S. E., 926; *Marable v. R. R.,* 142 N. C., 557, 55 S. E., 355; *Murphy v. New Orleans Public Service,* 7 La. App., 612, 169 So., 890. "It has been decided in many cases that the starting of a car with a 'jerk' is not evidence of negligence." *Gollis v. St. Ry.,* 254 Mass, 157, 149 N. E., 607; *Seidenberg v. St. Ry. Co.,* 266 Mass., 540, 165 N. E., 658.

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

MRS. LILLIE MASTEN v. ARVILLE MASTEN.

(Filed 16 June, 1939.)

Divorce § 13—In action for alimony without divorce denial of abandonment and failure to support plaintiff raises issues for determination of jury.

Plaintiff instituted this action for alimony without divorce upon allegations of abandonment of her and the children of the marriage by defendant, and his failure to provide them necessary subsistence. C. S., 1667. In his answer defendant alleged that he separated himself from his wife at her bidding after an altercation to avoid continual abuse, nagging and assaults by plaintiff, and that he had provided plaintiff and their children with a furnished house, paid bills for necessaries and given them cash weekly, and had therefore furnished them with necessary subsistence in accordance with his means in life. *Held:* The answer raises issues of fact determinative of the right to the relief sought, which issues must be submitted to the jury, and the granting of plaintiff's motion for judgment on the pleadings was error.

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

Civil action for alimony without divorce. C. S., 1667, as amended.

It is admitted that plaintiff and defendant were joined in marriage on 14 October, 1914, and that two children, a son now seventeen years of age, and a daughter now ten years of age, were born to them.

Plaintiff alleges that on 5 September, 1935, after an altercation between her and defendant, as described, defendant left her home and will-

fully abandoned her and their children, and has failed to provide them with the necessary subsistence according to his means and condition in life.

Defendant denies that he willfully abandoned plaintiff and their children, or that he has failed to provide them with necessary subsistence according to his means and condition in life. He denies that he has at any time mistreated the plaintiff. He avers that after difficulties of the night of 5 September, 1935, plaintiff told him to get his clothes and leave, and that he did leave and had since remained away in order to avoid "continual abuse, harassment, nagging and assaults of the plaintiff." He further avers that since he left home he has provided as best he could for plaintiff and their two minor children; that he built a $3,500 house, on plan approved by plaintiff, in which she and the children are now living; that he furnished the house at a cost of approximately $1,500; that the reasonable rental of the house is $35 per month; that he has furnished a cow, hogs and chickens, with feed for same; that he has paid all bills for groceries, doctor, dentist, lights and fuel; that in addition thereto he has paid to plaintiff $10 per week a part of the time, and $16 per week at other times, for the use and benefit of herself and children; and that from time to time he has given the children money and bought clothes for them.

When the case came on for trial, the plaintiff moved for judgment on the pleadings. The court, being of opinion and finding as a fact, "that the defendant has set up in his answer no legal defense to the claim of the plaintiff for a reasonable amount for the support and maintenance" of herself and children, allowed the motion and rendered judgment in favor of the plaintiff, continuing in effect the order for alimony *pendente lite* theretofore entered in the cause.

Defendant appealed therefrom, and assigns error.

Ratcliff, Hudson & Ferrell for plaintiff, appellee.
Wm. H. Boyer and Roy L. Deal for defendant, appellant.

WINBORNE, J. Appellant calls in question judgment on the pleadings, and contends that an issue of fact as to separation and failure to support is raised. Careful consideration of the pleadings in connection with the statute and decisions of this Court lend support to appellant's contention. C. S., 1667; Public Laws 1919, ch. 24, as amended by Public Laws 1921, ch. 123, and Public Laws 1923, ch. 52. *Crews v. Crews,* 175 N. C., 168, 95 S. E., 149; *Vincent v. Vincent,* 193 N. C., 492, 137 S. E., 426.

The statute provides that the wife may institute an action to have reasonable subsistence and counsel fees allotted and paid or secured to

her from the estate or earnings of her husband, (1) if he shall separate himself from her and fail to provide her and the children of the marriage with necessary subsistence according to his means and condition in life; or (2) if he shall be a drunkard or spendthrift; or (3) if he shall be guilty of any misconduct or acts which would be cause for divorce, either absolute or from bed and board. These issuable facts when raised by the pleadings are to be determined by the jury at the final hearing. *Crews v. Crews, supra; Vincent v. Vincent, supra.*

In the *Crews case, supra, Hoke, J.,* said: "When these issues are admitted by the parties or properly established to be in applicant's favor, the amount of the alimony and how the same is to be determined, etc., are questions of fact to be determined by the judge, having regard to the condition and circumstances of the parties, including also the separate estate of the wife, if she have any. But where these essential issues are made by the pleadings the right of trial by jury arises to the parties, and it then becomes the duty of the judge to transfer the same for such purposes to the civil issue docket," citing *Skittletharpe v. Skittletharpe,* 130 N. C., 72, 40 S. E., 851; *Cram v. Cram,* 116 N. C., 288, 21 S. E., 197.

In the present case plaintiff alleges that defendant has willfully abandoned her and their children and failed to provide them with the necessary subsistence. Defendant specifically denies the allegation. This raises an issue for the jury.

The judgment below is

Reversed.

R. J. REYNOLDS REALTY COMPANY v. MAUDE E. LOGAN AND MILTON STARR.

(Filed 16 June, 1939.)

Landlord and Tenant § 15c: Ejectment § 3—Peremptory instruction that lessee had exercised right of renewal under terms of lease held error upon conflicting evidence.

The lease in question provided for the right of renewal by lessee or his assigns at a figure satisfactory to lessor in preference to third persons. *Held:* In an action in summary ejectment, after the expiration of the original period, a peremptory instruction in favor of the assignees of the lessee is error when the lessor offers evidence that he leased the premises at competitive bidding, that defendants were advised and entered a bid, that the premises were leased to a third person entering a higher bid, and that defendant did not renew or increase his bid, even though defendants offered evidence in contradiction thereof upon their contention that they were given no opportunity to obtain preference over third persons.

REALTY CO. *v.* LOGAN.

APPEAL by plaintiff from *Clement, J.,* at February Term, 1939, of FORSYTH. New trial.

This was a summary ejectment proceeding instituted in the court of a justice of the peace, and by appeal tried by jury in the Superior Court. Plaintiff alleged that defendant was holding over after the expiration of the lease to defendants' assignor. Defendants asserted right to exercise renewal privilege contained in the original lease. Under peremptory instruction by the trial judge the jury answered the issues in favor of the defendants, and from judgment in accord with the verdict plaintiff appealed.

Manly, Hendren & Womble and W. P. Sandridge for plaintiff.

Edward J. Hanson, John J. Ingle, and Frank H. Kennedy for defendants.

DEVIN, J. The lease executed by plaintiff to defendants' assignor, and under which they occupied the premises, contained this provision: "It is understood, covenanted and agreed that at the expiration of this lease, provided the said premises are owned by the landlord and are for rent for the purpose of a theatre, the tenant, in event it has fully complied with all of the terms, covenants and conditions of this lease, shall be given the privilege of renewing the same in preference to a third party at a figure satisfactory to the landlord." By its terms this lease, which had been given for a period of five years, expired 31 December, 1938.

Plaintiff offered evidence tending to show that in May, 1938, defendants were advised that plaintiff proposed to consider only competitive proposals for a new lease and defendants were invited to submit a proposal. They were told that the contents of competitive bids would not be disclosed, and that the best proposal would be accepted without reopening the bidding. Pursuant to this understanding defendants, on 20 May, 1938, submitted a bid of $650.00 per month for a period of five years, the offer to expire 1 July, 1938. Plaintiff also received proposal from A. F. and J. B. Sams to pay $700.00 per month for a period of ten years, and to expend $10,000 in improvements. These bids were considered by plaintiff's board of directors and the Sams offer accepted 22 June, and lease executed to Sams 11 July, 1938, to begin 1 January, 1939. After due notice defendants refused to vacate the premises and this proceeding was instituted to eject them.

While there is authority for the position that when the lease contains a covenant for renewal and the tenant exercises his right to demand a renewal of the expiring lease, he is entitled to remain in possession, and this defense may be interposed in a summary ejectment proceeding before a justice of the peace. *Forsythe v. Bullock,* 74 N. C., 135;

McAdoo v. Callum, 86 N. C., 419; *Lutz v. Thompson,* 87 N. C., 334; *Barbee v. Greenberg,* 144 N. C., 430, 57 S. E., 125. However, it was said in *McAdoo v. Callum, supra,* quoting from Taylor on Landlord & Tenant, sec. 333: "A covenant to let the premises to the lessee at the expiration of the term without mentioning any price for which they are to be let, or to renew the lease upon such terms as may be agreed on, in neither case amounts to a covenant for renewal, but is altogether void for uncertainty."

Here the defendants were given the privilege of renewing "in preference to a third party at a figure satisfactory to the landlord." Thus the terms were not agreed upon but were left open, with the sole restriction upon the landlord that defendants be given preference over a third party. Plaintiff's evidence tended to show that defendants were advised of plaintiff's requirement of competitive bidding for lease at expiration of the term, and that defendants were warned to make their best proposal. Defendants entered the competition with a bid which proved to be less than that of a third party. Defendants' offer, which, by its terms, expired 1 July, 1938, was not renewed or increased.

While the defendants offered evidence tending to contradict the plaintiff's testimony, and contended that no opportunity had been given them to obtain the privilege of preference to third parties accorded by the terms of the original lease, we conclude that the learned judge was in error in giving the peremptory instruction to the jury to which exception was noted, for which there must be a new trial.

New trial.

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

(Filed 16 June, 1939.)

1. Appeal and Error § 49a—

A decision of the Supreme Court must be interpreted in the light of the question presented for review, and a decision that the lower court committed no error in denying plaintiff's motion for a judgment on the pleadings is decisive on that question alone and leaves for the determination of the jury upon the subsequent hearing the issues of fact raised by the pleadings.

2. Money Received § 1—Allegations of defendant's acceptance of a corporate check in payment of individual obligation of its president does not entitle plaintiff to judgment on the pleadings.

Evidence that defendant accepted a corporate check drawn by its president in payment of a personal obligation of its president is insuffi-

cient to entitle plaintiff to judgment on the pleadings when defendant denies fraud, since acceptance of the check alone is insufficient to put defendant on notice as a matter of law, the issue of fraudulent use of the check by the corporate president and the participation in the fraud by defendant, so as to bring the transaction within the application of ch. 85, sec. 5, Public Laws of 1923 (Michie's N. C. Code, 1864 [i]), as a breach of a fiduciary obligation in drawing or delivering the instrument, being raised by the pleadings for determination by a jury.

PETITION to rehear this case, originally reported in 215 N. C., 73.

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

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

CLARKSON, J. The petition is addressed to the failure of the court, in the opinion heretofore filed herein, to interpret chapter 85, section 5, Public Laws of 1923 (N. C. Code of 1935 [Michie], sec. 1864i), and to apply the same to the instant case. Specifically, the petition is directed to that portion of the prior opinion, 215 N. C., at p. 75, which declares: "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.*" This statement must be interpreted in the light of the question then before the Court, to wit, whether plaintiff was entitled to *judgment on the pleadings* where it is not denied that a personal debt was paid by a corporate check but the allegation of misappropriation or fraud is, without any further plea in justification or extenuation, denied. The statement: "We do not think that this was sufficient to put defendant on notice, etc.," simply means that it is not sufficient as a matter of law, so as to entitle plaintiff to a judgment on the pleadings. The allegation was that Paine, as corporate president, fraudulently used a check drawn by him as corporate president to pay a personal debt and that defendant knowingly participated therein; both the fraudulent user and participation was denied. This raised an issue for trial, and the trial judge properly refused to grant the motion for judgment on the pleadings.

Since this case presents a single question, to wit, whether the matters of fact put at rest by the pleadings are sufficient to support a judgment for plaintiff, it was not deemed necessary to discuss, in the prior opinion herein, the effect of the last sentence in section five, chapter 85, Public Laws 1923, as follows: ". . . If, however, such instrument is payable to a personal creditor of the fiduciary and delivered to the creditor in payment of or as security for a personal debt of the fiduciary to the actual knowledge of the creditor, or is drawn and delivered in any trans-

action known by the payee to be for the personal benefit of the fiduciary, *the creditor or other payee is liable to the principal if the fiduciary in fact commits a breach of his obligation as fiduciary in drawing or delivering the instrument.*" This statute, by its plain intendment, has no application unless the fiduciary commits "a breach of his obligation as fiduciary in drawing or delivering the instrument." In the instant case the denial of fraud raised an issue as to the existence of "a breach of his obligation as fiduciary." This issue has not been disposed of. Nor is it properly before us in the instant case, which is here for review only as to the correctness of the decision of the trial judge in denying the motion for judgment on the pleadings.

We adhere to our original position: The motion for judgment on the pleadings was correctly denied.

The costs will be taxed against the petitioner.

Petition dismissed.

STATE v. RICHARD PERRYMAN.

(Filed 16 June, 1939.)

Criminal Law § 63—Where record shows no breach of the condition upon which execution was suspended, execution on the judgment is error.

Defendant was convicted in the municipal court of a violation of the Prohibition Law, and judgment was entered that he pay a fine and costs and that he be imprisoned for six months, execution against the person to issue on motion of the solicitor condition upon the defendant being a law-abiding citizen for a period of five years. Thereafter defendant was convicted in the municipal court on a charge of a subsequent violation of the Prohibition Law, and in addition to the judgment in that case an order was issued that the judgment in the former prosecution should be put in effect. Upon trial *de novo* in the Superior Court upon appeal from the second conviction, defendant was acquitted. *Held:* The order putting into effect execution under the former conviction was based upon the fact of the second conviction, and this fact no longer existing, it was error for the Superior Court upon appeal from the said order not to discharge defendant, since defendant should not be imprisoned when the record fails to divulge that he had breached the condition upon which execution was suspended.

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

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

Elledge & Wells for defendant, appellant.

SCHENCK, J. The defendant was convicted in the municipal court of the city of Winston-Salem on 14 May, 1937, of violating the prohibition law when and where he was sentenced "to pay a fine of $100 and the costs" and "to be imprisoned in the common jail of Forsyth County for a term of 6 months to be worked on the public roads . . .; execution against the person to issue on motion of the solicitor, conditioned upon the defendant being law-abiding and of good behavior for a period of 5 years."

On 21 September, 1938, the defendant was again convicted of violating the prohibition law in the municipal court, whereupon the court found as a fact that he had not complied with the condition of the judgment of 14 May, 1937, "in that on 21 September, 1938, this defendant was convicted of violating the prohibition law," and "ordered and adjudged, . . . upon motion of the solicitor, that the defendant be confined in the common jail of Forsyth County for a period of six (6) months, to be assigned to the State Highway."

From his conviction on 21 September, 1938, the defendant appealed to the Superior Court, and also sought an appeal from the order of the same date putting into effect the judgment of 14 May, 1937, execution upon which had been suspended, which latter appeal was denied him by the municipal court.

On 30 September, 1938, Johnston, J., upon application of the defendant, issued a writ of *certiorari* to the municipal court directing said court to send up to the Superior Court the record in the case tried 14 May, 1937, including the order entered therein on 21 September, 1938.

Pending the hearing on the writ of *certiorari,* to wit, on 17 November, 1938, the defendant on appeal was tried *de novo* in the Superior Court upon the warrant upon which he had been convicted in the municipal court on 21 September, 1938, and was acquitted.

On 18 November, 1938, the writ of *certiorari* theretofore issued by Johnston, J., came on for hearing before Sink, J., at term time, who held that "the petitioner is not entitled to the relief prayed for" and ordered that "the writ (be) discharged and the petitioner remanded to the custody of the municipal court of the city of Winston-Salem, there to abide the orders of said court," and further ordered "the petitioner into the custody of the high sheriff of Forsyth County."

To the judgment of Sink, J., the defendant excepted and appealed to the Supreme Court, assigning said judgment as error.

We are of the opinion, and so hold, that the exception is well taken, and that the judgment of Sink, J., must be reversed, and the case remanded to the Superior Court to the end that, upon the *certiorari,* an order may be issued to the municipal court reversing the order of that

court of 21 September, 1938, directing the issuance of execution on the judgment of 14 May, 1937.

It is manifest that the judgment of 21 September, 1938, was predicated upon the finding "that on 21 September, 1938, this defendant was convicted of violating the prohibition law," and since upon appeal the defendant was acquitted of the charge of which he was so convicted, the fact upon which the judgment was predicated no longer existed. To allow the defendant to be imprisoned when the record fails to divulge that he has in any way breached the conditions upon which execution was suspended, and shows affirmatively that he has paid the fine and costs imposed, and met all of the conditions of the suspension, "would," as said by *Hoke, J.,* in speaking to a somewhat similar situation in *S. v. Hilton,* 151 N. C., 687, "afford opportunity for capricious exercise of arbitrary power unknown to the common law and disapproved and condemned by many well considered decisions of the present time."

Error and remanded.

SPUR DISTRIBUTING COMPANY v. CITY OF BURLINGTON ET AL.

(Filed 16 June, 1939.)

Municipal Corporations § 40: Mandamus § 1—Mandamus will not lie to compel issuance of building permit in violation of municipal ordinance.

Mandamus confers no new authority, but lies only at the instance of a party having a clear legal right to demand it, against a person under clear legal obligation to perform the act sought to be enforced, and therefore *mandamus* should be denied upon application of a party seeking issuance of a building permit for a filling station which it admits will be in direct violation of an ordinance of defendant municipality.

APPEAL by respondents from *Sinclair, Emergency Judge,* at January Term, 1939, of ALAMANCE.

Application for writ of *mandamus* to require the respondents to issue to applicant building permit for construction and operation of filling station with underground supply tank of 15,000-gallon capacity on lot of land leased by applicant in city of Burlington.

In its complaint the applicant alleges: "That plaintiff proposes to erect a modern filling station in a proper manner, complying with the building regulations and ordinances of the city of Burlington and the laws of the State of North Carolina."

Pending the action, the board of aldermen of the defendant city passed an ordinance making it unlawful to transport into or through the fire limits of the city of Burlington by motor vehicle, motor truck or motor

truck and trailer or to unload or deliver within said limits from any railroad tank car or other type or kind of vehicle, gasoline, naptha, etc., or other inflammable or explosive oil derivatives in quantities of more than 1,200 gallons.

"Plaintiff admits that its proposed method of unloading gas to be dispensed at its filling station will be in direct violation of the aforementioned ordinance." It contends, however, that the ordinance is void for arbitrariness.

The trial court held the ordinance to be void in accordance with applicant's contention, and ordered respondents to issue to applicant permit for construction and operation of filling station "according to the plans proposed and submitted to the city authorities of the city of Burlington."

From this order the defendants appeal, assigning error.

Tompkins & Tompkins and Long, Long & Barrett for plaintiff, appellee.

Cooper & Sanders and W. Clary Holt for defendants, appellants.

STACY, C. J. The question for decision is whether *mandamus* will lie to require the issuance of a building permit in violation of an ordinance. The answer is "No." *Braddy v. Winston-Salem,* 201 N. C., 301, 159 S. E., 310; *Refining Co. v. McKernan,* 179 N. C., 314, 102 S. E., 505.

In the instant case, it is enough to say the writ should have been denied, or limited to a lawful permit, for want of a clear showing of right on the part of the applicant to demand it. *Hayes v. Benton,* 193 N. C., 379, 137 S. E., 169. *Mandamus* lies only to enforce a clear legal right. *Cody v. Barrett,* 200 N. C., 43, 156 S. E., 146.

The admission by applicant that "its proposed method of unloading gas . . . will be in direct violation of the city ordinance" defeats its right to the peremptory *mandamus* which it here seeks, albeit its right to a permit to construct and operate a lawful filling station is neither denied nor resisted by the respondents. *Mandamus* lies only to compel a party to do that which it is his duty to do without it. It confers no new authority. The party seeking the writ must have a clear legal right to demand it, and the party to be coerced must be under a legal obligation to perform the act sought to be enforced. *Person v. Doughton,* 186 N. C., 723, 120 S. E., 481; *Missouri v. Murphy,* 170 U. S., 78.

The power to enact regulatory ordinances for the safety and protection of the public is not to be forestalled or foreclosed by specific writs of *mandamus. Wake Forest v. Medlin,* 199 N. C., 83, 154 S. E., 29.

Error and remanded.

STATE v. JULIUS BUCHANAN.

(Filed 16 June, 1939.)

1. Criminal Law § 50—

A statement by the court during the cross-examination of defendant that defendant "swore both ways" in regard to the matter under inquiry, *is held* prejudicial error, the effect of the observation being to disparage or discredit defendant's testimony in the eyes of the jury.

2. Criminal Law §§ 41d, 53e—

A charge that a person of good character is more apt to tell the truth than a person of bad character *is held* erroneous, the credibility of a witness being a matter for the jury.

3. Criminal Law § 52a—

The competency of a witness is a question of law for the determination of the court; the credibility of a witness is a matter of fact for the determination of the jury.

4. Criminal Law § 81d—

Where a new trial was awarded upon certain exceptions, other exceptions relating to matters not likely to arise on the subsequent hearing need not be considered.

APPEAL by defendant from *Clement, J.*, at January Term, 1939, of FORSYTH.

Criminal prosecution tried upon indictment charging the defendant with the murder of Gladys Buchanan, his wife.

Verdict: Guilty of murder in the first degree.

Judgment: Death by asphyxiation.

The defendant appeals, assigning errors.

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

John D. Slawter and Richmond Rucker for defendant.

STACY, C. J. The record discloses that on 3 December, 1938, the defendant slew his wife under circumstances which the jury has found to be murder in the first degree. The story is one of domestic infelicity which began with slight bickerings, followed by more serious quarrels, and finally culminated in a fight with the deceased wielding a hammer and the defendant a hatchet. The result was fatal to the wife, and the husband's conduct is here the subject of investigation.

On the trial the defendant was asked by the solicitor if the money found by the officers when he was arrested came from the sale of liquor. He answered in the negative. The solicitor then inquired: "You were

not working. Where did you get it?" Counsel for defendant objected, with the remark, "He did not say he was not engaged." Whereupon the court stated in the presence of the jury: "He swore both ways." To this the defendant noted an exception. The exception is well taken. *S. v. Rogers,* 173 N. C., 755, 91 S. E., 854. The effect of the observation was to disparage or to discredit the defendant's testimony in the eyes of the jury. *S. v. Bryant,* 189 N. C., 112, 126 S. E., 107; *Morris v. Kramer,* 182 N. C., 87, 108 S. E., 381. The remark, which, of course, was an inadvertence, is just one of those slips, or casualties, which, now and then, befalls the most circumspect in the trial of causes on the circuit. *S. v. Stiwinter,* 211 N. C., 278, 189 S. E., 868; *S. v. Kline,* 190 N. C., 177, 129 S. E., 417.

Again, the following excerpt taken from the charge, forms the basis of one of defendant's exceptive assignments of error: "A person who has a good character is not as apt to commit the offense as a person of bad character, and a person of good character is more apt to tell the truth about the matter than a person of bad character."

It is not perceived wherein this instruction differs in principle from the one held for error in the recent case of *S. v. Alverson,* 214 N. C., 685. The ruling in *Alverson's case, supra,* is controlling here.

The jury may be disposed to accept the testimony of a witness of good character rather than that which is adduced by one of bad character, but the law as such does not prefer the one over the other. Both are equally competent to testify. *S. v. Beal,* 199 N. C., 278, 154 S. E., 604. The competency of a witness is for the court; his credibility for the jury. Competency and credibility are not the same; the one involves a question of law; the other a matter of fact. A person may be a competent witness and yet not a credible one. The law declares his competency, but it cannot make him credible. "The credibility of a witness is a matter peculiarly for the jury, and depends not only upon his desire to tell the truth, but also, and sometimes even to a greater extent, upon his insensible bias, his intelligence, his means of knowledge and powers of observation." *Cogdell v. R. R.,* 129 N. C., 398, 40 S. E., 202.

There are other exceptions appearing on the record worthy of consideration, but as they are not likely to occur on another hearing, we shall not consider them now.

For the errors as indicated, the defendant is entitled to a new trial. It is so ordered.

New trial.

KATE HARRISON EBERT v. C. C. DISHER.

(Filed 16 June, 1939.)

1. Frauds, Statute of, § 9—

A permanent easement in lands cannot be created by parol nor is a verbal agreement relating thereto taken out of the operation of the statute of frauds by performance on the part of one of the parties and the expenditure of money by him in reliance upon the agreement. Michie's N. C. Code, sec. 988.

2. Frauds, Statute of, § 3—

A denial of the contract alleged is a sufficient pleading of the statute of frauds.

3. Money Received § 1—Person making improvements in reliance upon parol agreement for easement may recover amount the value of land is enhanced by the improvements.

Where an owner of land permits the owner of adjoining land to construct a dam on the adjoining land, ponding water back on both tracts, in reliance upon a verbal agreement that he should have an easement to so pond the water, the owner of the adjoining land, although he may not enforce the parol easement, may recover the moneys expended by him in making the improvements to the extent that they enhanced the value of the land of the owner permitting the improvements to be made without objection.

4. Parties § 3—Cause remanded for joinder of party defendant necessary to complete determination of cause.

Plaintiff trustor in a deed of trust on the property instituted this action to enforce a parol trust upon allegations that defendant purchased the land at the foreclosure sale under an agreement to convey to plaintiff upon the payment of the amount advanced with interest. Defendant agreed to execute the trust but contended he was entitled to make the conveyance subject to an easement permitting the maintenance of a dam on the contiguous property of his wife, which dam ponded water back upon both tracts, defendant contending that he constructed the dam pursuant to a parol agreement that he should have an easement therefor. *Held:* Although defendant may not enforce the parol easement upon plaintiff's plea of the statute of frauds, defendant, upon proper showing, may be entitled to recover the amount by which plaintiff's land was enhanced in value by the said improvements, and therefore defendant's wife, the owner of the land upon which the dam was constructed, is a necessary party to a complete determination of the cause, C. S., 456, and judgment of the Superior Court remanding the case to the county court for trial upon defendant's counterclaim is modified and affirmed.

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

APPEAL by plaintiff from *Clement, J.*, at March Term, 1939, of FORSYTH. Modified and affirmed.

This is an action brought by plaintiff against the defendant in the Forsyth county court, to recover a certain piece of land, some 6.23 acres and a 30-foot road, on the south side of Country Club Road, near the city of Winston-Salem, N. C. Henry F. Burke and wife, Eugenia Burke, the grandfather and grandmother of plaintiff, on 28 April, 1916, deeded her the above mentioned land as a gift and deeded the adjoining tract to plaintiff's sister, Mrs. C. C. Disher, as a gift. The defendant built a house on his wife's lot. Plaintiff's husband, T. E. Ebert, built a house on her lot and the two sisters and their husbands lived side by side.

The following indicates the controversy, in part: The plaintiff offers in evidence the following portion of paragraph one of the further defense of the defendant's answer:

"That he is advised, informed and believes that the property mentioned in the complaint was mortgaged to the Security Life & Trust Company; that said mortgage was in arrears and that the Security Life & Trust Company foreclosed the mortgage on the property in question and purchased same at said foreclosure sale.

"And the defendant avers that he agreed to execute his note in the sum of $6,000.00 and pay whatever was due the Security Life & Trust Company, and hold said property for the benefit of the plaintiff, and the plaintiff was to pay him the difference between the amount he had advanced in excess of the note of $6,000.00 at $20.00 a week, and to pay said note according to its tenor.

"The plaintiff offers in evidence the following portion of paragraph 6 of the amendment to the answer of the defendant: 'That in connection with the action of the defendant in purchasing the property from the Security Life & Trust Company in order to assist the plaintiff to save her home after the foreclosure sale in October, 1929, it was agreed between the plaintiff and defendant that the defendant would purchase said property from the Security Life & Trust Company and would pay the Security Life & Trust Company the amount due said company by the plaintiff; that the defendant did purchase said property and received the deed for said property and paid the Security Life & Trust Company the sum of $699.42 cash and executed a note for $6,000.00, secured by a deed of trust on the lands formerly owned by the plaintiff, and that the plaintiff was to repay the defendant the sum of $699.42, together with interest thereon, at the rate of twenty dollars per week, and that it was also agreed that the plaintiff would relieve the defendant from all liability by reason of the execution of said note, secured by the deed of trust to the Security Life & Trust Company, in the amount of $6,000.00, before the defendant should convey said property to the plaintiff.'

"The plaintiff offered in evidence the deed book 325, at page 66, from the office of the register of deeds of Forsyth County, being record of deed dated the 23rd day of April, 1930, from George A. Grimsley, Trustee, to C. C. Disher, covering the real property referred to and described in the complaint.

"The plaintiff offered in evidence the following instrument, the execution of which was admitted by the defendant, and which is Plaintiff's Exhibit #1: 'This agreement, made and entered into this 3rd day of September, 1938, by and between the Security Life & Trust Company, of Winston-Salem, North Carolina, and Kate H. Ebert and husband, T. E. Ebert, of Winston-Salem, North Carolina,'" etc.

In the defendant's amended answer is the following: "It was further agreed that if the plaintiff should repay to the defendant money he had advanced in her behalf and relieve the defendant of the obligation of the note in the amount of $6,000.00 and receive from the defendant a deed to the lands formerly owned by her that the defendant would have the right to maintain said dam, drain ditches and terraces so long as the basin should be used for the purpose of a lake or pool; that in reliance upon said agreement the defendant did construct a dam and did develop upon the property partly belonging to him and partly upon the lot formerly owned by the plaintiff a lake or pool; that the said lake was completed pursuant to said agreement, said drain ditches and terraces were built in accordance with said agreement, and that the defendant has expended large sums of money in the development of said lake and in the maintenance thereof; that he has built upon said property a concrete dam, also a stone wall, laid out terraces and drain ditches and made other improvements at great expense, and that said lake was developed in accordance with the agreement above set out; that the plaintiff has made no objection thereto; that by reason of said agreement above set out and by reason of the large sums of money the defendant has in good faith expended in developing said lake, the defendant is entitled to have a decree entered adjudging him to be the owner of an easement in the land covered by the lake or pool and in the appurtenances thereto, including drain ditches, terraces and the land between the terraces and the lake, all of which are necessary for the proper maintenance of said lake; that at the time the defendant agreed to assist the plaintiff in retaining her home and the purchasing of the property from the Security Life & Trust Company, as hereinbefore set out, and as a part of said agreement the plaintiff and defendant discussed the matter of sewer and cesspool line, as hereinbefore set out, and also discussed the matter of the defendant's purpose to develop the lake and the pool as hereinbefore set out, which lake and pool the defendant did develop pursuant to said agreement; that the plaintiff and

defendant agreed that if and when the plaintiff, by virtue of her compliance with said agreement, should become entitled to have the defendant convey to her the lot and property formerly owned by her, such conveyance would be subject to the payment of all money advanced and relief from the mortgage indebtedness, and subject to the defendant having an easement and right in and to said sewer line and cesspool hereinbefore set out, and also subject to an easement for the purpose of maintaining said lake and its appurtenances, as set out above; that the plaintiff acquiesced in the action of the defendant in building the said dam and improvements and developing the lake site and has stood by for a number of years and had made no objection thereto, and that the plaintiff has ratified and is now estopped to deny the defendant has an easement and a right to continue to maintain and use said lake and its appurtenances and the sewer lines and appurtenances hereinbefore described. Wherefore, the defendant having fully answered, prays for the relief as set out in his answer filed in this cause; that the court enter a decree adjudging the defendant to be entitled to an easement in and to the sewer line and cesspool on the land formerly owned by the plaintiff, and an easement in and to the lake site, terraces and ditches, and other appurtenances to the lake on the land formerly belonging to the plaintiff, upon a conveyance by the defendant to the plaintiff; and, that the plaintiff pay the costs of this action to be taxed by the clerk; and for such other and further relief as he may be entitled."

The Disher house was built, and, as there was no city water, they dug a well and placed an electric pump in the well. The Eberts had no water and no way of getting same. C. C. Disher testified, in part: "Mr. Ebert at that time did not have any water or any way for getting water, and we agreed that he could get water from our well at a rate of two dollars and twenty-five cents a month, and he was to pay for the water line to run over to his house from our line. I was to pay for my cesspool, or rather, the sewer line from my house to where it went into a 'Y' from his house into the main line going into the sewer or cesspool. He was to dig the cesspool and maintain the cesspool and pay for the building of the cesspool on his place. I was to dig my well and maintain the well. We were to pay for the line from the 'Y' to the cesspool jointly and I have bills to show it has been paid for jointly. I have been using that sewerage equipment and cesspool since that time, since about 1923. Later I built a fish pond or lake, built a dam where we had a stream of water running in. I had an understanding and agreement with Mrs. Ebert and Mr. Ebert in regard to a lake that we were to establish on the back of this lot if I took up this mortgage, or rather, took over the property, if I bought it and allowed them to take it back. I talked with Mr. Grimsley who, I understood, was the president of

the Security Life & Trust Company, and with Mr. C. C. Taylor before having any talk with Mr. Ebert or Mrs. Ebert, and then I came back and talked with Mr. and Mrs. Ebert in regard to it, told them what Mr. Grimsley had agreed to do in regard to deeding the property to me, and I told Mr. and Mrs. Ebert before I ever paid any of this or made any agreement with Mr. Grimsley that I would be willing to take this over, due to the fact that I already had a connection and cesspool over there and a line and had expended some money on that, and provided further that they would allow me, if I took it over, which they agreed on certain conditions to pay me back what I had advanced to them for taking the property over, if they paid me back I was to have that lake as long as it was used, not as long as I used it, but as long as it remained as a lake, it was to be my property. Before I would take the property over or make any payment on it, Mr. and Mrs. Ebert said that I could use the cesspool connection there from then on. There was no definite time set for ever terminating it; that I could continue to use it and that the lake should be mine, belong to our property there as long as it was used for a lake. After this conversation with Mr. and Mrs. Ebert I went to Mr. Grimsley, or rather, to the Security Life & Trust Company, and gave them my check for $699.42 which represented a considerable amount of past due interest that had accumulated on the mortgage of Mrs. Ebert's prior to the time of their foreclosure. . . . Mr. and Mrs. Ebert have not paid me back all the money I have expended in taking over this property. Neither the plaintiff, Mrs. Ebert, nor Mr. Ebert have tendered me any money to pay me for the money I have expended. They have not relieved me of my obligation of six thousand dollars on the note secured by the deed of trust to the Security Life & Trust Company. I am now and have been willing and ready to deed the property back to the plaintiff upon payment to me of the amount due and the use by me of the lake and the sewer line. After I had expended this money in taking over this property and carrying it, I employed Mr. Bryant to go down with a steam shovel and build a dam with a cement core. Before the dam was built we went in with the same steam shovel and dipped out the basin for this lake, made a regular pool out of it down between two hills and cleaned it out. The place where I built the lake was just a mucky bunch of old black-jacks, roots, stumps, nothing but mush mud. After we built a dirt dam with a cement core, we found it wouldn't stand on account of muskrats and things getting through it, and I went down and built a concrete dam clean across the bottom, probably eighty feet in length. Then I built another concrete wall about middleways of the pond, across the pond about thirty-six feet above the original dam and about four or five feet high. The dam at the end is about seven feet high and this second dam

wasn't up to the top of the water; that is, when it fills up to the height of that dam it flows over into the pool below and then fills up to the height of the big dam down below. The second concrete dam was to keep the mud from washing down out of the upper part of the lake or, rather, the upper part of the meadow, down against the first dam. I have this lake stocked with fish. I have built about 2,300 square feet of rock wall along the side of the lake, around the edge of the lake, as a retaining wall to keep the water from running into the lake. I cut a drainage ditch above the lake. . . . I have spent about twenty-five hundred to three thousand dollars on the lake and the cabin that I built and the walls and all. That lake has been in operation since the time it was built in 1930. Mr. and Mrs. Ebert's children use the lake, go in swimming often. Mrs. Ebert has brought them down and sat and watched them while they were playing in the water. Mr. Ebert was down there several times while the lake was being built and Mrs. Ebert was down there a couple of times, I don't know how many, but I noticed her there a couple of times while it was being built. I had a rock wall built around the spring down there, built up around it, a concrete floor in it and rock steps down to it. We built a very nice cabin which is used for picnic and gatherings, also for changing clothes for bathing and to sit around in, as a pleasure house. Mr. and Mrs. Ebert never made any complaint to me until a short time ago about this lake. The lake has been as it is now since 1931, I think. I think it was completed in 1931, and has been there ever since. The sewer and water connections have been in use since 1923, and are being used now. I am still furnishing Mr. and Mrs. Ebert water. . . . I had to have the first pump which I installed in the well overhauled three or four different times. Then I have had to buy a new pump and had to keep that one up, and I have to pay the current for pumping the water each month. Then I have had to have the well cleaned out, as I ordinarily would. I pay for the electric current rent for operating the pump. . . . The spring that I spoke of having walled in and put a concrete floor in is on Mrs. Disher's land. The cabin that I built is on Mrs. Disher's land. The rock wall that was built is on Mrs. Disher's land. The concrete wall in the pool is partly on Mrs. Disher's land and partly on Mrs. Ebert's land. There are two concrete walls or dams in this lake. I hadn't heard any complaint about the lake from the Eberts up to the time of the filing of the complaint in this action. I have heard some complaint since that time. . . . The land where we reside was conveyed to my wife by her grandfather and grandmother and the land adjoining where Mrs. Ebert resides was also conveyed to her by her grandfather and grandmother. My wife's property has been held continuously by her since the time it was conveyed to her by her grand-

father and grandmother. At the time the cesspool was built and the well dug and the pump installed in the well, my wife was the owner of the property. I paid for the erecting of the house in which we live on my wife's lot and I paid for the digging of the well, and the pump, and the equipment that went into it. I paid for the sewer pipe and line connecting my house with the sewer line from the 'Y' to the cesspool on Mrs. Ebert's place, the place that she formerly owned, and I think Mr. Ebert paid me back his part of it. I paid for the improvements at the spring and the erection of the lake on my wife's land and the land formerly owned by Mrs. Ebert and now in my name."

Mrs. C. C. Disher testified, in part: "The lot upon which we live was deeded to me by my grandfather, Henry Burke. After the property was deeded to me a house was built on it and we moved there. Mr. Disher's money went into the erection of the house on this lot. The matter of the well and the sewer was discussed with my sister and her husband two or three different times. Mr. Disher and I discussed this when they were talking about him taking over the property. Mr. Disher was to dig the well; Mr. Ebert was to dig the cesspool. That was done about 1923, when we moved out there. A long time after that there was a dam built back there on the property. That was in 1931. Prior to that time Mrs. Ebert's property had been sold by the Security Life & Trust Company under a mortgage. I heard a conversation between Mrs. Ebert and my husband about him paying the amount of the mortgage and taking the property over. They were to pay that back at $20.00 a week. Mr. Disher told Mr. and Mrs. Ebert that he was willing to take the property over and help them with it, and Mr. and Mrs. Ebert agreed to pay Mr. Disher $20.00 a week on this property and the cesspool was to remain and the lake was to remain just like it was. Mr. Ebert was to pay the amount of the indebtedness that Mr. Disher assumed. Mrs. Ebert came down to the lake when it was being built and after it was built continued to come down there. In the summertime the children would go every day and go in the water and Mrs. Ebert would come down. During the last two months, when Mr. Ebert would go to work, the children would slip off down there and go in. Before that they would go just any time of day they wanted to. The dam was built in 1931. I think it was started in the summertime or maybe in the early spring. The arrangement for my husband to take up the debt to the Security Life & Trust Company was made in 1930. We saw Mr. and Mrs. Ebert over at their house about that matter. There wasn't a day in the week but what I was over there and they were at my house, or she was. Mr. Ebert was present when the arrangement was made between my husband and Mrs. Ebert and I was present. If I am not mistaken, that was in our back yard one day about noon. As

I said, this was discussed more than one time. We talked about it two or three times over at Mrs. Ebert's house when she and Mr. Ebert were both there. I know Mr. Disher was to take the property but I don't know as to just what he was to pay. They were to pay him $20.00 a week on the indebtedness after he took the property over, and that was for the obligation he had undertaken with the Security Life & Trust Company. The conversations concerned taking over the property and the cesspool and the lake. What was said in the conversations was that the cesspool was to remain like it was and the swimming pool was to remain as it was so long as it was used as it was. I heard a discussion between Mrs. Ebert and Mr. Disher about the fish pond before Mr. Disher took the property, along about the same time they were talking about him taking it over. There weren't any fish in it but there was a lake there at the time. No, there was no lake there when he took over the property. There was just an old marshy place down there."

T. E. Ebert, husband of plaintiff, testified, in part: "I am the husband of Mrs. Kate Harrison Ebert and am a foreman at Reynolds Tobacco Company. I was present when the arrangement was made between Mr. Disher and my wife about his assisting her in the financing of a debt to the Security Life & Trust Company. That arrangement was discussed with Mr. Disher one time in our house and one time in his place of business which was on the south end of Cherry Street. He was running a place of business there and it was discussed there one time between him and me. At the time of those discussions the cesspool was already constructed and there was no mention during the negotiations of the cesspool. At that time there was no pool or pond on the property. I do not recall the exact date that the fish pond or pool was built on the property, but the best I can recollect it was in or near the year of 1933. I haven't any way to check that except my memory. During the negotiations between Mr. Disher and my wife with reference to him rendering her assistance or financing the indebtedness no reference or mention was made to any fish pond or lake. The well and the cesspool were both constructed after Mrs. Disher and Mrs. Ebert owned the properties. Mrs. Disher owned at that time the property she still owns and where she and her husband live, and Mrs. Ebert owned at that time the property where she and I live now which is the property described in this suit as now in the name of Mr. Disher. I have made complaints about the lake. I spoke to those colored people Mr. Disher mentioned—that is, I didn't make any complaint, but they were complaining to me. I have made complaints about the mosquitoes. We fight mosquitoes there half the night. This Mr. Snotty that lives on Mr. Disher's place, I told him the damn thing ought to come out of there; that from the middle dam up it's a regular mosquito hole, no

doubt about it, bulrushes up in it and a considerable amount of hog manure been washed in there from a hog pen a year or so back which still lies there, and that's why I have complained. I have not complained directly to Mr. Disher. There are weeds all around the upper side of the pond as high as my head, on the north side, on our piece of property. There was no arrangement at all between Mr. Disher and Mrs. Ebert about the lake, as I know of. It was discussed between me and Mr. Disher probably six months before it was built. I couldn't say just the date of that conversation. Mr. Disher wanted me to go in with him and build the pond and I couldn't do it. I told him I couldn't, wasn't able to. It was discussed at that time as a fish pond, and he discussed how he ought to build it, how the dam ought to be built. That was after Mr. Disher had taken the property over. Just an ordinary dirt dam was what he built first."

Judgment was rendered in the Forsyth county court, as follows: "This cause coming on to be heard, and being heard, before the undersigned judge of the Forsyth county court, at the September 12th Term, 1938, and it appearing to the court that the plaintiff alleges in substance that the defendant held the property conveyed to him by Geo. A. Grimsley, Trustee, recorded in deed book 326, page 66, in the office of the register of deeds for Forsyth County, in trust for the plaintiff, to permit the plaintiff to redeem said land upon the condition that the plaintiff would pay to the defendant any and all indebtedness which the defendant had incurred and paid in connection with a loan on said property, together with interest on the same at the rate of six per cent per annum from the date paid until repaid; and it further appearing to the court that the defendant admits said allegations in his pleadings, and that there is a dispute between the parties as to the amount that has been paid by the defendant on behalf of the plaintiff in connection with said loan, which dispute has been referred to T. Hardin Jewett, Esq., referee, for the purpose of determining said amount: Now, therefore, it is ordered and adjudged that the plaintiff pay to the defendant such an amount as shall be determined to be owing by the plaintiff to the defendant by said referee, and that such amount shall be paid into the office of the clerk of the Superior Court within five days after the filing of the referee's report, and that the plaintiff shall relieve the defendant of any and all liability incurred by reason of the defendant having executed a note or notes to the Security Life & Trust Company, secured by a deed of trust on said property, and upon the plaintiff paying said indebtedness and relieving the defendant of such liability that the defendant shall forthwith convey to the plaintiff the property described in the deed from George A. Grimsley, Trustee, to C. C. Disher. It is further considered, ordered and adjudged that the said C. C. Disher holds said property in

trust for the plaintiff, which said trust shall be terminated by the plaintiff complying with the conditions hereinbefore set out and upon said compliance that the defendant shall reconvey said property to the plaintiff. It is further considered, adjudged and ordered that the costs of this action be taxed by the clerk, one-half against the plaintiff and one-half against the defendant. And this cause is retained for further orders. Oscar O. Efird, Judge of Forsyth county court."

To the signing of the foregoing judgment, the defendant excepted, assigned error and appealed to the Superior Court.

On appeal to the Superior Court, the following exceptions and assignments of error also were made by defendant:

"1. For that the court erred in admitting in evidence the contract executed between the Security Life & Trust Company and Kate H. Ebert and husband, T. E. Ebert.

"2. For that the court erred in signing an order for a reference as appears of record.

"3. For that the court erred in refusing to grant the defendant's motion for judgment as of nonsuit at the close of the plaintiff's testimony.

"4. For that the court erred in refusing to allow the defendant to show the amount of money he had advanced to the plaintiff, as follows: 'Q. I hand you another check here, dated October 26, 1931, payable to Security Life & Trust Company, for $180.00. What was that check for? (Objection; sustained.) The court: I think you have gone into this far enough. Mr. Hastings: I have a number of other checks I would like to get in the record, what those checks are that make up the account. Q. I hand you here a paper. I ask you to state to his Honor and the jury how much money you have paid on account of taxes, on account of this note to the Security Life & Trust Company, and the money you have actually expended on this property by virtue of taking it over, as you have testified to. (Objection; sustained.)'

"5. For that the court erred in refusing to allow the witness R. G. Wilmoth to testify as to the amount of indebtedness due by the plaintiff on said property, as follows: 'Q. How much is he behind in his interest, if any? (Objection; sustained.) Witness would answer, if allowed, $770.00.'

"6. For that the court erred in permitting the witness R. G. Wilmoth to testify on cross-examination, as follows: 'Q. Was that a condition of the loan? Ans.: Yes, sir.'

"7. For that the court erred in permitting and authorizing judgment as of nonsuit as to the defendant's further defense and cross-action, as follows: 'The court: Let the record show that at the conclusion of the defendant's evidence the plaintiff moved for judgment as of nonsuit as to the defendant's further defense.'

"8. For that the court erred in signing the judgment as appears of record."

The judgment of Clement, J., in the Superior Court, was as follows: "This cause coming on to be heard upon appeal from the Forsyth county court, and being heard before the undersigned judge of the Superior Court at the March 20, 1939, Term upon the record and case on appeal and argument of counsel, and the court being of the opinion that the assignments of error, Nos. 1, 3, 4, 5, 7, and 8 should be sustained, and that assignments of error Nos. 2 and 6 should be overruled; and the court being further of the opinion that this cause should be remanded to the Forsyth county court for a new trial upon the defendant's counterclaim or cross-action; and the parties through counsel have, by consent, agreed that this judgment may be signed out of term as of the term which expired April 1st, 1939: It is, therefore, ordered and adjudged that assignments of error Nos. 1, 3, 4, 5, 7, and 8 be and the same are hereby sustained; that assignments of error Nos. 2 and 6 be overruled; and that this cause be remanded to the Forsyth county court for trial upon the defendant's counterclaim or cross-action in accordance with this judgment; and that the plaintiff pay the costs of this appeal, to be taxed by the clerk. This judgment is signed and entered *nunc pro tunc* as of the March 20th Term, 1939, of the Superior Court of Forsyth County. This the 6th day of April, 1939. J. H. Clement, Judge Superior Court."

The plaintiff excepted and assigned error to the signing of the judgment and also to the six exceptions and assignments of error made by defendant which the court below sustained. The plaintiff contends that she had complied in all respects with the agreement made with defendant and a deed should be made to her.

Ingle, Rucker & Ingle for plaintiff.

F. M. Parrish, Hastings & Booe, and Peyton B. Abbott for defendant.

CLARKSON, J. Although the statement of facts are prolix, from the exceptions and assignments of error and the record, we gather that there is no dispute as to the "signing an order for a reference as appears of record." The main controversy, as we understand it: When plaintiff complies with her agreement with defendant in relieving him of his obligation to the Security Life & Trust Company, and the deed is made to her, provision be made in the deed as set forth in defendant's amended answer "subject to the defendant having an easement and right in and to said sewer line and cesspool and also subject to an easement for the purpose of maintaining said lake." Further, the question may arise as to the right of defendant to have a recovery for money had and received.

Several questions of law arise on the exceptions and assignments of error in the record. The plaintiff moved for judgment as of nonsuit on defendant's further defense, which was granted by the Forsyth county court and overruled by the Superior Court. Under this exception and assignment of error plaintiff contends that the defense set up was an easement and must be in writing.

N. C. Code, 1935 (Michie), sec. 988, is as follows: "All contracts to sell or convey any lands, tenements or hereditaments, or any interest in or concerning them, and all leases and contracts for leasing land for the purpose of digging for gold or other minerals, or for mining generally, of whatever duration; and all other leases and contracts for leasing lands exceeding in duration three years from the taking thereof, shall be void unless said contract, or some memorandum or note thereof, be put in writing and signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized."

A permanent right to overflow land by the erection and maintenance of a mill dam cannot be created by parol. *Bridges v. Purcell,* 18 N. C., 492. The doctrine which prevails in many states, that a part or even a full performance of the stipulation of an unwritten agreement for the disposition of an interest in land exempts such agreement from the operation of the Statute of Frauds, is not recognized in this State under this section which declares such agreements to be void and of no effect. *Kivett v. McKeithan,* 90 N. C., 106 (108); *Ellis v. Ellis,* 16 N. C., 342. In such a case, however, the party who has advanced the purchase price or has made improvements shall be refunded his advances. *Kivett v. McKeithan, supra; Barnes v. Brown,* 71 N. C., 507; *Luton v. Badham,* 127 N. C., 96; *Smithdeal v. McAdoo,* 172 N. C., 700 (703).

In *Justice v. Baxter,* 93 N. C., 405 (409), it is said: "It is in just such contingencies, when the ameliorating work has been done *bona fide* and under the honest belief of having title, that the statute interposes and says to the true owner, you are entitled to your land, but it is inequitable for you with it to take the enhance value of the expenditure and labor of another honestly put upon it."

A party may rely on the Statute of Frauds under the general issue or a general denial. *Luton v. Badham,* 127 N. C., 96; *Winders v. Hill,* 144 N. C., 614. A denial of the contract as alleged is equivalent to a plea of the statute. *McCall v. Institute,* 189 N. C., 775.

In *Kivett v. McKeithan, supra,* it is said: "We do not recognize the doctrine which prevails in many of the states, that a part or even a full performance of the stipulation of an unwritten agreement for the disposition of an interest in lands, other than a lease not enduring more than three years (The Code, sec. 1743), exempts such agreement from the operation of a statute which declares it 'shall be void and of no

effect' (sec. 1554), while in such case we compel the restoration of moneys paid under it, and perhaps allow compensation for what has been expended and cannot be restored to the extent of the value of the benefit which the other party receives and appropriates to his own use."

In Elliott on Contracts, Vol. 2, p. 511, sec. 1271, is the following: "How contract concerning land may be taken out of the statute. If the parol agreement is clearly and satisfactorily proven, and the plaintiff, relying upon such agreement and the promise of the defendant to perform his part, has done some act or acts of performance on the faith of the contract and to the knowledge of the defendant, a court of equity may decree specific performance, when it would be a virtual fraud to allow the defendant to interpose the statute as a defense and at the same time secure to himself the benefit of what has been done in performance."

In *Avery v. Stewart,* 136 N. C., 426 (434), we find: "A mere parol agreement to convey land to another raises no trust in the latter's favor and comes within the provisions of the statute of frauds. *Campbell v. Campbell,* 55 N. C., 364. Our case is not of that kind. There are other elements present which are of an equitable character and affect the conscience of the defendant." *O'Briant v. Lee,* 214 N. C., 723.

N. C. Code, *supra,* sec. 456, is as follows: "All persons may be made defendants, jointly, severally, or in the alternative, who have, or claim, an interest in the controversy adverse to the plaintiff, or who are necessary parties to a complete determination or settlement of the questions involved," etc. This section contemplates that all persons necessary to a complete determination of the controversy, the matter in litigation, and affected by the same in some way, as between the original parties to the action, *may,* in some instances, and *must* in others, be made parties plaintiff and defendant.

It appears from the pleadings and evidence that Mrs. C. C. Disher was the former owner of the land in controversy adjoining plaintiff's land, and on which the water and sewerage system and lake were built. She may have certain rights for a complete adjustment of the controversy and should be made a party to the action. The questions of law and fact arising on this record are intriguing and intricate.

Modified and affirmed.

BARNHILL, J., concurring in part and dissenting in part: I concur in the conclusion expressed in the majority opinion, supported by authorities therein cited, that the defendant has offered no sufficient competent evidence to establish an easement in the property, title to which he held in trust for the plaintiff. Nor do I desire to challenge the suggestion that if plaintiff stood by and knowingly and without objection permitted the defendant to expend money in constructing a

dam and creating a lake on her property she should be required to pay therefor, if, as a result thereof, the value of her property was enhanced.

I cannot agree, however, that the pleadings in this case are such as to warrant the submission of an issue of debt on the theory that the plaintiff has been unjustly enriched by expenditures made by the defendant on her property. The defendant in his cross-action alleges: "That by reason of said agreement above set out (the oral agreement in respect to the construction of the dam, lake, etc.) and by reason of the large sums of money the defendant has in good faith expended in developing said lake, the defendant is entitled to have a decree entered adjudging him to be the owner of an easement in the land covered by the lake or pool and in the appurtenances thereto, including drain ditches, terraces, and the land between the terraces and the lake, all of which are necessary for the proper maintenance of said lake." There is no allegation as to the amount expended or as to any enhanced value of the property. In my opinion this is not sufficient, even though accompanied by a general prayer for relief. It may be that the defendant is entitled to recover the sums so expended by him, or at least a sum which represents the enhanced value of the property by reason of the improvements. But on the present state of this record he is not entitled to do so in this cause. I, therefore, take the view that the judgment below should be reversed.

STATE v. JAMES GODWIN.

(Filed 16 June, 1939.)

1. Criminal Law § 44—

A motion for a continuance is addressed to the discretion of the trial judge to be determined by him upon the facts in the exercise of his duty to administer right and justice without sale, denial, or delay. Constitution of North Carolina, Art. I, sec. 35.

2. Criminal Law § 81a—

The trial court's refusal of defendant's motion for a continuance is not reviewable on appeal in the absence of palpable or gross abuse, and under the facts of this case there is no evidence of abuse of discretion.

3. Criminal Law § 14: Jury § 9—Motion for change of venue or for special venire is addressed to discretion of the court.

A motion for a change of venue or for a special venire upon supporting affidavit alleging that the minds of the residents in the county in which the crime was committed had been influenced against defendant is addressed to the discretion of the trial court, since the matter is governed by statute, which provides that the judge may grant such relief only if he is of the opinion that such relief is necessary to obtain a fair and impartial trial. C. S., 471, 472, 473.

4. Criminal Law § 81a—

Under the facts of this case there was no evidence of abuse of discretion on the part of the trial court in the refusal of defendant's motion for a change of venue or for a special venire.

5. Criminal Law § 29b: Homicide § 20—Evidence of the defendant's commission of other crimes held competent to show intent and motive.

The State's evidence tended to show that defendant shot and killed the owner of an automobile, who was sitting in the driver's seat of the car. The State offered evidence that defendant had escaped from jail in company with another, that they stole and took with them the jailer's revolver, that they forced a taxi driver to drive according to their directions, that they thereafter bound the taxi driver and took his watch, purse, badge, driver's license and his taxicab, went to defendant's home and obtained another revolver, that they then sought to obtain a car in which to make their get-away, that defendant left his companion in the taxi at a filling station, sought to force another driver to drive according to his directions at the point of a pistol, that this driver foiled defendant by making a sudden turn into a filling station, that thereafter defendant went to where deceased was sitting in his car and fired the fatal shot and then ran back to the filling station where his companion was waiting and told him they would have to make a quick get-away because he thought he had killed a man. *Held:* Evidence of the commission of the other crimes by defendant was competent for the purpose of showing motive and intent.

6. Criminal Law § 33—Evidence held to support the findings of the trial court that confessions admitted were voluntary.

The trial court excluded evidence of one confession made by defendant on the ground that it was involuntary and admitted confessions made to two other witnesses upon its finding that the confessions to these witnesses were voluntary. The State contended that the confessions admitted were first made and defendant contended that the confession excluded was first made and that the confessions admitted flowed from the same vitiating influence. *Held:* The findings of the trial court upon the *voir dire* supported by the evidence that the confessions admitted were voluntary is conclusive.

7. Same—

The competency of alleged confessions is for the determination of the court upon the preliminary hearing, and it is incumbent upon defendant to introduce evidence at that time if he desires to contend that the confessions were involuntary.

8. Criminal Law § 34b—

Flight is a circumstance to be considered by the jury with the other evidence in the case in determining defendant's guilt.

9. Criminal Law § 53f—

The refusal of the trial court to give part of the instructions requested by defendant *held* not error, the court having given in substance the applicable instructions requested by him.

10. Homicide § 27d: Criminal Law § 53d—Court need not submit question of manslaughter when there is no evidence of defendant's guilt of this degree of crime.

In this prosecution for murder, the State's evidence tended to show that defendant killed deceased in an attempt to rob him of his automobile. The court submitted to the jury the questions of defendant's guilt of murder in the first or second degrees or not guilty, and defendant excepted to the court's failure to submit the question of his guilt of manslaughter. *Held:* The exception is untenable, the evidence being sufficient to limit the jury's inquiries to murder in the first degree or not guilty and the submission of the question of defendant's guilt of murder in the second degree being favorable to him.

11. Homicide § 27a—

Defendant was charged with murder in the attempt to perpetrate a robbery. Defendant excepted to the charge for the court's failure to define "robbery." *Held:* The exception is untenable, it being incumbent upon defendant to request special instructions if he desired a more detailed charge on this aspect of the case.

12. Criminal Law § 53g—

An incorrect statement of the contentions of the defendant must be brought to the court's attention in time to afford opportunity for correction.

13. Criminal Law § 53e—

Defendant's exception to the charge on the ground that the court expressed an opinion on the weight and credibility of the evidence by undue emphasis in the charge *held* untenable.

14. Criminal Law § 61d—Whether the court should order inquiry as to defendant's mental capacity to receive sentence rests in sound discretion.

After rendition of the verdict of guilty by the jury, defendant suggested through his counsel that he was insane and moved that judgment be suspended pending inquiry as to his sanity and offered supporting affidavit of insanity. *Held:* The statute, C. S., 6237, provides for an inquisition as to defendant's mental capacity to receive sentence when he "shall be found by the court" to be without sufficient mental capacity, and such finding by the court is to be determined from the facts in the exercise of a sound discretion and the court may properly refuse such inquiry when defendant's suggestion of insanity is not supported by sufficient evidence to raise any doubt.

APPEAL by defendant from *Olive, Special Judge,* and a jury, at 17 October Special Term, 1938, of GUILFORD. No error.

The defendant was tried on an indictment for murder. C. S., 4614. He was convicted of murder in the first degree and the following sentence pronounced: "And it is adjudged that the said warden then and there cause a sufficient quantity of lethal gas to be administered to you to cause your death; and may God have mercy on your soul."

The evidence was to the effect that the defendant lived with his parents in High Point. That while held in jail in Lexington with William M. Wilson—both on separate charges of robbery with firearms —he and "Bill" Wilson, with the aid of Lula Belle Kimel, daughter of the jailer, escaped on 3 October, 1938, about 3:55 p.m. Defendant took a .45 Colt revolver from the jailer's desk and Wilson got some .45 automatic cartridges. Defendant handed the Colt revolver to Wilson, who stuck it in his belt. They went down to the Union Bus Terminal and Wilson gave defendant the .45 Colt revolver. They had Wm. Swink, a taxi driver, take them out on the High Point road towards Thomasville and turned to the left on a dirt road. Defendant told Swink, "All right, stop right here," and put the gun pretty close to the taxi driver's neck. Swink saw the gun and stopped. When he stopped Wilson got out, took the taxi driver's seat, cap and badge and drove towards High Point. The taxi driver sat behind Wilson with defendant on the right-hand side back seat. In going over to High Point the taxi driver said, "You want to see my kid's picture?" and reached in his pocket and pulled out his pocketbook. Wilson took his pocketbook and driver's license. They went to defendant's home and Wilson asked Mrs. Godwin where her son Warren was. They got some adhesive tape at a drugstore and drove back to a spot on the highway—defendant was holding the .45 Colt on Swink, who was on the right-hand side of the taxi. Defendant held the gun on him and put his back to a little oak tree, his hands behind him and put adhesive tape on him. Wilson took his wrist watch and stuck a handkerchief across his mouth and wrapped a roll of adhesive tape all around his head. They got in the taxi and went back to High Point and to defendant's home, both went in. Defendant got some clothes and a pair of shoes. In the back of the house defendant opened a drawer and took a .38 pistol out and handed it to Wilson and said, "She is a beauty," and he got some cartridges and started out the door. Defendant said, "Give me that .38." Wilson handed it to him and he loaded it. They got in the front seat of the taxi and drove about looking for a car, "Any way we could get it." They followed a red sedan. Defendant said, "This is a pretty nice car, I would like to have it." Defendant got out of the taxi, which was about out of gas. He talked to the man in the red sedan, the man unlocked the door to the back seat and defendant got in and they drove off. While Wilson was having gas put in the car defendant came running back, he had both guns, he jumped in the car with one gun in his hand and said, "Take off and take off in a hurry, I think I have killed a man." Wilson drove off. "We were aiming to get another car and dump that." Wilson sold the watch taken from the taxi driver to buy gas. After driving around and getting two gallons of gas, they drove out of High Point. They drove to Granite Falls in

Caldwell County, where they were captured. They saw an account of the killing in the *Greensboro Daily News* and defendant told Wilson: "By God, they will never take me alive." He said, "If they find me now with this pistol, I will burn as sure as hell." After going several different places, they went down in an old barn and slept there in the day. They kept the guns in their hands. They stayed there the next day and night and Wilson gave himself up. He had hid the .45 Colt revolver and informed the officers as to where it was. When defendant came out of the barn he had a pistol in his hand and was commanded to "Halt," but did not and was shot with No. 9 bird shot. He attempted to shoot the officer. When shot he threw the .38 Colt revolver against the barn.

Donald Moss, the deceased, was sitting in his Chevrolet car near the hosiery mill, parked 60 feet from the intersection of Pine Street, headed towards the mill. He and his wife were working in the mill, they worked until twelve o'clock at night. He was off that evening about 7:30 for supper.

The following witnesses for the State testified, in part: W. P. Frazier: "I passed Don's car. He was sitting in it. I threw my hand up and said, 'Let's go to work.' He said, 'I will be on in a minute.' I had gone approximately thirty feet toward the mill entrance on Pine Street and I heard someone say, 'Don't shoot.' I was smoking a cigarette and stopped to finish it and leaned up against the fence with my back and when I heard the first one, then he said, 'Don't shoot' again 'Please' and then a shot. Q. How many times did he repeat the language, 'Don't shoot'? Ans.: I heard it distinctly twice. Q. And you say the last time he said what? Ans.: After the last shot he said 'Don't shoot,' he said, 'Please'—then I heard a shot. Q. Then what? Ans.: . . . Q. Who was in the car from which the sound was coming? Ans.: I knew Don was up there. Q. Did you recognize the voice? Ans.: No, I did not recognize the voice. I heard a scream and ran back up there and found it to be Donald Moss. . . . Q. State what he was doing and saying just at the time when you got there? Ans.: He was pulling off his coat and he said: 'He shot me, what did he do it for?' and by that time two boys ran up and a bunch ran up and Bruce Jones and Bill Hughes picked him up." This testimony was corroborated by Jones.

When Moss was asked for his automobile keys he replied, "They are in my pocket." Moss handed his coat to Frazier, who got the keys out of his right-hand coat pocket. Moss was taken to a hospital, and died the next morning at 7:40 from the wound. The bullet hole was just below the nipple—right chest—went downward. Moss was in perfect health, weighed about 165 pounds, was 5 feet, 5½ inches high. He was

30 years old and a knitter at Adams-Millis Company. He was married in the spring (5 April, 1938) before he was killed on 3 October, 1938. The evening he was killed he was dressed in overalls with a coat on.

Dr. E. A. Sumner: "I attended Donald Moss on the night of October 3rd. . . . I made an X-ray (handing to solicitor). There are two, one of the chest and the other of the abdomen and pelvis. It shows the location of the bullet which is lying on the left side with its nose up about two inches away from the spinal column just behind the pelvic bone. . . . My opinion of the cause of his death is gunshot wound in the abdomen. Only one wound in him. It started on the right and ranged across the right lodging in the left hip. He said, 'Doctor, I am suffering so bad I cannot stand it. Do anything you can for me, but I think I am going to die anyway.' He did not talk to me about what happened. I told him we would operate and probably he would be all right."

R. L. Whitaker: "I first saw him (defendant) around 7:45. I was driving a Pontiac eight, and my wife was with me. The automobile was a maroon sedan, and a 1938 model. I first saw James Godwin at the intersection of Lindsay and English Streets as I was entering English Street intersection with Lindsay going south. I drove up to English Street and the red light caught me at the intersection over the center of the road. The light changed red as I drove up. I stopped. Godwin came up to the side of my car on my side. He came from the rear of my car and he said to me, 'Mister, are you going towards town?' I said, 'No, sir, I am going in the other direction.' He said, 'I have a car here and I am out of gas.' He said, 'I am out of gas and don't know that man over there.' My brother operates that filling station. He said, 'I want you to take me to Red's Filling Station to get some gas.' I said to him, 'I am in a hurry, how much gas will you have to have? I will get him to let you have a gallon or so.' He then said, 'Mister, I appreciate that but I would appreciate it much better if you will run me to Red's Filling Station so that I can get the gas that I want, . . .' Then I said to him, 'Where is that filling station?' and he said, 'Right over on the corner of English and North Main Street.' I said, 'If that is all the way, get in.' And as I pulled off of Lindsay Street into English I felt something in my shoulder pressing pretty tight. Q. Go ahead. Ans.: And I glanced my eye in the mirror and I seen a gun. Ans.: . . . And he said, 'You make a left turn.' We had not gone more than fifty feet from English Street then. My wife was in the front seat beside me. He was in the rear. I had my car in second. I pushed down on my accelerator with all power and just before I entered Pine Street he said, 'Make that turn.' I was going so fast I could not. I pulled up in high and stepped down on it again with all

power. The gun was hurting. I felt it pressing very tight. Mr. Godwin was standing over me as I could see in the mirror, pressing tight. He said, 'Damn you, make that turn,' and his hand was almost on the steering wheel and I snapped right into the filling station on the corner of Elm and English. When I made a quick dash to the right, Mr. Godwin was thrown. I ran right in, stepped on my brake and the car stopped quick. I heard something hit. He said, 'Oh, hell.' He got out of the door and went running across English Street. He went back toward the hosiery mill, the Adams-Millis mill. I did not see him any more. I was 350 or 400 feet from the Adams-Millis mill when I ran into that filling station and stopped. About a half block. That was right close to 7:45. By gun, I mean a .38 with a six-inch barrel. It looks very much like the gun there (indicating). I heard two shots fired shortly thereafter within three minutes of the time I ran in the filling station. Q. Where did the report that you heard, the report of the shots, appear to be? Q. You say you heard two shots fired? Ans.: Yes, sir. Q. Where were they? Ans.: From over toward the mill. Q. What mill? Ans.: Adams-Millis Corporation."

Bailey Whitaker: "I live in High Point. I run a service station, on the corner of English and Main Streets. On the night Mr. Moss was shot I was on duty. I saw my brother, Mr. R. L. Whitaker, who testified here a while ago, that night. It was around between a quarter to 8:00 and 8:00 o'clock. I heard some shots fired before I saw my brother. I could not say it was he—James Godwin—at my filling station that night. I could not recognize him. The shots were fired near Adams-Millis mill. There was some little difference in them. I saw a taxicab come in my station just in a moment or so afterwards and the man said 'Oh, man, run me in some gas and make it snappy, for I am in a hurry.' It was a dark-colored cab with white lettering. Not but one was in it at that time. Just in a moment's time after he called for the gasoline, before I taken off the cap, and I reached back to get my hose, I heard someone coming running down the sidewalk, sounded like in a hurry. As I turned back to my tank to trip the lever, he ran by me and fell up beside the driver. Some man, I will not say who. He had on a hat, and he said 'Get to God damn hell out from here and let's make our getaway.' I did not see anything in his hand. Absolutely not. The cab pulled out and barred right. It was not over half a minute from the time I heard that shot until the person ran up."

J. W. McMahon: "I received the Colt No. .38 revolver from Mr. Williams and retained it in my custody since that time. I have studied the science of ballistics or firearms since 1918. I have the scientific equipment in the police department of High Point with which to make comparisons of missiles shot from different types of firearms. We use

a comparison microscope. There is the instrument sitting there on the reporter's table. I studied in the Intelligence Division of the United States Army during the World War. Later I got various textbooks and experimented with every type of firearms cases and also of bullets of lead and steel jackets that had been passed and forced through barrels and fired through barrels of various types of weapons. I have seen instruments in the Bureau of Investigation at Washington and attended Northwestern University, for the course of criminology. (State offers witness as an expert, and the court finds as a fact that witness McMahon is an expert in the science of ballistics.) This instrument is a scientific instrument used in making comparisons of missiles fired from different types of firearms. Subsequent to the delivery to me of the Colt .38 revolver which has been offered in evidence, Mr. Williams fired two shots in my presence from the Colt .38 revolver. They were marked in my presence. This is one of the cartridges or missiles fired. I studied the markings on the missile. Q. Are you prepared to state whether you have an opinion as to whether or not the missile which you hold in your hand was fired— Q. Mr. McMahon, state if you have an opinion whether the bullet taken from the body of Donald Moss, was fired from the same identical gun or pistol that the missile that you now hold in your hand was fired from? Ans.: I have. Q. What is that opinion? Ans.: That it was."

After hearing certain evidence on the *voir dire,* the record discloses: "The Court: After hearing the evidence offered by the State, the court finds as a fact that the statement now about to be asked by the State of the witness Nance was not made upon any threat or inducement or promise or hope of reward."

Ray Nance: "Q. 'What statement, if any, did he make there at that time?' is question read by stenographer. Some one of the officers asked him why he did not go ahead and tell the truth about the whole matter. He said, 'If I was to tell the truth about the whole matter,' he said, 'I would burn and that boy over there . . .' Q. Who was he referring to? Ans.: 'Probably get thirty years.' Q. Who was the boy over there? Ans.: I did not see who he pointed to. I was back of the row of cabinets from them. Q. Was Bill Wilson in there? Ans.: I don't know, I wouldn't say positive. Q. Did he make any further statement there at that time following that? Ans.: Someone asked him this question, 'James, why did you shoot that man, that is the brutalist thing I ever heard tell of, just to shoot a man when he didn't have anything to say to you or anything?' He said, 'Nobody knows, except the man that is dead and me, what was said.'"

H. G. Therrall: "I was at police headquarters at High Point the night they brought Godwin in there. I was there from 7:30 until 8:30.

I heard the defendant make a statement. Q. What was that statement? Ans.: He said, 'If I open up and tell the truth I will burn' and pointed to Wilson and said, 'He will get 25 or 30 years.' The Court: The court finds as a fact that the statement now asked by the State of the witness was not made upon any threat or inducement or promise or hope of reward, and that it was made voluntarily."

Ernest J. Eubanks, who lived near Granite Falls and knew Bill Wilson: "Q. When you showed James Godwin and Wilson the newspaper, you said you had one, and you said you showed it to them? Ans.: Yes, sir. Q. What did James Godwin do and say about it? Ans.: Godwin told Wilson 'I guess they are straight in behind us.' Q. Who said that? Ans.: Godwin told Wilson, 'I guess they are straight in behind us,' and he said, 'What are we going to do about it?' Q. State, Mr. Eubanks, whether there was an article in the paper about the killing of Mr. Moss. Ans.: Yes sir. Q. State, Mr. Eubanks, if there was a picture of James Godwin in the paper. Ans.: Yes sir. Q. Then what happened after that? Ans.: I said to Wilson, I did not know Godwin— Me and Godwin were talking. Q. Now, what did you say in reply? Ans.: I asked Godwin if that was his picture, and he said 'Yes, that is mine.' I said, 'Did you shoot a man?' Q. What did he say? Ans.: He said 'No, I shot at a man.' He said 'I did not know I shot him.' Q. He said, 'I shot at one but did not know I shot him?' Q. What else happened? Ans.: I said to Godwin and Wilson both, 'Boys, this will get you in trouble.' Ans.: (continuing) I said 'Godwin, I am going in and report this,' and they said, 'Go ahead, we are going to leave anyway,' and that is all that was said. That is all they said to me."

Miss Ruby Fowler: "Godwin said nothing about any shooting before the paper was brought. Q. Afterwards? Ans.: After he brought the paper and they were reading, they saw that the man had been injured pretty bad. I don't think at the time they knew— Q. Just tell what James Godwin said after he read the paper. Ans.: Well, he said he shot off-hand at the man. He said he ran across to the other car and was scared Bill Wilson was not going to be there, and that is all I know. Q. He said he shot off-hand at a man? Ans.: Yes, sir."

Swink's taxicab was found in a garage at Granite Falls, left there by defendant and Wilson.

The court below excluded the evidence of J. W. McMahon, an officer who was a friend of defendant, and who questioned defendant at some length urging him to tell the truth with veiled promises. There was other evidence of the police officer which the court below thought rendered the confession made incompetent. This statement was excluded by the court below because of the pressure which was exerted by the police officer, McMahon, on defendant.

The defendant introduced no evidence and did not go on the stand as a witness. The jury returned a verdict of "Guilty of murder in the first degree." The court below pronounced judgment of death on defendant. 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 A. Myers, Thomas Turner, Jr., and T. J. Gold for defendant.

CLARKSON, J. The *first* question presented on the appeal: Was it error for the court below to refuse the defendant's request for a continuance? We think not under the facts and circumstances of this case.

The trial was held on the 11th day after the arrest of defendant and the 15th day following the homicide. The defendant was without counsel and the court below appointed to represent him (a fact of common knowledge) two of the most able, well known and efficient attorneys in Guilford County—where the crime was committed. These attorneys, in well prepared affidavits, set forth in substance that on account of their previous court engagements it would be impossible for them to give such time and attention to preparing the case as they felt was required. That many witnesses for defendant will have to be examined showing "mental and physical condition of the defendant." That the case presents "numerous intricate questions of law requiring a great amount of legal research." That the defendant would rely for his defense, among other things, on the fact that at the time the alleged crime is alleged to have been committed "that he was insane." That the counsel had "been unable to secure all the psychiatrists they desire to examine the prisoner for the purpose of testifying as to his insanity." They tried to get Dr. Beverly R. Tucker, of Richmond, Va., a leading psychiatrist of the country. A telegram, dated 14 October, 1938, from Dr. Tucker said that he could not be present and stated: "These cases require much time and study suggest you get Dr. R. S. Crispbell Duke University or Dr. Ashby Dix Hill." The trial did not commence until 19 October. It was further shown that the parents of defendant, who had lived in Guilford County for some years, were Texans; that many of defendant's near relatives live there. That his uncle and aunt, who live in Houston, Texas, desired to be present at the trial and employ counsel and provide funds necessary for the defense. The uncle of defendant arrived from Houston by airplane the morning of the trial and employed Hon. T. J. Gold (a fact of common knowledge), not only a learned attorney but a State Senator of Guilford County, of great influence in the county.

N. C. Const., Art. I, sec. 35, says: "All courts shall be open; and every person for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial, or delay."

This provision seems to indicate that when an injury is done to a person affecting his personal or property rights, the due course of law is applicable, and "right and justice administered without sale, denial or delay." To determine this fundamental right, power must be lodged somewhere. This Court has wisely left the matter in the sound discretion of the court below, unless there is "palpable abuse," or "gross abuse," of this discretion.

This Court, in a most thorough opinion, citing a wealth of authorities, said in *S. v. Sauls,* 190 N. C., 810 (813): "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,' . . . 'palpable abuse' . . . or 'gross abuse' . . ." *S. v. Rhodes,* 202 N. C., 101 (102-3); *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).

The *second* question presented on this appeal: Was it error for the court below to refuse defendant's motion for change of venue or for a special venire? We think not under the facts and circumstances of this case.

N. C. Code, 1935 (Michie), sec. 471, is as follows: "In all civil and criminal actions in the Superior and criminal courts, when it is suggested on oath or affirmation, on behalf of the State or the traverser of the bill of indictment, or the plaintiff or defendant, that there are probable grounds to believe that a fair and impartial trial cannot be obtained in the county in which the action is pending, the judge may order a copy of the record of the action removed to some adjacent county for trial, if he is of the opinion that a fair trial cannot be had in said county, after hearing all the testimony offered on either side by affidavits," etc. It will be noted that the statute limits the right of the court below to remove "if he is of the opinion that a fair trial cannot be had in said county."

Section 472, in part: "The judge shall order the removal of the action, if he is satisfied after thorough examination of the evidence as aforesaid that the ends of justice demand it."

Section 473 provides that additional jurors from other counties may be had instead of removal.

The affidavit of the mother of defendant, Harriet Godwin, for removal, in part, was to the effect: "That the alleged details of the alleged homicide have been the subject of almost universal comment in Guilford County—being the topic of conversation in almost any gathering of people; that the accounts of the alleged homicide have been given a prominent place in said newspapers and have been carried under glaring and sensational headlines, and the said accounts have been published with pictures of the crowd, which assembled at the municipal building in the city of High Point, when the defendant was brought there; that these daily newspaper accounts with their glaring headlines, sensational pictures and morbid details of the alleged homicide, have inflamed the public mind in Guilford County against the prisoner." Attached to the affidavits are the newspaper accounts.

James W. Godwin, father of defendant, in his affidavit corroborates the statements of his wife and says, in part: "That the alleged killing has been given wide publicity with sensational details and pictures in both Guilford and Davidson counties. That this affiant verily believes that the ends of justice require that this cause be tried in some county other than Guilford or Davidson counties, or that a special venire be drawn from some county outside the Twelfth Judicial District for the purpose of selecting a jury to try the defendant."

These motions for change of venue or for special venire were denied by the court below. We think this was in the sound discretion of the court below and no "palpable or gross abuse" of discretion is shown.

In *S. v. Hildreth,* 31 N. C., 429 (1849), *Ruffin, C. J.,* said: "It is province of the court in which the trial takes place to judge of the truth or sufficiency of the causes assigned for a motion for a continuance or removal of a trial. It must be so; else it would be in the power of a prisoner to postpone a conviction indefinitely, however clear his guilt, by making affidavits with the requisite matter on the face of them. . . . The presiding judge must dispose of such applications in his discretion; and, as in other cases of discretion, his decisions cannot be reviewed here, but are final."

In *S. v. Smarr,* 121 N. C., 669 (671) (1897), speaking to the subject, the Court said: "It has always been held that the granting or refusing to grant an order of removal is a discretion which the lawmaking power has vested in the trial judge and that his action is not reviewable (citing authorities). These were the uniform decisions even under the former statute. . . . Since then the present statutes have made the discretion reposed in the trial judge still more explicit by forbidding him to remove 'unless he shall be satisfied' . . . that the ends of justice demand it." *S. v. Turner,* 143 N. C., 641; *S. v. Wiseman,* 178 N. C.,

784; *S. v. Shipman,* 202 N. C., 518 (525); *S. v. Lea,* 203 N. C., 13 (*certiorari* denied, 287 U. S., 649).

The *third* question presented on the appeal: Was the evidence as to the conduct of defendant with Wilson, from their escape from the jail in Lexington until captured, competent? We think so, under the facts and circumstances of this case.

There were numerous exceptions and assignments of error to the evidence of the State's witnesses as to the action of defendant and Wilson from the time they escaped from jail until they were again arrested. None of them can be sustained. The evidence all went to show that until the fatal shot which killed Donald Moss defendant and Wilson each evinced "a heart devoid of social duties and a mind fatally bent on mischief." *S. v. Morris,* 215 N. C., 552. The testimony objected to was to collateral offenses showing *scienter,* intent, system, design or identity closely connected in point of time with the killing of Donald Moss. Defendant and Wilson, before and after the killing, were together and acted jointly—like Siamese twins.

The question here presented was recently thoroughly discussed in the case of *S. v. Smoak,* 213 N. C., 79 (91): "In *S. v. Miller,* 189 N. C., 695 (696), speaking to the subject, it is said: 'It is undoubtedly the general rule of law, with some exceptions, that evidence of a distinct substantive offense is inadmissible to prove another and independent crime, the two being wholly disconnected and in no way related to each other. *S. v. McCall,* 131 N. C., 798; *S. v. Graham,* 121 N. C., 623; *S. v. Frazier,* 118 N. C., 1257; *S. v. Jeffries,* 117 N. C., 727; *S. v. Shuford,* 69 N. C., 486. But to this there is the exception, as well established as the rule itself, that proof of the commission of other like offenses is competent to show the *quo animo,* intent, design, guilty knowledge, or *scienter,* when such crimes are so connected with the offense charged as to throw light upon this question. *S. v. Simons,* 178 N. C., 679, and cases there cited. Proof of other like offenses is also competent to show the identity of the person charged with the crime. *S. v. Weaver,* 104 N. C., 758. The exceptions to the rule are so fully discussed by *Walker, J.,* in *S. v. Stancill,* 178 N. C., 683, and in a valuable note to the case of *People v. Molineaux,* 168 N. Y., 264, reported in 62 L. R. A., 193-357, that we deem it unnecessary to repeat what had there been so well said on the subject.'" *S. v. Beam,* 184 N. C., 730; *S. v. Flowers,* 211 N. C., 721; *S. v. Payne,* 213 N. C., 719 (724).

The facts, succinctly: Defendant and Wilson were in jail in Lexington, accused on separate charges of robbery with firearms. They escaped with the aid of the jailer's daughter, but before leaving stole from the jailer's desk a .45 Colt revolver and cartridges. They immediately forced a taxicab driver to take them where they wanted to go and took

from the taxi driver his watch, purse, badge, driver's license and cap. Afterwards they tied him to a tree with adhesive tape, stuffed a handkerchief in his mouth and left him there. They then went to defendant's home and got a .38 Colt revolver and some cartridges and loaded it. Defendant remarked, "She is a beauty." They then drove around looking for a car "any way we could get it." They followed a red sedan and defendant got in the back seat and held his gun to the owner's shoulder, forcing him to drive where he directed; but the owner made a quick dash to the right and ran into a filling station. Defendant was thrown and got out of the door and went towards the hosiery mill. Near the mill Donald Moss sat in his Chevrolet car, about 7:45 p.m., he was shot in the breast and died next morning from the wound. Defendant had the .38 Colt pistol, two shots were fired shortly after he left the filling station going towards the hosiery mill where deceased was shot. Immediately afterwards defendant was seen at another filling station nearby, where Wilson was waiting in the stolen taxicab. Defendant said, "Oh, man, run me in some gas and make it snappy for I am in a hurry." Defendant told Wilson, "Get the God damn hell out of here and let's make our getaway"—"Take off and take off in a hurry, I think I have killed a man." When defendant was captured he had the .38 Colt pistol. The ball that killed Donald Moss was from a .38 Colt pistol and an expert testified that the ball that was taken from the body of Donald Moss was fired from the pistol in defendant's possession when he was arrested.

The *fourth* question presented on the appeal: Were the confessions made to Ray Nance and H. G. Therrall voluntary? We think so, under the facts and circumstances of this case. The court so found, after hearing the evidence on the *voir dire.* A confession made to J. W. McMahon was excluded as not being voluntary. Defendant contends that the confessions admitted were made after, tainted with and influenced by the confession excluded. The State contends that the confession made to Nance and Therrall were made some time before that made to McMahon. As to these contentions, the court below on the *voir dire,* after hearing the evidence, held they were voluntary. There was evidence to support this finding.

In *S. v. Moore,* 210 N. C., 686 (692), we find: "It is true that where a confession has been obtained under circumstances rendering it involuntary, a presumption arises which imputes the same prior influence to any subsequent confession, and this presumption must be overcome before the subsequent confession can be received in evidence. *S. v. Drake,* 82 N. C., 592; *S. v. Lowhorne,* 66 N. C., 638; *S. v. Roberts,* 12 N. C., 259. On the other hand, it is equally well established that although a confession may have been obtained by such means as would exclude it,

a subsequent confession of the same or like facts may and should be admitted, if it appear to the court, from the length of time intervening or from other facts in evidence, the prior influence had been removed at the time of the subsequent confession. . . . (citing authorities). In this jurisdiction, the competency of a confession is a preliminary question for the trial court. *S. v. Andrew,* 61 N. C., 205, to be determined in the manner pointed out in *S. v. Whitener,* 191 N. C., 659. The court's ruling thereon will not be disturbed, if supported by any competent evidence," citing authorities. *S. v. Fox,* 197 N. C., 478; *S. v. Blake,* 198 N. C., 547.

The confession made to the two witnesses above were practically the same. "He said, 'If I open up and tell the truth I will burn' and pointed to Wilson and said 'He will get 20 or 30 years.'" We think the matter of admitting the above evidence, under the facts and circumstances of this case, was for the court below, and, upon the findings made by the court on hearing the evidence on the *voir dire,* we do not think the evidence should be excluded.

The evidence of semi-confessions, not objected to, for example was: Ernest J. Eubanks testified: "I asked Godwin if that was his picture, and he said 'Yes, that is mine.' I said, 'Did you shoot a man?' Q. What did he say? Ans.: He said: 'No, I shot at a man.' He said, 'I did not know I shot him.' Q. He said, 'I shot a man but did not know I shot him?' Q. What else happened? Ans.: I said to Godwin and Wilson both, 'Boys, this will get you in trouble.' Ans.: (continuing) I said, 'Godwin, I am going in and report this,' and they said, 'Go ahead, we are going to leave anyway,' and that is all that was said. That is all they said to me." Ruby Fowler testified, in part: "After he brought the paper and they were reading, they saw that the man had been injured pretty bad. I don't think at the time they knew— Q. Just tell what James Godwin said after he read the paper. Ans.: Well, he said, he shot off-handed at the man. He said he ran across to the other car and was scared Bill Wilson was not going to be there, and that is all I know. Q. He said he shot off-handed at a man? Ans.: Yes, sir."

It nowhere appears in the record that the defendant introduced any evidence on the *voir dire* to challenge the State's evidence as to the confessions. There was nothing harmful in refusing to allow repetition of the evidence. Flight may be considered with other facts and circumstances on the question of guilt. *S. v. Payne,* 213 N. C., 719 (723).

The defendant submitted certain prayers for instruction. Part were substantially given and the others not given. We see no error in this.

The *fifth* question presented on the appeal: Was there prejudicial or reversible error in the charge? We think not. "It, therefore, becomes your duty, upon a consideration of all the evidence to determine whether

the defendant is guilty or not guilty of the murder whereof he stands charged." The defendant, under the evidence, was either guilty or not guilty of murder. There was no evidence of murder in the second degree or manslaughter arising on the State's evidence. The defendant introduced no evidence. Notwithstanding this, the court below left the question of murder in the second degree to the jury. This was liberal to defendant. We think this contention of defendant untenable and attenuated. All of the evidence tends to show that defendant, being foiled in his attempt to rob the owner of the red sedan, went in the direction of where Donald Moss sat in his parked car and killed him in an attempt to rob him of his automobile. Defendant went running back with both guns and said to Wilson, "Take off and take off in a hurry, I think I have killed a man."

N. C. Code, *supra,* sec. 4200, is as follows: "A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death. All other kinds of murder shall be deemed murder in the second degree and shall be punished with imprisonment of not less than two or more than thirty years in the State Prison."

The charge defined the law above set forth applicable to the facts. The court charged fully as to what was reasonable doubt, circumstantial evidence, presumption of innocence, etc. We do not think that the charge impinged C. S., 564. The charge contained some 30 pages. It is full, complete and accurate, giving the contentions fairly for the State and the defendant. The defendant complains that the court below failed to declare and explain the law arising thereon, as the court omitted in its charge to the jury to define robbery, etc. We cannot so hold. *S. v. Puckett,* 211 N. C., 66; *S. v. Linney,* 212 N. C., 739. The evidence and charge fully set forth the offense with which defendant was charged and if defendant wanted the charge more in detail on the matters complained of, he should have submitted prayers for instructions. If any of the contentions set forth by the court below in the charge were erroneous the court's attention should have been called to it so that the court could have had an opportunity to correct it. *S. v. Johnson,* 207 N. C., 273.

We do not think *S. v. Hart,* 186 N. C., 582 (589), cited by defendant, is applicable here. We think the court below gave the defendant a "fair, impartial and lawful trial by a jury of his peers." We see no prejudicial or reversible error in any of the exceptions and assignments of error made by defendant.

After the jury brought in its verdict and the formal motions to set aside and that judgment be arrested had been denied, the defendant through his counsel suggested that he was insane and moved that judgment be suspended pending inquiry into his sanity. In support of this motion was an affidavit by John Dyer, M.D., a physician of Guilford County, stating that in his opinion James Godwin is now insane. This affidavit was signed eight minutes after the jury retired on 21 October. The affidavit further states that the affiant observed James Godwin on 21 October, 1938, and formed an opinion as to his sanity. 21 October was the last day of the trial, the jury retiring at 4:24 p.m. The observations which John Dyer made must have been in the courtroom on that day. James Godwin did not go on the stand and the affiant does not indicate that Dr. Dyer talked to him alone or did anything more than "observe" him. The case of *S. v. Vann,* 84 N. C., 722 (1881), is not controlling. That case was decided prior to the present statute, C. S., 6237, which became law for the first time as section 65 of chapter 1 of the Public Laws of 1899. The case of *S. v. Vann, supra,* therefore, states the common law rule. After 1899, the matter was controlled by statute and it is, therefore, important to examine the language of the statute. The common law rule is stated in 16 C. J., page 1283, as follows: "Under the common law, where a suggestion of defendant's insanity is made after conviction and before sentence, it is sufficient ground for the court to postpone sentence until this fact can be ascertained," citing *S. v. Vann, supra.* "The plea of insanity at this stage of the case is only an appeal to the humanity of the court to postpone punishment until a recovery takes place, or as a merciful dispensation. Thus, where a defendant's insanity is suggested after conviction, it is within the discretion of the court to take such action as it deems best." Speaking of statutory provisions, the text continues as follows: "They usually authorize suspension of sentence in such case if, in the opinion of the court, there is any reasonable ground for believing defendant to be insane." 16 C. J., 1284.

The pertinent part of C. S., 6237, is, "When a person accused of the crime of murder . . . shall be found by the court to be without sufficient mental capacity . . . to receive sentence after conviction." The statute requires that an inquisition shall be had when a person "shall be found by the court" to be without sufficient mental capacity. A finding by the court implies a discretion of the trial judge and on the evidence presented by the affidavit, it cannot be said that the trial judge abused his discretion.

The only case since the statute which deals with this question is *S. v. Khoury,* 149 N. C., 454. While the case is not exactly in point, there is a discussion of the problem raised by *S. v. Vann, supra.* It was

pointed out that, in that case the trial judge directed that a jury be impaneled to try the question of the defendant's sanity and that action of the trial judge was affirmed. The Court, in *S. v. Khoury, supra* (p. 456), then continued by quoting from a text on insanity, as follows: "Although, if there be a doubt as to the prisoner's insanity at the time of his arraignment, he is not to be put upon trial until the preliminary question is tried by a jury. The question of the existence of such a doubt seems to be exclusively for the determination of the court; and counsel for the defendant can neither waive an inquiry as to the question of defendant's sanity, nor compel the court to enter upon such an inquiry when no ground for doubting it appears. . . . And the question whether an inquiry is called for by the circumstances of the case, is for the determination of the court."

The Supreme Court further suggested that where a defendant is at the bar of the court, when his manner, appearance, etc., may be seen by the judge, the trial may not be stopped by the mere suggestion of counsel that a jury be impaneled to try the defendant's sanity. In this case, the defendant did not go on the stand and no evidence was introduced in the defendant's behalf. The jury's verdict is conclusive of all matters embraced in it, including the defendant's capacity to commit the crime charged. The court below in his discretion, and in view of the jury's verdict, was undoubtedly of the opinion that the suggestion of the defendant's insanity after the jury's verdict came in was not supported by sufficient evidence to raise any doubts. His action in refusing to suspend judgment pending inquiry into defendant's insanity was, therefore, proper, and we see no reversible error.

The entire record shows defendant to be a bad man and dangerous with firearms. The criminal conduct of defendant in so short a time after escaping from the jail at Lexington with Wilson could hardly be equaled. The killing of the unoffending hosiery worker, in an effort to rob him of his car, was ruthless and dastardly. He fled and defied the officers of the law and had to be shot in being arrested. On the trial of defendant in the court below, he did not try to show that he was insane at the time he killed Donald Moss, as found by the jury. The theory of the defense was that he did not kill him. It is truthfully written, "For they have sown the wind and they shall reap the whirlwind." The defendant has had a fair, impartial and lawful trial.

In the judgment of the court below we find

No error.

STATE v. BRICEY HAMMONDS.

(Filed 16 June, 1939.)

1. **Criminal Law § 52b—**

Upon a motion to nonsuit, only the evidence favorable to the State should be considered.

2. **Same—**

Upon a motion to nonsuit, the evidence should be considered in the light most favorable to the State and it is entitled to every reasonable intendment thereon and every reasonable inference therefrom. C. S., 4643.

3. **Criminal Law § 52a—**

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

4. **Homicide § 4c—**

Premeditation and deliberation imply thought prior to the execution of the fixed design, but the length of time elapsing between the formation of the fixed intent and the execution is immaterial.

5. **Homicide §§ 4c, 21—**

The surrounding circumstances and lack of provocation or sudden passion may be properly considered by the jury upon the question of premeditation and deliberation.

6. **Homicide § 25—Evidence held sufficient to be submitted to the jury on the question of defendant's guilt of murder in the first degree.**

The evidence tended to show that a prison guard, the defendant and the defendant's father were riding together in an automobile, that the car had a flat tire and that while the guard was crouching on the ground with his coat off in attempting to place the mended tire on the car, defendant, who was standing back of him, slyly took the guard's pistol from his holster and shot the guard in the back of the head, inflicting the fatal wound without warning, provocation or prior altercation. *Held:* The evidence was sufficient to be submitted to the jury on the question of defendant's guilt of murder in the first degree, it being for the jury to determine from the actions of defendant and the manner of the killing whether the crime was committed with premeditation and deliberation.

7. **Same—**

It is not necessary for the State to prove motive in order to make out a case of murder in the first degree.

8. **Homicide §§ 4c, 27c—Instruction upon defendant's defense of intoxication precluding premeditation and deliberation held without error.**

The State's evidence tended to show an intentional killing of deceased with premeditation and deliberation. Defendant contended that he was so intoxicated at the time that he did not know what he was doing and was incapable of premeditation or deliberation, and that therefore he could not be convicted of the capital offense. *Held:* The court's instruc-

tion to the jury to the effect that defendant could not be convicted of the capital crime if at the time of committing the act he was incapable of premeditation or deliberation, but that if defendant formed a fixed intent to kill prior to getting drunk and executed such intent while intoxicated, the killing would constitute murder in the first degree, is without error.

9. Homicide § 16—

A defendant asserting the defense of drunkenness to the charge of murder in the first degree has the burden of proving the defense to the satisfaction of the jury.

10. Criminal Law § 41i—

An instruction that if the jury should believe from the facts and circumstances that interested witnesses had told the truth, their testimony should be given the same credit as that of disinterested witnesses is without error.

APPEAL by defendant from *Burney, J.*, and a jury, at January-February Term, 1939, of ROBESON. No error.

The defendant was tried on a bill of indictment for the murder of Lacy Brumbles, convicted of murder in the first degree and judgment of death by asphyxiation was pronounced by the court below.

The evidence was to the effect that Lacy Brumbles was killed by defendant. Brumbles had a position with the State as a guard for a chain-gang in Robeson County. He had been sick with a cold and cough and had been at home on that account for several days. On Sunday morning, 5 February, 1939, about 8:30 o'clock, he left his home in a little '29 Ford roadster. He had an officer's badge and pistol in a holster in his belt, which he carried as an officer. He was married three years before and was 35 years old. He went to the State camp, about three miles from Lumberton. Defendant was an Indian and had served a term for manufacturing liquor and was released that Sunday morning. He was a cripple, one leg and one hand partly off. Brumbles arrived at the camp about 8:45; he changed his coat and left in his Ford roadster in the direction of Pembroke. He went to the home of James Hammonds, father of defendant, and told him he had promised to bring Bricey Hammonds home but he had left the camp. Brumbles and the father of Bricey Hammonds went to hunt for defendant, but did not find him and returned to the father's home and found defendant there. He had walked home. Brumbles told defendant he had gone to the camp to take him home but had missed him. They stayed there some half hour and the three went to Pembroke in the roadster. The father got out of the car at a garage and was to be picked up at Son Lowry's filling station. Brumbles and defendant went off and stayed about an hour and picked up the father, who testified for defendant, in part:

"When they came back Bricey looked to me about half foolish, when he drove up he had his head hanging down that way, and my first cousin

says, he told me, 'Jim,' he said to me, 'Bricey is drunk, you better get in the car with him and go on, the law will get him.' I got in the car and we come on. When I got in on the side that put Bricey in the middle, and he had his head throwed up against my left shoulder. I took him to be drunk. Mr. Brumbles had drunk some, I could smell it on him when me and him were taking the tire off the wheel. . . ." They started to the father's home and the tire to the roadster leaked down. Brumbles got an inner-tube out of the car and was putting it in the tire. The following witnesses for the State testified, in part:

Harvard Chavis: "The automobile was out on the edge of the road, parked to the right-hand side of the road, kinder outside; there was room enough for other cars to pass; this car was headed south. . . . I saw these three men. When I first observed them Mr. Hammonds and Bricey were not doing anything but this other fellow was working on a tire, he was taking it off on account of its going down. I didn't know him at that time. When I walked up I spoke to Bricey and me and him spoke a few words, I asked him when he come home, he told me that morning, and said he was going to stay; said he had just come from the prison camp, he had not been home in four months and he was going to stay when he got there, said he come that morning. Nobody else in the crowd said anything to me right then. I stayed there. Something was said about me helping fix the tire, Bricey was the first one asked me, he said 'You better help fix the tire,' I told him I reckon I better get on, it was looking cloudy, I was going to get kindling. This guard, Bricey and his father were there then; I mean the deceased when I say the guard. At the time this conversation took place me and Bricey were in the edge of the road and the guard was over in front of the wheel working on the wheel; me and Bricey were right in front of the car; James Hammonds was around on the other side kinder back of the car like, across the car to where we were standing, he was kinder back behind it like. I stood there about a minute I suppose and tried to decide whether to help them with the tire or not; Bricey acted like he had had a drink and I didn't know what shape this other man was in; he had his coat on at the time and I didn't see no badge or gun and I didn't know who he was. He must have got hot taking the tire off and he taken his coat off, walked around in front of the car and threw it in the seat, and when he threw it in the seat I seen his badge and pistol. His badge was on his shirt or vest under his coat, right along down there (indicating the location on his body), and his pistol was in his holster on his right side hip. So when I seen his pistol and badge I decided it would be all right to help him with the tire. I said, 'All right, I think I will help with the tire since the cloud's coming up,' looked pretty gloomy, like he might get wet. I started around to try

to help him as much as I could. He taken the old inner tube out and pitched it in the back of the car and he had another inner tube and put it around in the tire; he was squatted down; he put the tire on the car and when it got around tight James Hammonds was holding the tire like this and this guard had inserted a screw driver on the right-hand side down here over on this side and was trying to insert the other tire tool in there; I was in the center and if he got it in there I was going to push down. We all had hold of the tire, I was on my knees and he was squatted down over here on the right, I was immediately to his left, and James was standing kinder to the running board holding all he could. James was to my left and I was in the middle. Me and James were on our knees and this man he squatted down, kinder short man like. At that time Bricey was standing kinder behind us, behind the guard. While we were kneeling down there and inserted the screw driver to get this other tool down here for me to push it down, I heard a pop and felt the heat side of my head and it kinder deafened me and I jumped up and looked around, Bricey had a pistol in his hand, I seen some smoke around close up and he had a pistol in his hand, and his father he looked at the man first and when he hollered, he said 'Bricey you have shot that man,' and I happened to look over there, and there was the man, he had fell on his face kinder against the wheel, bottom of the wheel, the inside rim, he fell with his face kinder down there and the blood was gushing out of his mouth and nose, and when I seen that, kinder dazed me for a few minutes and I stood there and looked at Bricey and he still had the pistol in his hand like this, and his father was coming around me and around him and he come around me and him and went to the road and Bricey hollered to him and said, 'Wait, Pa,' and he turned his back to me, and when he did I grabbed him around the waist and arms from behind. I grabbed him and held him for his father to come back and take the pistol away from him, so his father came back and wrung the pistol out of his hand and when he wrung the pistol out of his hand I turned him aloose. When his father got the pistol, he said, 'Good Lord, what did you mean by shooting that man?' he told him he hadn't done nothing, to keep his mouth shut; that was what Bricey said to him. When I turned Bricey loose I looked back to see if he had fell over, he didn't have any pistol, it wasn't in his holster, the pistol that was in his holster was gone. The pistol was in his holster when he squatted down to fix the tire. When James got the pistol, James told the boy to go on home and stay until he got there."

Brumbles was taken to Baker Sanatorium in Lumberton. The chief surgeon, Dr. H. M. Baker, removed the bullet: "I have an opinion from my examination, satisfactory to myself as to what caused the death of

Lacy Brumbles; he died as a result of the bullet entering the brain. Brumbles died in my hospital about seven o'clock Sunday night."

The tire was fixed near Inman Bridge. Ed Martin: "Brumbles was down on his knees and hands and his head was against the wheel of the car when we got there; it was the right front wheel. When we got there Warrix and Mr. Herbert Lowry and Harvard Chavis taken him up and I went around and cranked the car up and brought him to Baker Sanatorium. I observed that he was bloody, back of his head, the brains was running out and back of his head the clots of blood in the forehead. I brought him to Baker Sanatorium. . . . When we got back there Herbert Lowry had Bricey under arrest. I talked with the defendant, Bricey Hammonds, and he told me he had not been along that road that day, the road the car was on where we got Brumbles at. Brumbles was living when we found him; he was living when I left Baker Sanatorium. It was after twelve o'clock when Bricey told me he hadn't been along that road that day; just after we got back from bringing the man to the hospital he said, in the presence of Sergeant and myself, he hadn't been along that road that day. At the time we got Brumbles from off the ground there at the car he had his coat off; he had a holster for a pistol; there was nothing in it. I stopped at Harvard Chavis' before I brought this man; the shooting was approximately fifty yards from his house and I went and got the pistol; Harvard Chavis went in the house and got a pistol and gave it to me. He (Harvard) told me he and Bricey's father, James Hammonds, taken the pistol away from him; said Jim told him to keep the pistol until some officer or other came after it and I went to the house and he delivered the pistol to me. When he turned it over to me I opened it and I saw an empty cartridge in the chamber. The pistol was entirely loaded with the exception of one empty cartridge in the chamber; the rest of them were balls. I then brought the man on down here and when I come back I turned the gun over to Sheriff Wade. . . . I found a hole through the back of his hat. . . . I saw blood and hair on the inside of the hat. I saw the coat that was lying in the Brumbles automobile. . . . When I got back I took Bricey and put him in Sergeant's automobile and I got in the seat in the back and sit with him until we got to the jail, and he said, 'I will tell the truth about the thing,' he said, 'liquor caused it all.' He said, 'I went to Lizzie Lowry's for a 25c drink of whiskey and I went to Alleen Carter's and bought 50c worth of whiskey,' and he said to Sergeant, 'that caused all of it.'" It was around twelve o'clock when he got to the scene of the killing. "Bricey Hammonds was sober when we brought him to jail; we brought him to jail around two o'clock, somewhere in the neighborhood of two o'clock, I won't be positive. I had seen Bricey before the shooting; he was sober when I saw him

before the shooting, he was sober the first time I saw him after the shooting. . . . I would say it was around 12:15, something like that, that I saw Bricey. I said the shooting took place around 11:45 and I went out to where this thing happened and carried the injured man to Baker Sanatorium. . . . I saw Bricey Hammonds out at Inman Bridge when Herbert Lowry had him under arrest and I observed him. I saw him talk, I saw him walk. I saw nothing about the defendant that would indicate he was drinking."

Shelbie Warrix corroborated Ed Martin's testimony, and testified, in part: "I could smell whiskey on him but I didn't see him walk anymore. I heard him talk. He said he hadn't done nothing. I asked him what he did it for, he said he hadn't done nothing. I smelled whiskey on him, I wouldn't say he was sober; he didn't act like a drunk man, but I think he had had a drink."

Sergeant F. R. Bell: "I asked him if he ever had any trouble with Mr. Brumbles, and he said 'No, sir, Captain Brumbles was the finest man I ever knew in my life, never have had a cross word with him, nor he has never said anything to me out of the way.' I said, 'Well, why did you shoot him?' He said, 'I haven't done anything, they are just framing up on me.' Bricey did not mention that Mr. Brumbles was to carry him home. While I was sitting there talking with him, he was not drunk, he was what I would call about a third drunk; he talked with pretty good sense; he was not drunk and didn't stagger when he walked; he has a peg leg, and I noticed him very close, he got about mighty well to have just one leg. I smelled the odor of liquor on him and it was stump-hole liquor he was drinking. . . . I saw Bricey Hammonds out at Inman Bridge where this homicide took place. I saw him walk."

Sheriff E. C. Wade: "I testified that at the time I saw the defendant that afternoon that he had been drinking, you could smell liquor on him. . . . I went to the car where Herbert Lowry had this defendant arrested and opened the door—it was a roadster—called Bricey and he got out and walked behind the car and walked down the road, to the other side of the road, and I opened the door and he got in the back with Mr. Bell and Ed Martin. I didn't see him stagger. The only thing I could tell about his condition, I could smell the odor of liquor, I couldn't tell by his actions or walking that he was drunk, but I could smell the odor of whiskey. His appearance, the way he walked, acted and talked, was the same as it is here, except in his talk there, when I asked him two or three different times there, he said he hadn't done anything."

Herbert Lowry: "I noticed this man when I arrested him. I noticed him particularly. The reason I was looking at him was because I

was going to arrest him. When I searched him I smelled whiskey on him but he didn't stagger and I didn't ask him any questions and he didn't talk to me any at all. He didn't stagger from where I arrested him over to the car; I taken him over to the car where the shooting was done and put him in the car, and I didn't talk to him, ask him any questions, and I didn't see that he was drunk, he wasn't staggering about any. I walked with him a half mile or three-quarters. That was probably thirty minutes after the thing happened."

W. F. Bailey: "I saw the defendant this past Sunday when the officers had him up here on the road when he was arrested and observed him. I didn't see anything that would indicate he was drunk. I couldn't tell it. He was sitting in the patrol car with Sergeant Bell and the glass was rolled down and I was as close to him as here to her (indicating about two feet); he was holding his head erect and answering questions Sergeant Bell was asking and he was talking and holding his head erect, sitting erect in the car, didn't have the appearance of a drunk man in the car."

D. W. Biggs: "I am coroner of Robeson County. I saw Bricey Hammonds Sunday evening up near Inman Bridge where the killing took place, he was in an automobile up there. I didn't hear him talk any then, I heard him talk around at the jail later on. I just saw him sitting in an automobile up there. From what I saw I didn't see anything that would indicate that he was drunk."

Bricey Hammonds, the defendant, testified, in part: "James Hammonds is my father; this is my father sitting here. I am a married man, have one child, my wife is sitting over there with the child. I have been on the chain-gang, I was there in October, November and December. I was confined to the county roads before this past Sunday; I was released Sunday morning. I knew Lacy Brumbles; I saw him on this past Sunday, I first saw him at my daddy's house. It was somewhere about ten o'clock or ten-thirty when I first saw him; he was at my daddy's house when I went home. Me and him and my father later went to Pembroke. When he got to Pembroke my daddy got out of the car; he got out at Tyner's garage." He then told about getting the liquor from two parties in Pembroke. "Me and Brumbles then left together and come on back and got up with my daddy; we got up with him there at that garage. Well, after he got there he pushed me over and got in the car or got in over me one, I disremember. I was high and I had sot up with the night man all night long, never even shut my eyes. I remember my daddy getting in the car but I never did remember anything else. I don't know whether we went some other place or not. The next thing I remember was at my daddy's, there in the kitchen laying down across the bed. I don't know how long it was

after that I was arrested. When I come to my right mind, I was coming to my right senses, I was in the sheriff's car. I don't know anything about the shooting, I was drunk. I never had any ill will against Lacy Brumbles, we were friends. I have been in trouble before, three times. I was convicted three times. The first time, me and some more boys, I was a young fellow along then, small fellow, went off with some boys and stole a talking machine, I was convicted of that, I served sixty days I believe, as far as I can remember. I was convicted the second time, there was a fellow that stole some tires and laid it to me and I had to pull time for it; I was convicted for that crime, I pulled sixty days for that. The last time I was convicted for whiskey, manufacturing whiskey, and that was the sentence I was serving when I was released Sunday. I have never killed a man before in my life, never have killed Bish Chavis. I am twenty-four years old, I think. . . . I never said I had been sent there eight months for killing a man and had served five months and Governor Hoey had paroled me; I heard him say that. I know Clarence Locklear, known him all my life. I don't know whether he is my pastor or not, he has preached in my church, he is a good man. I don't know what he has against me to come in here and tell that on me, he was my witness, I had him subpœnaed to testify for me. I was not drinking then. . . . Clarence Locklear picked me up in Pembroke and carried me to the Inman Bridge and he carried me within 300 yards of my home. I missed Brumbles. When he did see me I was coming up to the house at my daddy's."

The defendant was convicted of murder in the first degree, judgment of death was pronounced on the verdict by the court below. 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.

David M. Britt for defendant.

CLARKSON, J. At the close of the State's evidence and at the close of all the evidence, the defendant in the court below made motions for judgment to dismiss or nonsuit. C. S., 4643. This motion was addressed solely to the charge of murder in the first degree "or by any kind of willful, deliberate and premeditated killing." C. S., 4200. The record discloses "at the close of the evidence the defendant admits the killing."

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

The first question to be decided on this appeal: Did the court below commit error in overruling the defendant's motion to dismiss as to murder in the first degree? We think not. *S. v. Daniel,* 139 N. C., 549.

In *S. v. Steele,* 190 N. C., 506 (511-12), *Varser, J.,* for the court said: "The requirement, in first degree murder, in order to constitute 'deliberation and premeditation' does not require any fixed time before hand. These mental processes must be prior to the killing, not simultaneous, 'but a moment of thought may be sufficient to form a fixed design to kill.' *S. v. Norwood,* 115 N. C., 789; *S. v. McCormac,* 116 N. C., 1033; *S. v. Covington,* 117 N. C., 834; *S. v. Dowden,* 118 N. C., 1145, 1153; *S. v. Thomas,* 118 N. C., 1113, 1123; *S. v. Exum,* 138 N. C., 599." *S. v. Buffkin,* 209 N. C., 117 (124); *S. v. Bowser,* 214 N. C., 249 (253-4); *S. v. Burney,* 215 N. C., 598.

In North Carolina there is ample authority for the statement that the surrounding circumstances and lack of provocation or sudden passion may be taken into consideration by the jury in determining whether the killing was with premeditation and deliberation. *S. v. McCormac, supra,* 1033; *S. v. Roberson,* 150 N. C., 837; *S. v. Walker,* 173 N. C., 780; *S. v. Roderick,* 175 N. C., 722; *S. v. Evans,* 198 N. C., 82.

Before the killing the deceased and the defendant seemed to have been friendly. The deceased, with James Hammonds and Harvard Chavis, was fixing the tire to Brumbles' Ford roadster, on account of its going down. The defendant, Bricey Hammonds, when Chavis came up, was standing there and had a conversation with him. He said to Chavis, "You better fix the tire." The deceased took his coat off and walked around in front of the car and threw the coat on the seat.

Chavis saw his badge and pistol. His badge was on his vest and his pistol was in his holster on his right hip. When Chavis saw the pistol and badge he thought it would be all right to help with the tire. Chavis testified, in part: "Me and James were on our knees and this man (deceased) he squatted down, kinder short man like. At that time Bricey was standing kinder behind us, behind the guard. While we were kneeling down there and inserted the screw driver to get this other tool down here for me to push it down, I heard a pop and felt the heat side of my head and it kinder deafened me and I jumped up and looked around, Bricey had a pistol in his hand, I seen some smoke around close up and he had a pistol in his hand, and his father he looked at the man first and when he hollered, he said, 'Bricey, you have shot that man,' and I happened to look over there, and there was the man, he had fell on his face kinder against the wheel, bottom of the wheel, the inside rim, he fell with his face kinder down there and the blood was gushing out of his mouth and nose. . . . I grabbed him (Bricey Hammonds) and held him for his father to come back and take the pistol away from him, so his father came back and wrung the pistol out of his hand and when he wrung the pistol out of his hand I turned him a loose. When his father got the pistol he said, 'Bricey, good Lord, what did you mean by shooting that man;' he told him he hadn't done nothing, to keep his mouth shut; that was what Bricey said to him." The defendant had slipped the pistol from the holster which was on deceased's right hip, while he was fixing the tire, and shot him in the back of the head.

We think under the authorities cited, this was plenary evidence to be submitted to the jury on malice, premeditation and deliberation. It is well settled that proof of a motive for the homicide is not necessary where the evidence shows an intentional killing with deliberation and premeditation. *S. v. Buffkin, supra,* 125.

On the attitude of premeditation and deliberation, the action of defendant speaks louder than words. There was enough evidence to be submitted to the jury that he did the awful deed cooly, with malice, premeditation and deliberation. He saw the pistol in the holster on deceased's hip, he thought out and resolved in his mind and planned to get the revolver slyly without the deceased's knowledge. After getting the pistol out of the holster, standing behind him, he fired the pistol into the back of deceased's head and killed him.

Craft v. State, 3 Kansas, 447, relied on by defendant, is not in point. It says: "'. . . nothing in the manner of the killing . . . to indicate that there has been premeditation.'" In this case we have the manner of killing, slyly slipping the pistol from the holster on deceased's hip so that he would not know it, and shooting him from behind in the head. After the fatal act defendant told his father "He

hadn't done nothing, to keep his mouth shut." Cain, the first murderer, said: "I know not; am I my brother's keeper." The evidence evinces that defendant was prompted by an evil heart, desperately wicked and fatally bent upon mischief.

The second question to be decided on this appeal: Was there error in the charge of the court below as regards drunkenness or intoxication as a defense to the killing? We think not.

The defendant contended he was drunk or intoxicated to such an extent that he could not form any intent to commit the criminal act. The court charges on this aspect, in part: "Drunkenness is no excuse for crime and has often been said, but where a specific intent—and I charge you a specific intent is essential to convict of the crime of murder in the first degree—is essential to the criminality of the act, or there must be premeditation or deliberation or some mental process of the kind, in order to determine the degree of the crime, it is proper to consider the prisoner's mental condition at the time of the alleged offense, so committed; if he was not able for any reason to think out beforehand what he intended to do, and to weigh it and understand the nature and consequence of his act, he could not be held to the same measure of responsibility as one with better faculties and a clearer mind should be. . . . And a person who commits a crime while so drunk as to be incapable of forming a deliberate and premeditated design to kill is not guilty of murder in the first degree. . . . Where a specific intent is essential to constitute crime, the fact of intoxication may negative its existence. Accordingly, since the statute dividing the crime of murder into two degrees and in cases where it becomes necessary, in order to convict an offender of murder in the first degree, to establish that the killing was deliberate and premeditated, these terms contain, as an essential element of the crime of murder, a purpose to kill previously formed after weighing the matter, a mental process, embodying a specific, definite intent, and if it is shown that an offender, charged with such crime, is so drunk that he is utterly unable to form or entertain this essential purpose, he should not be convicted of the higher offense of murder in the first degree. . . . If a person when he is cold sober, forms a deliberate intent to kill a person and after he has formed that intent to kill a person, he then becomes intoxicated and while intoxicated kills a person, the fact that he was intoxicated would not reduce murder in the first degree to murder in the second degree. You understand that, gentlemen? To make such defense available, the evidence must show that at the time of the killing, the prisoner's mind and reason was so completely and utterly incapable of forming a deliberate and premeditated purpose to kill. As the doctrine is one that is dangerous in its application, it is allowed only in very clear cases,

and where the evidence shows that the purpose to kill was deliberately and premeditatedly formed when sober, the imbibing of intoxicants to whatever extent in order to carry out the design will not avail as a defense." Taking the charge as a whole and not disjointedly, we see no error in the charge.

In *S. v. Kale,* 124 N. C., 816 (819), it is written: "If one voluntarily becomes drunk and kills, without justification, he is guilty of murder. *S. v. Wilson,* 104 N. C., 868. The test of accountability is the ability of the accused to distinguish right from wrong and that in doing a criminal act he is doing wrong. When killing with a deadly weapon is admitted or proved the law implies malice and the burden of showing the absence of malice is upon the defendant. Drunkenness at the time the crime is committed, nothing else appearing, does not repel malice nor lower the grade of the crime. The law recognizes the dethronement of reason, as an insanity for instance, as an excuse. *S. v. Potts,* 100 N. C., 457. 'Voluntary drunkenness is never an excuse for the commission of a crime.' *S. v. Keath,* 83 N. C., 626. If one charged with murder has premeditated and deliberately formed the intention to kill and did kill the deceased, when drunk, the offense is not reduced to murder in the second degree. *S. v. McDaniel,* 115 N. C., 807. Of course the killing and its manner, the intent, intoxication, how it comes about and for what purpose drunkenness takes place, and the like, are questions for the jury under the court's instructions as to the law applicable thereto."

The charge of the court below seems to be taken from *S. v. Murphy,* 157 N. C., 614 (617, 618, 619). *S. v. Alston,* 210 N. C., 258; *S. v. Edwards,* 211 N. C., 555; *S. v. Hawkins,* 214 N. C., 326 (333); *S. v. Adams,* 214 N. C., 501 (505); *S. v. Bracy,* 215 N. C., 248.

The burden rests upon defendant to prove the defense of drunkenness to the satisfaction of the jury to mitigate the offense. *S. v. Bracy, supra,* 255, 257.

The defendant contends that the charge was erroneous as there was no evidence that the defendant had formed any intent to kill deceased before he got drunk. Taking the evidence and the charge as a whole, we see no prejudicial or reversible error. We do not think the charge, as a whole, impinged C. S., 564, and is not so conflicting that it could not be reconciled. In fact, it is favorable to defendant. In the very beginning of the charge of the court below is the following: "I instruct you, gentlemen of the jury, that you have the right under the evidence in this case, to render either one of several verdicts. You may find the defendant guilty of murder in the first degree, guilty of murder in the second degree, guilty of manslaughter, or you may find him not guilty, as you may find the facts to be from the evidence in the case. So your

charge is to say by your verdict whether the prisoner is guilty of murder in the first degree, murder in the second degree, manslaughter, or not guilty. It is a matter solely for you to determine whether he is guilty of the felony and murder whereof he stands indicted and determine the grade or degree of guilt, if any you shall find, or to say by your verdict he is not guilty of either offense charged in the bill of indictment as you may find the evidence shall warrant." The court went on and defined correctly murder in the first and second degrees and manslaughter, malice, intent, reasonable doubt. The law applicable to the facts was carefully given. The contention to the charge as regards testimony of interested persons is untenable. The court charged: "And if, from the testimony, or from it and the other facts and circumstances in the case, the jury believes such witnesses have sworn the truth, then they are entitled to as full credit as any other witness, and you should give that testimony as much weight as the testimony of a disinterested witness."

From a careful reading and re-reading the charge of the court below, it seems as if the learned judge took unusual pains in trying the case following the law as laid down by this Court and applying the law applicable to the facts.

In the judgment we see no prejudicial or reversible error.

No error.

MRS. MABEL C. WHITE, ADMINISTRATRIX OF THE ESTATE OF F. L. WHITE, DECEASED, v. NORTH CAROLINA RAILROAD COMPANY.

(Filed 16 June, 1939.)

1. Trial § 22b—

Upon motion to nonsuit, the evidence tending to support plaintiff's cause of action is to be considered in the light most favorable to plaintiff, and she is entitled to every reasonable intendment upon the evidence and every reasonable inference therefrom.

2. Railroads § 9—Evidence held sufficient to be submitted to the jury in this action to recover for death of intestate resulting from a crossing accident.

The evidence favorable to plaintiff tended to show that intestate, while attempting to drive over a railroad crossing within an incorporated town on a dark, foggy night was struck and killed by defendant's freight train running on its main line track, that there were two sidetracks before reaching the main line track, that the view of a driver was obstructed until he was within eight or ten feet of the main line track, that the crossing was in the business section of the town and traversed by heavy traffic, that defendant maintained no safety appliances, warning signals, or flagman at the crossing, and that the train was traveling between forty and fifty miles an hour in violation of the town ordinance, and that

it gave no warning by bell or whistle. *Held:* The evidence was properly submitted to the jury on the issues of negligence and contributory negligence.

3. Same—

The violation of a municipal ordinance regulating the speed of trains within its limits is negligence *per se*, and ordinarily whether such negligence is a proximate cause of the injury in suit is for the determination of the jury.

4. Same—

An engineer is charged with the duty of giving some signal of the approach of the train to a public crossing.

5. Same—

The failure of a motorist to come to a full stop before entering upon a railroad crossing as required by statute is not contributory negligence *per se*, but such failure is a circumstance to be considered by the jury with the other evidence in the case upon the question. Michie's North Carolina Code, 2621 (47) (48).

6. Death § 8—Charge held erroneous in failing to instruct jury that it should not consider income derived from investments.

The evidence disclosed that intestate had a large amount of income producing investments and was also engaged in a gainful occupation. *Held:* The charge on the issue of damages should have confined the jury's consideration of the income of deceased during his life expectancy to earned income, and the failure to exclude from the jury's consideration income derived from investments is error.

APPEAL by defendant from *Hill, Special Judge,* and a jury, at November Civil Term, 1938, of ALAMANCE. New trial.

This is an action for actionable negligence, brought by plaintiff, administratrix of F. L. White, deceased, against defendant, to recover damages for the death of her intestate. C. S., 160. The defendant denied negligence and set up the plea of contributory negligence.

The evidence on the trial was to the effect that the population of the town of Mebane is about 1,500 inhabitants. Fourth Street, where plaintiff's intestate was killed, is in the business part of the town and one of its main streets. It is paved. Before you enter the main Highway No. 10, this street crosses the highway.

W. T. LeGrand, Jr., witness for plaintiff, testified, in part: "Highway No. 10 is a paved highway and is very heavily used. Cars passed at all times of the day and night, and trucks also. Fourth Street is traveled a good deal, due to the fact that it is in the business part of the town and covers each side of the residential section also. After Fourth Street crosses the railroad and then crosses Highway No. 10, it then enters the business section of the town. . . . As you cross Fourth Street going north across the railroad, the railroad station building is

on your right to the east. The driveway to the station comes right down to the street in a few feet. It is a platform where you can drive across on up to the platform of the station. That driveway comes down to within about 10 feet of Fourth Street. This station extends the length of the block there, the whole platform and building. The depot fronts on Fifth Street and runs almost through from Fifth to Fourth Street. The building next to the Fourth Street is more or less a platform with a low roof on it for unloading things. The roof is supported by posts six by six or something like that. The platform is about 5 feet high. The opening between the roof and the platform is about 12 or 15 feet. I think there are two tracks between the depot and the main line track. Both of these cross Fourth Street. Going north on Fourth Street you would cross two tracks before you got to the main line. The freight siding there that you reach going north to the platform or depot is about a foot. A freight car just goes by the platform. Then there is another one and then the main line. . . . I observed the condition around the depot and on the sidings looking east on the night that White was killed. That is, east of the Fourth Street crossing. There were several boxcars east of the Fourth Street crossing there. On the first siding next to the depot. They were something like 190 feet from the Fourth Street crossing. I measured them the next day. . . . I have those exact figures—190 feet east of the crossing. It was 193 feet to the first boxcar from the Fourth Street crossing, that is east. There was more than one boxcar standing on that siding. I just don't remember the number, but I would say there were several. They were extending east down the siding toward Fifth Street. There were no other structures immediately east from Fourth Street crossing other than the depot itself. I think there were two electric light poles and a railroad sign right to the right of the platform there, to the right of the driveway. I am talking about the runway that goes up to the platform. I think they are regular telephone or light poles, about 14 inches in circumference, something like that. It had been raining on this evening. It was a drizzly rain, and it was just a little bit foggy. This occurred about 6:30 in the evening. It was dark. On this occasion I don't recall whether or not there were any lights or anything on the depot. . . . Fifth Street is a block away from Fourth Street. . . . On Fifth Street, they have two bells, one on each side of the crossing, worked by electricity, and when the train comes within a certain distance, these bells start ringing, and a red light. It continues to ring until the train has passed over it. . . . The third track from the south, being the main line track, is the track that trains pass through the town on ordinarily."

Plaintiff's intestate, in going from his residence to his store, passed over this railroad crossing. On the night he was killed the freight train was on the main track traveling west and after striking him ran 217 feet before stopping west of the crossing. The car was on the pilot or cow-catcher of the engine in an upright position. Plaintiff's intestate was on the south side of the main track about fifty feet from the crossing, and was killed almost instantly. The car plaintiff's intestate was driving was going north on Fourth Street, toward Highway No. 10. It was a level crossing. There is a North Carolina "Stop" sign at the intersection. It was in evidence, for plaintiff, that "A man going that evening on Fourth Street could see eastwardly down those tracks after he got on the first siding. You would have to get pretty close to the tracks before you could see anything. He would have to get by those buildings." Plaintiff's intestate was killed about 6:30 o'clock in the evening, 2 December, 1937. Fourth Street at that time was 29 feet, 11 inches wide. It is the same distance all across these tracks until it enters Highway No. 10 on the north side. There are four tracks crossing Fourth Street. The third track on Fourth Street going north was the main or "death" track.

A. A. Fuller, witness for plaintiff, testified, in part: "Q. To what extent does the location of those boxcars as they were located on the night of December 2, obstruct the view of one crossing Fourth Street to his right? Ans.: Going north, approaching the railroad track, you would have to get upon the railroad track, the spur track, before you can see down east of the train approaching. You cannot see down the track. The depot and those cars obstruct the view. Q. How close would a person in an automobile going north on Fourth Street have to be to the main line track before he could see past these obstructions that you have described, looking east on the main line, to see a train or any other object? (The Court): Q. Have you ever tried it out to see? Ans.: Yes, sir. Q. Been in a car? Ans.: Yes, sir, measured it out for a reason. Q. Go ahead. Ans.: You would have to be 8 or 10 feet before you could get to the main line. Q. Do you mean by that answer that you would have to be within 8 or 10 feet of the south rail of the main line track before you could see past these obstructions to the east? Ans.: Yes, sir. Q. You have tried that yourself? Ans.: Yes, sir. I made an examination of the condition of the crossing at Fourth Street the next day after Mr. White was killed. Examined it right carefully. The rails projected above the crossing two inches. I measured it with a 2 x 4. It is two inches thick. It was lower between the two main tracks, two inches lower. The street itself was paved. It wears out there so bad. Q. Was it worn out? Ans.: Yes, sir. Q. What else did you observe about the condition of the pavement? Ans.: Between the

rails and the shoulders of the filling in there, there is right smart little space in there. It was mighty rough. Going across in an automobile it bumps you so, I mean it is so low between the rails when you cross over you drop down and have to go up again to get over it. Q. How long had that condition existed prior to December 2, 1937? Ans.: It stays rough pretty much of the time, I don't know how long. . . . Q. State how frequently the Fourth Street crossing is used and what sort of traffic there is across that crossing? Ans.: Fourth Street is the main crossing. . . . It would be hard to get at the volume of traffic across the Fourth Street crossing December, 1937, and immediately prior thereto, but it is heavily used because it is the main crossing and residential section on the south and all the business on the north, and the post office on the north, and everybody has to go across there to get their mail from the south side and to get their groceries. The post office is on No. 10 Highway between Fifth and Fourth Streets. It faces the railroad. Highway No. 10 is built up for business purposes between Third and Fifth Streets. . . . I have observed the traffic conditions on Fourth Street both day and night. It was frequently used prior to December 2, 1937, at nighttime by automobiles and other vehicles. There was no street light of any sort immediately over the railroad tracks where you cross Fourth Street. . . . On December 2, 1937, the railroad company did not maintain any sort of lighting signals on that crossing. There was no red or green light maintained at that crossing. There was no gate maintained by the railroad to obstruct passengers when trains were passing. They did not keep any watchman to watch out for passing trains. . . . I am familiar with the number of trains that crossed that crossing at or about December 2, 1937. We have eight passenger trains a day, each going back and forth, and then we have numerous freights. We have a local that goes one way one day and back the next, and then we have numerous freights going through. Some of these trains are operated at night and some in the day. . . . The condition of traffic on that highway at night was practically regular all the time, heavy traffic on No. 10 always. On December 2, 1937, just before night, there came a little shower. It was damp, cold and foggy. It rained a little bit just before night. I can't say exactly the time Mr. White was killed because I was at the house, and did not get there until after it was all over. It was between 6 and 7 o'clock. About 6:30. It was dark."

Witnesses for plaintiff testified that the train was running 40 to 50 miles an hour; and that the train did not blow any whistle or ring any bell.

Mrs. Mabel C. White testified, in part: "I am Mrs. F. L. White, Mr. White was 63 years old at his death. We had been married 36

years. We have four children. We have one girl who is 16. My husband's business was that of a druggist. He was a licensed pharmacist. I couldn't tell you exactly how long he had been licensed, about 31 years. He did not go to the University. I can't think of the name of the college where he received his education. For a year prior to his death, he gave practically all his time to his business. Mr. White had phlebitis caused from a sting he got in Florida in 1925. Whenever he would hurt his leg it would cause a sore on it. That incapacitated him from work very little. For two or three years prior to his death he lost very little time from his work on account of that or any other physical ailment. Other than the phlebitis, his health was perfect. I imagine his eyesight was just about that of the average man of his age. His hearing was good. Q. What were the average earnings of Mr. White over a period of three years prior to the date of his death? Ans.: I would say between $3,000 and $4,000 a year. He owned his own home. It was located in Mebane on Fourth Street. The family and I occupied that as a family home. He owned the drugstore business he operated. He owned the building in which the drugstore is located. He had one boy employed assisting him in the drugstore at the time of his death. My son also worked there all the time. I also worked there. Not very much previous to his death."

Plaintiff offered in evidence section 77 of the Ordinances of the town of Mebane, reading as follows, to wit: "Section 77. Railroad, etc. It shall be unlawful for any person, persons or corporations to run any train or trains within the corporate limits of the town of Mebane, at a greater rate of speed than 15 miles an hour, or to blow or allow to be blown any locomotive whistle within the city limits, except when necessary for proper signals. Any person, persons or corporations violating this ordinance shall pay a fine of $10.00 for each offense."

Plaintiff offered in evidence the Mortuary Table, sec. 1790, of the Consolidated Statutes: Completed age, Expectancy of Life at 64 shows 11.7 years. Completed age at 63 shows 12.3 years.

The court charged, in part: "She (plaintiff) alleges that all of these negligent acts, or that at least some of them, proximately produced and brought about the collision and the death of her husband, her intestate. She says that his estate has suffered and will suffer to the extent of at least one hundred thousand dollars. She alleges that he was in good health at the time of his death, that he owned and operated a drug business, that he had a reasonable expectancy or might expect to live in the future 11 to 13 years, or approximately 13 years if he lived out his normal span of life. (A) She alleges that he was earning from $3,000 to $4,000 a year, or she alleges that after deducting his own personal living expenses and other necessary expenditures that he would

make that, that there would have been net earnings to his estate of from $3,000 to $4,000 a year, and that this multiplied by his expectancy of at least 11 years, would give the sum of $33,000 to $44,000, and that the present cash worth of this sum would amount to a substantial sum, she contends and insists from $35,000 upwards. (A) [The defendant excepted to that part of the charge set out between the letters (A) and (A).] . . . If you answer the second issue 'No,' then go to the third and last issue, which is: What amount, if any, is the plaintiff entitled to recover of the defendant? The burden of proof of that issue is upon the plaintiff, Mrs. White, to satisfy you by the greater weight of the evidence of any injury proximately resulting from defendant's negligence, and extent of the injury and damages sustained. (R) With regard to the third issue, the court instructs you that if the plaintiff is entitled to recover at all, she would be entitled to recover such sum as damages for loss of life as would be the present value of the net income of the deceased, and this is to be ascertained by deducting the cost of his living and ordinary expenditures from his gross income and then estimating the present value of the accumulation of such net income based upon the number of years that he would have lived, or his expectancy. (R) [The defendant excepts to that part of the charge set out between the letters (R) and (R).] In applying this rule, and in order that the jury may properly estimate the reasonable expectation of life of the deceased, it should consider his age, habits, industry, means, business qualifications, skill, physical condition, and say from the evidence offered what would have been his reasonable expectation of life. Now, gentlemen, under that rule the plaintiff offers in evidence the mortuary tables, and the court admits such tables as evidence in the case tending to show the probable expectation of the life of plaintiff's intestate. As the court recalls, the statute fixes the expectancy of plaintiff's intestate at approximately 11 or 12 years. They were read to you and you remember what the counsel said. If you desire to examine them, if there is no objection by counsel, the court will permit you to do so. The fact that the Legislature has passed this statute and provided that a person's expectancy may be so much, is not conclusive. The statute itself provides that that is merely evidence for you to consider along with all the other evidence in the case as to the probability of how long the life of a person in question would have been had he lived out his natural and normal period of time. (T) In this case plaintiff contends that her husband was in good health, that he was operating a business, that he could operate his car, and was earning from three to four thousand dollars a year; that his expectancy was from 11 to 13 years; that he had accumulated around $40,000 to $50,000; that he would have earned more as time passed and when you

deduct his personal and ordinary expenses there would have been left over his period of expectancy of life a sum in the neighborhood of $50,000, or approximately that sum, and she contends that his estate has been damaged to that extent. (T) [The defendant excepts to that part of the charge set out above between the letters (T) and (T).]"

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

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

"2. If so, did the plaintiff's intestate, by his own negligence, contribute to his fatal injury, as alleged in the answer? Ans.: 'No.'

"3. What amount, if any, is the plaintiff entitled to recover of the defendant? Ans.: '$10,000.'"

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 necessary facts will be set forth in the opinion.

T. C. Carter and Brooks, McLendon & Holderness for plaintiff.
Long, Long & Barrett and W. T. Joyner for defendant.

CLARKSON, J. At the close of plaintiff's evidence and at the conclusion of all the evidence, the defendant made motions for judgment as in case of nonsuit. C. S., 567. The court overruled these motions and in this we can see no error. On a motion for nonsuit, the evidence which makes for plaintiff's claim, or tends to support her cause of action, is to be taken in its most favorable light for the plaintiff, and she is entitled to the benefit of every reasonable intendment upon the evidence and every reasonable inference to be drawn therefrom.

The evidence of plaintiff is to the effect that the defendant's freight train, going west, was traveling between 40 and 50 miles an hour, contrary to a town ordinance, ringing no bell and blowing no whistle, over a street crossing in the business section of the town, on which there was heavy traffic. There was a drizzling rain and it was a dark, foggy night. There were no safety appliances, stop lights or warning signals at Fourth Street. The crossing was rough and worn out, the rails projecting above the crossing two inches. The depot and boxcars obstructed the view of an approaching train going west of a traveler in a car on Fourth Street going north—he would have to be within eight or ten feet of the south rail of the main track before he could see the train which killed plaintiff's intestate.

We think there was sufficient evidence to be submitted to the jury on the question of negligence and contributory negligence. *Moseley v.*

R. R., 197 N. C., 628; *Lincoln v. R. R.*, 207 N. C., 787; *Preddy v. Britt*, 212 N. C., 719.

In the *Moseley case, supra*, at p. 638, quoting from 60 A. L. R., at p. 1196, it is said: "'Where the evidence shows that a railroad crossing is for any reason peculiarly dangerous, it is a question for the jury whether the degree of care which a railroad company is required to exercise to avoid accidents at crossings imposes on the company the duty to provide safety devices at that crossing.'" *Harper v. R. R.*, 211 N. C., 398 (405).

Some of the questions of negligence that arise on the facts in this record are set forth in *Sanders v. R. R.*, 201 N. C., 672 (678): "In *Hendrix v. R. R.*, 198 N. C., at p. 144, is the following: 'It is well settled in this jurisdiction that the violation of a town or city ordinance, or State statute, is negligence *per se*, but the violation must be the proximate cause of the injury. Ordinarily, this is a question for the jury if there is any evidence, but, if there is no evidence that the violation of the ordinance or statute is the proximate cause of the injury, this is for the court to determine.' In *Collett v. R. R.*, 198 N. C., at pp. 762, we find: 'An engineer in control of a moving train is charged with the duty of giving some signal of its approach to a public crossing; if he fails to perform this duty the railway company is deemed to be negligent; and if as a proximate result of such negligence, injury is inflicted the company is liable in damages. *Russell v. R. R.*, 118 N. C., 1098; *Perry v. R. R.*, 180 N. C., 290; *Moseley v. R. R.*, 197 N. C., 628.' In *Kimbrough v. Hines*, 180 N. C., at p. 280, the Court quotes from cases as follows: 'It is also established by the weight of authority that it is not always imperative on a traveler to come to a complete stop before entering on a railroad crossing; but "whether he must stop, in addition to looking and listening, depends upon the facts and circumstances of each particular case, and so is usually a question for the jury." . . . Persons approaching a railroad crossing are not required, as a matter of law, to stop before attempting to cross, but his omission to do so is a fact for the consideration of the jury.'" N. C. Code, 1935 (Michie), secs. 2621 (47) and 2621 (48).

In *Harris v. R. R.*, 199 N. C., 798 (799), we find: "The law in this State does not impose upon the driver of a motor vehicle, on his approach to a public crossing, the duty, under all circumstances, to stop his vehicle before driving on the crossing. Whether under all the circumstances, as the evidence tends to show, and as the jury may find from the evidence, the failure of the driver to stop, as well as to look and listen for an approaching train at a railroad crossing, was negligence on his part, is ordinarily a question involving matters of fact as well as

of law, and must be determined by the jury under proper instructions." *Keller v. R. R.* and *Davis v. R. R.*, 205 N. C., 269 (278).

From a careful reading of the charge on damages, we think it prejudicial. The court below charged the jury that "If the plaintiff is entitled to recover at all, she would be entitled to recover such sum as damages for loss of life as would be the present value of the net income of the deceased, and this is to be ascertained by deducting the cost of his living and ordinary expenditures from his gross income and then estimating the present value of the accumulation of such net income based upon the number of years that he would have lived, or his expectancy."

The rule laid down in *Carpenter v. Power Co.*, 191 N. C., 130 (132-3), is as follows: "Under the State law, the damages for the pecuniary worth of the deceased are to be ascertained by deducting the probable cost of his own living and usual or ordinary expenses from the probable gross income derived from his own exertions based upon his life expectancy. *Purnell v. R. R.*, 190 N. C., 573. And in ascertaining these damages, the jury is at liberty to take into consideration the age, health and expectancy of life of the deceased, his earning capacity, his habits, his ability and skill, the business in which he was employed and the means he had for making money—the end of it all being to enable the jury fairly to determine the net income which the deceased might reasonably have been expected to earn, had his death not ensued. In *Benton v. R. R.*, 122 N. C., 1007, the following instruction was approved: 'To enable the jury properly to estimate the reasonable expectation of pecuniary advantage from the continuance of the life of the deceased, they should consider his age, habits, industry, means, business qualifications, skill, and his reasonable expectation of life.' It is only the present worth of the pecuniary injury resulting from the wrongful death of the deceased that may be awarded the plaintiff. It is not the equivalent of human life that is to be given, nor is punishment to be inflicted, or anger to be appeased, or sorrow to be assuaged, but only a fair and just compensation for the pecuniary injury resulting from the death of the deceased is to be awarded," citing authorities.

Damages of this kind, unlike damages for pain, suffering and mental anguish, are susceptible of somewhat accurate proof.

N. C. Code, *supra*, sec. 1790, is as follows: "Mortuary tables as evidence.—Whenever it is necessary to establish the expectancy of continued life of any person from any period of such person's life, whether he be living at the time or not, the table hereto appended shall be received in all courts and by all persons having power to determine litigation, as evidence, with other evidence as to the health, constitution and habit of such person, of such expectancy represented by the figures in the columns headed by the words 'Completed age' and 'Expectation,' respectively," etc.

This statute would indicate, as far as practicable, a formula to estimate the expectancy of the continued life of a person. The pecuniary worth must be ascertained by "deducting the probable cost of his own living and usual or ordinary expenses from the probable gross income derived from his own exertions based upon his life expectancy."

Upon the present record it seems probable, although this is by no means clear, that the difference between deceased's gross income and his gross income "from his own exertions" was substantial and the vice in the charge was the failure of the court below to make this distinction clear, which we think was prejudicial to defendant. In view of the substantial damages involved in the instant case, this must be held as reversible error.

For the reasons given, there must be a

New trial.

J. PAUL LEONARD v. A. J. MAXWELL, COMMISSONER OF REVENUE.

(Filed 16 June, 1939.)

1. Pleadings § 20—

A demurrer tests the sufficiency of a pleading, admitting for the purpose the allegations of fact and relevant inferences of fact deducible therefrom, but it does not admit inferences or conclusions of law.

2. Taxation § 2a—Legislature may make reasonable classification of articles for computation of sales tax.

The Legislature may levy a sales tax or a tax on the business of selling tangible personal property, levied as a license or privilege tax, and classify trades, callings, and occupations for the imposition of the tax, and classify articles sold as the basis for computing the tax, exempting certain classes of articles and providing a graduated tax as to other classes of articles, or differentiate in the method of collecting the tax as to some of the classes, provided the levy applies equally and uniformly to all who fall within each particular classification, and provided the classifications are reasonable and based upon some real distinction.

3. Same—Classifications of property for sales tax made by the Revenue Act of 1937 held reasonable and valid.

The provision of Art. V, Schedule E, of the Revenue Act of 1937, making a distinction between wholesale and retail merchants, and exempting sales of ice, medicines on a prescription, fish and farm products when sold in the original or unmanufactured state, commercial fertilizer, agricultural lime and plaster, public school books, sale of used or repossessed articles, and sales to the Government or governmental agencies, etc., constitute classifications based upon reasonable and real distinctions, and an allegation that the act is void as imposing arbitrary discriminations in making such classifications is untenable.

4. Constitutional Law § 6b: Statutes § 5b—

The presumption is in favor of the constitutionality of an act of the Legislature, and the courts will not declare a statute unconstitutional if it can be upheld on any reasonable ground.

5. Taxation § 2a—

Art. V, Schedule E, of the Revenue Act of 1937, providing that a proportion of the six cents per gallon gasoline tax should be deemed in satisfaction of the privilege sales tax levied by the act, is valid.

6. Taxation § 38c: Constitutional Law § 6b—Party may not attack constitutionality of statute in absence of showing that he has suffered injury thereby.

This action was instituted by a taxpayer to recover a sum paid under protest levied by the Commissioner of Revenue as a privilege sales tax under the provision of Art. V, Schedule E, of the Revenue Act of 1937. It was not alleged in the complaint that plaintiff was engaged in the business of selling building materials or gasoline. *Held:* No facts are alleged showing injury to plaintiff from the provisions of the act relating to the tax on sales of building materials and gasoline, and he is not entitled to attack the constitutionality of the statute in respect thereto.

7. Taxation § 2a—

The fact that a privilege sales tax is levied upon all retail merchants as a single category with exemptions relating to certain classes of articles sold, amounts in effect to classifications for the purpose of taxation, and are valid if the classifications are reasonable, the method by which the classifications are made being immaterial.

8. Taxation § 38c: Constitutional Law § 6b—Party may not attack constitutionality of statute in absence of showing that he has suffered injury thereby.

This action was instituted by a taxpayer to recover an amount paid under protest as a privilege sales tax levied by the Commissioner of Revenue under the provision of Art. V, Schedule E, of the Revenue Act of 1937. The complaint did not allege facts showing any injury resulting to plaintiff by reason of the provision of the act requiring that the tax should be passed on to the consumer, nor that the tax sought to be recovered was paid under the provision of the act imposing a maximum tax of $15 on the sale of any single article of merchandise. *Held:* In the absence of a showing of injury, plaintiff is not entitled to attack the provisions as being discriminatory and unconstitutional.

9. Constitutional Law § 6a: Statutes § 5b—Reapportionment is a political and not a judicial question.

Plaintiff attacked the validity of an act of the General Assembly of 1937 upon allegations that no reapportionment had been made at the first session after the 1930 census as required by Art. II, sections 4, 5 and 6, of the State Constitution, and that therefore the General Assembly passing the act was not properly constituted, and that no legislation attempted thereat was valid. *Held:* Reapportionment is a political and not a judicial question and the allegation of invalidity is a mere conclusion of the pleader and is untenable.

APPEAL by plaintiff from *Hamilton, Special Judge,* at February Term, 1939, of FORSYTH.

Civil action to recover sales tax paid under protest, and alleged to have been wrongfully and illegally collected under the Emergency Revenue Act of 1937.

On 30 August, 1938, the plaintiff, in response to demand therefor and after hearing, paid to the defendant, under protest, $3.13 being 3% of the gross amount of sales made by the plaintiff as a "retail merchant" during the month of May, 1938, and immediately demanded refund thereof, which was declined. In apt time and pursuant to the provisions of the statute, plaintiff brings this action to recover back the tax so paid.

Plaintiff seeks to recover the tax on the ground that Art. V, Schedule E, of the Revenue Act of 1937 (chap. 127), under which it was collected and paid, is unconstitutional. Liability for the tax is conceded if the act be valid.

The statute is assailed on three grounds: (1) Discrimination, in that it is alleged the statute is not applicable to all "retail merchants" alike; (2) Arbitrariness, in that the maximum tax on the sale of any single article of merchandise is fixed at $15.00 without any reasonable basis therefor; and (3) Disqualification of members of the General Assembly, for that no reapportionment was made at the first session after the last general census as required by Art. II, secs. 4, 5, and 6 of the Constitution.

Demurrer interposed on the ground that the complaint does not state facts sufficient to constitute a cause of action. Demurrer sustained and from ruling thereon the plaintiff appeals, assigning error.

Fred M. Parrish and Walter E. Johnston, Jr., for plaintiff, appellant.

Attorney-General McMullan and Assistant Attorney-General Gregory for defendant, appellee.

STACY, C. J. The office of a demurrer is to test the sufficiency of a pleading, admitting, for the purpose, the truth of factual averments well stated and such relevant inferences as may be deduced therefrom, but it does not admit any legal inferences or conclusions of law asserted by the pleader. *Pearce v. Privette,* 213 N. C., 501, 196 S. E., 843; *Kirby v. Reynolds,* 212 N. C., 271, 193 S. E., 412; *Ballinger v. Thomas,* 195 N. C., 517, 142 S. E., 761; *Manning v. R. R.,* 188 N. C., 648, 125 S. E., 555. We must, therefore, look to the allegations of the complaint to ascertain the questions presented.

First. It is alleged that the act in question is void, in that it purports to levy a 3% tax on the gross sales of every "retail merchant" as therein defined, "for the privilege of engaging or continuing in the business of

selling tangible personal property," with the provision that the maximum tax on the sale of any single article of merchandise shall be $15.00, and, at the same time, numerous "retail merchants" engaged in selling tangible personal property are exempted from its provisions, without any reasonable basis for such exemptions, thus resulting in arbitrary discriminations.

What are the alleged invalidating exemptions appearing on the face of the statute? In summary they follow: Sales of (1) ice; (2) medicines on physician's prescription, or compounded, processed or blended by the druggist; (3) products of farms, forests, mines, and waters, when sold by the producers in original or unmanufactured state; (4) fish and sea foods when sold by the fishermen; (5) commercial fertilizers on which inspection tax is paid, and lime and land plaster used for agricultural purposes; (6) public school books on adopted list; (7) used articles taken in trade on sale of new articles and resale of repossessed articles. Exempted also are sales to governments and governmental agencies. Conditional exemptions are allowed on sales of primary and essential articles of food, specifically enumerated, the condition being that the merchant shall keep separate records of such sales.

It is further alleged that certain building materials are arbitrarily exempted from the retail sales tax, and a similar allegation is made in respect of gasoline.

Complaint is also lodged against the following provision: "Retail merchants may add to the price of merchandise the amount of the tax on the sale thereof, and when so added shall constitute a part of such price, shall be a debt from purchaser to merchant until paid, and shall be recoverable at law in the same manner as other debts. It is the purpose and intent of this article that the tax levied herein on retail sales shall be added to the sales price of merchandise and thereby be passed on to the consumer instead of being absorbed by the merchant."

The statute provides that any retail merchant who shall, by public advertisement, offer to absorb the sales tax, or advertise that the tax is not considered as an element in the price to the consumer, shall be guilty of a misdemeanor.

It is observed *in limine* that while the plaintiff alleges the tax in question was not added to the purchase price of the merchandise sold, nor collected by him from the purchasers, the statute gave him this right, and he still has a remedy to save himself harmless from any loss by reason of the imposition of the tax. Whether this circumstance takes from the plaintiff the right to challenge the constitutionality of the act was not considered below, nor has it been urged here, *S. v. Lueders,* 214 N. C., 558, 200 S. E., 22, doubtless for the reason that notwithstanding the opportunity afforded the retail merchant to pass

the tax on to the consumer, the tax itself is in terms levied on "the privilege of engaging or continuing in the business of selling tangible personal property." *Bickett v. State Tax Com.*, 177 N. C., 433, 99 S. E., 415.

As a further preliminary consideration, it may be noted that the right of classification in matters of taxation was expanded or enlarged by amendment to Art. V, sec. 3 of the Constitution, adopted at the general election held in November, 1936, and now extends to property for *ad valorem* as well as franchise purposes, subject to the provision that "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." Chap. 248, Public Laws 1935. It may also be noted that the requirements of "uniformity," "equal protection," and "due process" are, for all practical purposes, the same under both the State and Federal Constitutions. *Clark v. Maxwell,* 197 N. C., 604, 150 S. E., 190, affirmed 282 U. S., 811.

It is conceded that the power to impose license or franchise taxes of the character here in question is undoubted, and the right of selection or classification is referred largely to the legislative will, with the limitation that it must be reasonable and not capricious or arbitrary. *Belk Bros. v. Maxwell,* 215 N. C., 10; *Land Co. v. Smith,* 151 N. C., 70, 65 S. E., 641; *Brown-Forman Co. v. Kentucky,* 217 U. S., 563.

This discretion in the selection of subjects of taxation extends not only to the classification of trades, callings, businesses, or occupations to be taxed, but also to the classification of property to be taxed. *Bickett v. State Tax Com., supra; Rapid Transit Corp. v. New York,* 303 U. S., 573; *State Board of Tax Comrs. v. Jackson,* 283 U. S., 527, 73 A. L. R., 1464; *Kidd v. Alabama,* 188 U. S., 730.

These propositions have been established by the decisions:

1. A sales tax or a tax on the business of selling tangible personal property, levied as a license or privilege tax, is within the power of the taxing authority. *Tea Co. v. Maxwell,* 199 N. C., 433, 154 S. E., 838, affirmed 284 U. S., 575; *Lacy v. Packing Co.,* 134 N. C., 567, 47 S. E., 53, affirmed 200 U. S., 227; *S. v. French,* 109 N. C., 722, 14 S. E., 383, 26 A. S. R., 590; *Gatlin v. Tarboro,* 78 N. C., 122.

2. In levying a sales tax as a license or privilege tax, the General Assembly may set apart certain trades, callings, or occupations for imposition of the tax and exclude others from its operation. *Smith v. Wilkins,* 164 N. C., 136, 80 S. E., 168. The tax may be fixed at a flat rate for some, graduated as to others, and withheld from others. *S. v. Carter,* 129 N. C., 560, 40 S. E., 11; *S. v. Powell,* 100 N. C., 526, 65 S. E., 424. One business may be taxed and another left untaxed. *Carmichael v. So. Coal & Coke Co.,* 301 U. S., 495, 109 A. L. R., 1327.

3. Reasonable selection or classification of the subjects for such taxation may be made by the General Assembly and different rates or different modes and methods of assessment applied to different classes. *Rosenbaum v. New Bern,* 118 N. C., 83, 24 S. E., 1; *S. v. Stevenson,* 109 N. C., 730, 14 S. E., 385, 26 A. S. R., 595. A wide latitude is accorded the taxing authorities in the selection of subjects for taxation, particularly in respect of occupation taxes. *Oliver Iron Mining Co. v. Lord,* 262 U. S., 172.

4. The limitation on the legislative discretion is that the classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Royster Guano Co. v. Virginia,* 253 U. S., 412. "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.' " *Land Co. v. Smith, supra.*

5. Equality within the class or for those of like station and condition is all that is required to meet the test of constitutionality. *S. v. Stevenson, supra.* "A tax on trades, etc., must be considered uniform when it is equal upon all persons belonging to the prescribed class upon which it is imposed." *Gatlin v. Tarboro, supra.*

6. Discrimination may exist among the classes. *Rapid Transit Corp. v. New York, supra.* The equal protection clause does not forbid discrimination in respect of matters and things that are different. *Puget Sound P. & L. Co. v. Seattle,* 291 U. S., 619.

7. In proper instances, exemptions from the general rule of either persons or property may be regarded as permissible limitations or as allowable exceptions made in the exercise of the power of classification. *Smith v. Wilkins, supra; Cobb v. Comrs.,* 122 N. C., 307, 30 S. E., 338; *Stewart Machine Co. v. Davis,* 301 U. S., 548, 109 A. L. R., 1293. "The rule of equality permits many practical inequalities. And necessarily so. . . . What satisfies this equality has not been and probably never can be precisely defined." *Magoun v. Illinois Trust & Savings Bank,* 170 U. S., 283. "And inequalities that result not from hostile discrimination, but occasionally and incidentally in the application of a system that is not arbitrary in its classification, are not sufficient to defeat the law." *Maxwell v. Rugbee,* 250 U. S., 525. "The operation of a general rule will seldom be the same for every one. If the accidents of trade lead to inequality or hardship, the consequences must be accepted as inherent in government by law instead of government by edict." *Fox v. Standard Oil Co.,* 294 U. S., 87.

8. Finally and in brief, the test is this: Does the classification rest upon a relevantly rational basis and is the tax uniform in respect of those similarly situated? *Louisville Gas Co. v. Coleman,* 277 U. S., 32. "The boundary between what is permissible and what is forbidden by the constitutional requirement has never been precisely fixed and is incapable of exact delimitation." *Colgate v. Harvey,* 296 U. S., 404.

Applying these principles to the provisions of the act in question, it is observed, first, that the classification and exemptions apply alike to all retail merchants affected by the act; and, secondly, that reasonable and pertinent bases for such classification and exemptions are readily discernible. This is all that is required to sustain the constitutionality of the act. *Provision Co. v. Maxwell,* 199 N. C., 661, 155 S. E., 557. The exemptions upheld in the case of *Smith v. Wilkins, supra,* cover nearly all the articles here challenged. In many instances they are the same, e.g., ice, products of farm, fish, books, etc. Similar distinctions may be pointed out in respect of the other exceptions made in the Emergency Revenue Act of 1937.

Given the power of classification based on reasonable differences, the General Assembly may place proprietary medicines in one class, and those prepared on prescription or compounded by the druggist in another. It may tax one of these classes according to one rule, and the other according to another; or it may tax one and refuse to tax the other. *Smith v. Wilkins, supra.* Likewise, throughout the list of exemptions enumerated in the statute, reasonable distinctions may be suggested. It is proper to classify merchants as "wholesalers" and "retailers," and tax them differently. *Cook v. Marshall,* 196 U. S., 261. Merchants dealing in second-hand clothing may be separated from other merchants. *Rosenbaum v. New Bern, supra.* Brokers and pawnbrokers may be put in different classes. *Schaul v. Charlotte,* 118 N. C., 733, 24 S. E., 526. The integrated chain store as compared with the voluntary type may be made the basis of differentiation. *Liggett Co. v. Lee,* 288 U. S., 517. One business may be taxed and another of an allied kind exempted. *Lacy v. Packing Co., supra.* The sale of cigarettes may be taxed and other tobacco products not. *Ex parte Asotsky,* 319 Mo., 810, 5 S. W. (2d), 22. Commercial fertilizers, lime and land plaster may be exempted in aid of agriculture without doing violence to the rule of uniformity. *S. v. Spaugh,* 129 N. C., 564, 40 S. E., 60. So, also, may sales to governments and governmental agencies be exempted, *State v. Smith,* 338 Mo., 409, 90 S. W. (2d), 405, as well as primary and essential articles of food. *Morrow v. Henneford,* 182 Wash., 625, 47 Pac. (2d), 1016. Likewise the sales of farm and other products when sold by the producer in the original or unmanufactured state may be exempted from the general tax. *S. v. Stevenson, supra; S. v. French, supra.*

Other instances might be cited, but the foregoing will suffice to show the trend of the decisions on the subject and to indicate how slight the differences need be, when pertinent and real, to sustain the classification and to obtain the imprimatur of judicial approval. *Colgate v. Harvey, supra.* Indeed, it is not after the manner of the courts to strike down such legislation if it can be upheld on any reasonable ground. *Belk's Gap R. Co. v. Pennsylvania,* 134 U. S., 232. The presumption in favor of validity is in full support of the rule. *S. v. Lueders, supra.* Of necessity, no unbending rule of equality can be applied in such cases. *Rapid Transit Corp. v. New York, supra.* The power to classify *ex necessitate* carries with it the discretion to select the subjects of taxation and to grant exemptions. In the nature of things, narrow distinctions are sometimes invoked, and if founded on a rational basis and reasonably related to the object of the legislation, the courts will not say that a different result should have been reached or that the differentiation is arbitrary. *Provision Co. v. Maxwell, supra.* "Such differences need not be great." *State Board of Tax Comrs. v. Jackson, supra.* However, "*mere* difference is not enough." *Louisville Gas Co. v. Coleman, supra.* It must be relevant or pertinent as well as rational.

The matter is covered in a pithy paragraph by *Mr. Justice Holmes* in the case last cited, where he says: "When a legal distinction is determined, as no one doubts that it may be, between night and day, childhood and maturity, or any other extremes, a point has to be fixed or a line has to be drawn, or gradually picked out by successive decisions, to mark where the change takes place. Looked at by itself without regard to the necessity behind it the line or point seems arbitrary. It might as well or nearly as well be a little more to one side or the other. But when it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the legislature must be accepted unless we can say that it is very wide of any reasonable mark."

The allegations pertaining to building materials and gasoline are wanting in accuracy. The tax on specified building materials is levied on the purchaser or user, and not on the seller, except when sold by a "wholesale merchant." *Supply Co. v. Maxwell,* 212 N. C., 624, 194 S. E., 117. Of this, the plaintiff is in no position to complain. Likewise, it is provided that "a proportion of the tax of six cents per gallon" on gasoline otherwise taxed, "shall be deemed in satisfaction of the tax upon retail sales levied in this article." This meets the requirement of constitutionality. Re Opinion of Justices, 88 N. H., 500, 190 Atl., 500. Moreover, no facts are alleged to show injury to the plaintiff from any discrimination within these classes. He is not engaged in the business of selling either building materials or gasoline.

The fact, if it be a fact as plaintiff alleges, that all "retail merchants" engaged in the business of selling tangible personal property, are, by the terms of the act, placed in a single category, and then numerous withdrawals are made in the form of exemptions, amounts in the end to no more than the exercise of the power of classification. The method of selection is not material, so long as the results are lawful. *Gregg Dyeing Co. v. Query,* 286 U. S., 472.

If it be thought the suggested reasons underlying these exemptions and advanced in favor of their validity, are subject to some debate in the field of pure logic, it is enough to say they were regarded as sufficient in the legislative halls and are well understood by those acquainted with the life of our people. *Carmichael v. Southern Coal & Coke Co., supra.* Moreover, it should be remembered that in devising a scheme of taxation, "the State is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use, or value." *Ohio Oil Co. v. Conway,* 281 U. S., 146. Nor is it confined to a formula of rigid uniformity. *Swiss Oil Corp. v. Shanks,* 273 U. S., 407. It may tax some kinds of property at one rate, and others at another, and exempt others altogether. *Stewart Machine Co. v. Davis, supra.* "Some play must be allowed for the joints of the machine." *M. T. & K. Ry. Co. v. May,* 194 U. S., 267.

The plaintiff derives a modicum of comfort from the decision in *Winter v. Barrett,* 352 Ill., 441, 186 N. E., 113, 89 A. L. R., 1398. It supports his position. The case has not been followed in other jurisdictions, however, and is not controlling here. It is at variance with a number of pronouncements elsewhere. See *Amer. Sugar Refining Co. v. Louisiana,* 179 U. S., 89; *Bank v. Edwards,* 27 N. C., 516; *Bank v. Deming,* 29 N. C., 55; *State ex rel. Botkin v. Welsh,* 61 S. D., 593, 251 N. W., 189; *State ex rel. Stiner v. Yelle,* 174 Wash., 402, 25 Pac. (2d), 91.

The provisions in respect of passing the tax on to the consumer, and prohibiting the retail merchant from advertising otherwise, are not here involved. *Pierce Oil Co. v. Hopkins,* 264 U. S., 137. The plaintiff has alleged no hurt from these provisions. *St. George v. Hardie,* 147 N. C., 88, 60 S. E., 920. If others have been aggrieved thereby, it suffices to say the plaintiff can speak only for himself. In matters of constitutional challenge, he is not his brother's keeper. *Newman v. Comrs. of Vance,* 208 N. C., 675, 182 S. E., 453.

Second. It is further alleged that the maximum tax of $15.00 on the sale of any single article of merchandise is arbitrary, and perforce results in discrimination.

The plaintiff has aimed his hardest blows at this provision. He points out that the limitation is not on a single sale, but on the sale of

a single article. *Stewart Dry Goods Co. v. Lewis*, 294 U. S., 550. Conceivably, he says, one merchant may sell a number of articles for $1,000 and pay a tax of $30, while another sells a single article for a like amount and is taxed $15, the only basis of distinction being in the number of articles sold, with the limitation favoring the sale of the single article. *Tea Co. v. Doughton*, 196 N. C., 145, 144 S. E., 701; *S. v. Dixon*, 215 N. C., 161.

The defendant, on the other hand, suggests that the limitation has the effect of creating a class of articles selling for $500 and more, and in no way offends against the legislative discretion of classification. *Powell v. Maxwell*, 210 N. C., 211, 186 S. E., 326. At most, he says, it is an uniform restriction applicable alike to all. *Wayne Mercantile Co. v. Mt. Olive*, 161 N. C., 121, 76 S. E., 690, 49 L. R. A. (N. S.), 954. If the sale of articles of small value may be exempted for administrative reasons, *Drug Co. v. Luke*, 48 Ariz., 467, 62 P. (2d), 1126, the limitation of the tax upon the sale of any single article would seem to be allowable on practical or economic grounds. *Carmichael v. So. Coal & Coke Co., supra; Ficklen Tob. Co. v. Maxwell*, 214 N. C., 367, 199 S. E., 405.

As the total tax which plaintiff seeks to recover is only $3.13, and therefore less than the maximum tax collectible on the sale of any single article, it would seem that he is in no position to complain at the limitation. For aught that appears, he has suffered no injury. His tax has not been increased thereby. Nor could he derive any benefit from a favorable decision on the point, because in sec. 839 it is provided that if any clause, sentence, paragraph, or part of the act be adjudged invalid, "such judgment shall not affect, impair, or invalidate the remainder of this act but shall be confined in its operation to the clause, sentence, paragraph, or part thereof directly involved in the controversy in which such judgment shall have been rendered." *Riggsbee v. Durham*, 94 N. C., 800; *Supervisors v. Stanley*, 105 U. S., 312. The plaintiff's present position is not that of one who can challenge the validity of the provision. *St. George v. Hardie, supra.*

Third. The third ground upon which the plaintiff assails the validity of the act is, that the General Assembly of 1937 was not properly constituted because no reapportionment was made at the first session after the last census as required by Art. II, secs. 4, 5, and 6 of the Constitution, and that none of the legislation attempted at this session can be regarded as possessing the sanctity of law. In other words, as the first session of the General Assembly after the 1930 census was the session directed by the Constitution to make the reapportionment, and failed to do so, it is suggested that no other session is competent to make the reapportionment or to enact any valid legislation and that henceforth no

de jure or legally constituted General Assembly can again be convened under the present Constitution. Quite a devastating argument, if sound.

Plaintiff concedes in his brief, however, and rightly so, that the authorities are against him on this point. *People ex rel. Fergus v. Blackwell et al., Members of the General Assembly,* 342 Ill., 223, 173 N. E., 750. The question is a political one, and there is nothing the courts can do about it. *State ex rel. Cromelieu v. Boyd,* 36 Neb., 182, 54 N. W., 252, 19 L. R. A., 227. They do not cruise in nonjusticiable waters. *Coleman v. Miller,* 305 U. S., ..., decided 5 June, 1939.

The allegation in the complaint is but a conclusion of the pleader, and is untenable. *People v. Clardy,* 334 Ill., 638, 166 N. E., 640.

It results, therefore, that the demurrer was properly sustained.

Affirmed.

STATE v. JAMES HENDERSON.

(Filed 16 June, 1939.)

1. Jury § 8: Constitutional Law § 27: Criminal Law § 81a—Evidence held to support finding that names of colored citizens were not excluded from jury box.

Defendant, a Negro, filed a plea in abatement before the selection of a jury on the ground that qualified members of his race had been excluded from the jury box. The trial court found upon supporting evidence that the names of qualified members of the Negro race had been placed in the box and that the jurors were properly selected therefrom by a child under ten years of age, and overruled the plea in abatement. *Held:* The findings of the trial court are conclusive upon appeal and the ruling of the court will not be disturbed, there being no evidence of any abuse of discretion.

2. Criminal Law §§ 44, 81a—A motion for continuance is addressed to discretion of the trial court.

A motion for continuance is addressed to the discretion of the trial court, and where it appears that counsel appointed were given the names of the State's witnesses, that defendant confessed the commission of the crime, and that he presented numerous witnesses who testified in support of the matter asserted by him as a defense, defendant's exception to the refusal of the court to grant a continuance cannot be sustained, there being no indication of any abuse of discretion.

3. Criminal Law § 77c—

Where the charge of the court is not in the record, it will be presumed that the court fairly and correctly charged every phase of the law applicable to the evidence.

STATE *v.* HENDERSON.

APPEAL by defendant from *Burgwyn, Special Judge,* and a jury, at November Term, 1938, of NEW HANOVER. No error.

The defendant was tried on a bill of indictment charging him with murder, on 6 November, 1938, of Mrs. Stella Hobbs. The jury rendered a verdict of murder in the first degree. The court below pronounced judgment of death by asphyxiation.

Mrs. Stella Hobbs, 43 years of age, whose husband had been dead for about one year, was last seen by her daughter on Sunday morning, 6 November, between 4:30 and 5 o'clock, when the daughter had gone back to sleep while her mother was talking to her from her bedroom. Her body was found early Sunday morning about 3 feet from the back of her overturned automobile. No glass in the automobile was broken. It was lying on its right side, but the top of the automobile looked as if it had been torn or cut, or pulled loose. The hole in the top was large enough to get a body through. The head was lying in a pool of blood and there were two wounds on the right side of the head above the ear about the size of a quarter. The skull was knocked in and this brain wound was sufficient to have caused death. The body was covered with bruises, particularly around the face and eyes. A further examination that afternoon showed evidence of recent intercourse. The body was in such a position that the deceased could not have been thrown from the car, and there were no tracks of her own shoes, nor anything to show how she got there.

The defendant, a 20-year-old Negro, about six feet three inches tall, weighing 190 pounds, was seen running from the scene of the accident early Sunday morning. His shoes fit the tracks leading from the car. A lug wrench was found in the car with some blood and hair on the socket end, the hair being the same as the deceased's.

The defendant made two statements to the police. The record shows that these statements were made voluntarily and without compulsion. The first statement was made on Monday, and the defendant stated that Mrs. Hobbs wanted him to buy some whiskey for her and that he finally got into the car and that she drove so recklessly that they turned over. He then stated that he put his feet on the seat and pushed his head and shoulders through the top but did not help her out. He ran from the scene of the accident and stated that he was afraid to report it. The defendant stated that she was getting out of the car when he ran off, but later, in the same statement, he says: "I don't believe she regained consciousness after the car turned over."

The second statement was made to the police on Tuesday. The defendant again stated that Mrs. Hobbs tried to get him to buy some whiskey for her and that finally he got in the car and, at her direction, drove, although he had no experience in driving an automobile. He

admitted the intercourse and stated that the accident happened while he was attempting to turn around. He stated that he pulled Mrs. Hobbs through the hole in the top of the car, and that she was mad and threatened him and that he struck her with his fist and hit her with a lug wrench and then ran.

The defendant went on the stand in his own behalf. According to this testimony, Mrs. Hobbs was drunk, and the defendant himself was so drunk that he didn't know what he was doing, although his testimony was inconsistent on this point. There is considerable confusion in his attempts to deny the statements made to the police. Consider the following testimony in regard to his second statement, admitting that he struck the deceased with the lug wrench.

"They said they had my fingerprints on the wrench, and if they had, I must have had my hand on it, and if I was the only one that touched the wrench I must have hit her. I only made the statement about striking Mrs. Hobbs from the suggestions made me by the officers."

"The officers explained she was hit and I said I must have did it. I didn't deny hitting her and I still don't."

C. David Jones, sheriff, recalled, testified: "On Monday of this week I had a conversation with the defendant relative to these two statements. He told me the first statement he made on Sunday night was not true, or that the statement he made on Monday rather, was not true, but the one he made on Tuesday was true, but for one thing that he wanted to get straight; that he wanted to tell the truth about the whole thing, and didn't want to leave a blemish, or anything, on Mrs. Hobbs' character, because he had known her and had nothing against her. He said in the presence of his mother on Monday night, Mr. Fales, Mr. Thompson and myself that there was one point he wanted to clear up in his second statement, which had been made on Tuesday, the 8th of November, and that was that Mrs. Hobbs was a good woman, and had a boy and girl that were nice children, and he didn't want to leave the blemish against the children, and that Mrs. Hobbs didn't know anything about the intercourse; that she didn't give her permission, and I asked the question, 'James, what caused you to do that; what caused you to do what you did and to kill Mrs. Stella?' and he said, 'I don't know, sir.' I said, 'Were you drunk?' He said, 'I was drinking.' I said, 'Was it the animal passion that got the best of you?' and he said, 'It was both.' That is about the sum and substance of what was said."

The evidence of the State was that the deceased, Mrs. Stella Hobbs, was 43 years old and was the widow of J. T. Hobbs, who died 3 October, 1937. A colored woman, Janie Williams, worked for Mrs. Hobbs whenever she went for her. The deceased would usually leave early on Sundays to go for Janie Williams and would travel in her car. The

deceased was at her home something like a quarter to five o'clock on Sunday morning, 6 November, 1938, and was found dead about 6:30 o'clock that morning. She had gone in the direction of Janie Williams' home in her car.

The confession of defendant was corroborated in every respect. The State's evidence was to the effect that the deceased was raped and then murdered by defendant. That the part of defendant's confession that she consented to the intercourse and her drinking at the time was untrue. The defendant lived about a block from the dead woman. The confession was corroborated in all material respects—the fastness of the car, he was seen running from the scene of the crime and told witness Elvin Lee: "And I said what are you doing down here, and he said tending to some business, and he said don't tell any damn body you saw me."

As to the identity of the footprints, W. D. Thompson, witness for the State, testified, in part: "His shoe fitted the track as perfect as it was possible to fit it. He later admitted to me in the presence of other officers that the track I fitted his shoe in—the two tracks—were made by him."

The defendant testified in part: "The last thing I remember during the drive was when the car turned over. It turned over one way or the other; I don't remember which way it turned over, but after I managed to get out of the car, I taken her by my ownself—I must have helped Mrs. Hobbs out of the car. I don't know what I did, but I must have, and after that I don't know anything that happened. . . . I was driving the car when it turned into Thirteenth Street, and Mrs. Hobbs was unable to drive herself. She was absolutely drunk. I don't think she knew a thing. . . . I don't recall saying anything to my mother on Monday night. I said several things to her, and asked how she was. I told her in case they found me guilty, which I am not, and was condemned to die, I told her not to bring my body home. That is all I told her. I did say I didn't want to leave a stain on the children of Mrs. Hobbs. I said I wanted to say I didn't have an intercourse with her with her consent. If I had it, it had to be without her will; she would never have given her consent. These officers said there were bruises on her jaw, and that she was hit with my fist, and I told them my being the only man with her, I must have hit her. I don't know what's in that paper about hitting her on the jaw. I know what I said as far as I am able to call back. The officers did not know about my confession. The officers explained she was hit and I said I must have did it. I didn't deny hitting her, and I still don't. I don't know whether she was standing, stooping or sitting. I didn't have the wrench home with me when I got home; I didn't have it in the bed with me.

I don't know what I did with it. I don't recall especially running. I don't know whether I fell down."

It was in evidence that defendant had been arrested for vagrancy and his fingerprints taken. The defendant introduced several witnesses as to his drinking pretty heavily Saturday night; playing pool and when he missed a ball would curse, etc. "He was drinking, I would not say he was what you call real drunk." Thos. Betts, witness for defendant, testified: "I know James Henderson. I saw him Sunday morning at my home. . . . I could not say he was drunk but he was under the influence; a drunk man can't walk. That was five minutes to six Sunday morning. It was not dark at that time."

Upon the judgment of death being pronounced, on the verdict of guilty of murder in the first degree, the defendant made several exceptions and assignments of error and appealed to the Supreme Court. They and the necessary facts appearing in the record will be considered in the opinion.

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

Alan A. Marshall and W. F. Jones for defendant.

CLARKSON, J. The exceptions and assignments of error are as follows: (1) The defendant, before the selection of a jury, filed in writing a plea in abatement based on the exclusion of qualified members of the Negro race from the jury box. We think there is no error in the denial of the plea on this record. (2) The denial of defendant's plea for a continuance. In this we can see no error.

The court below on the plea in abatement being filed by defendant, made the following entry in the record: "This cause coming on to be heard before the undersigned judge, the following facts are found: That the defendant was indicted by the grand jury of New Hanover County of murder in the first degree, true bill for same being returned by the grand jury on the morning of the 14th of November, and the court being apprised of the fact that the defendant was without counsel, and without means to provide private counsel for his defense, and being informed by the solicitor for the State that he would ask for a verdict of guilty of murder in the first degree, thereupon, appointed as counsel for the defendant two reputable lawyers of the New Hanover County Bar, to wit: Alan A. Marshall and W. F. Jones, and informed them of their appointment, the same being accepted. The court further finds that at 2:30 p.m., on the 14th day of November, 1938, the defendant was arraigned in open court, and for his plea to the bill of indictment entered a plea of not guilty, which plea was made in his own proper

person and by his attorneys, each standing by his side. The court further finds as a fact that the cause was then set for trial at 2:30 the following day, Tuesday the 15th, and upon the agreement of counsel for the State and for the defense that seventy-five names would be sufficient to constitute a special venire to serve as jurors in this case in addition to the regular panel, if such regular panel should become exhausted, and thereupon a child under the age of ten years, to wit, Horace Thomas Chinnis, drew the names from the jury box of the county in accordance with the law, in the presence of the defendant and of his counsel; that at the commencement of the afternoon session, 2:30 p.m., November 15, 1938, the defendant's counsel filed a plea in abatement, which plea in abatement is supported by an affidavit signed by Thomas Woody. The court further finds as a fact that the affidavit supporting the plea of abatement does not disclose to the court that there are not now in the jury box of New Hanover County the names of colored citizens of the county, but, to the contrary, shows that two years ago a number of names of the Negro race were placed in such jury box, and the court finds that the names of members of the Negro race of New Hanover County have been, within the last two years, placed in the jury box of New Hanover County. The motion of plea in abatement is not allowed by the court, in its discretion, and the same is hereby overruled."

In *S. v. Walls,* 211 N. C., 487 (494), speaking to the subject, it is said: "The exclusion of all persons of the Negro race from a grand jury, which finds an indictment against a Negro, where they are excluded solely because of their race or color, denies him the equal protection of the laws in violation of the Constitution of N. C., and the United States. *S. v. Peoples,* 131 N. C., 784." *Strauder v. W. Va.,* 100 U. S., 303, 25 L. Ed., 664; *Neal v. Del.,* 103 U. S., 370, 26 L. Ed., 567; *Norris v. Ala.,* 294 U. S., 587, 55 S. Ct., 578 (1933) (second Scottsboro case).

There was some evidence to sustain the above finding of fact made by the court below. It has been generally held by this court that the findings of fact are conclusive on appeal in the absence of gross abuse. *S. v. Walls, supra,* p. 494. The *Walls case, supra,* on appeal to the U. S. Supreme Court, was dismissed, 302 U. S., 635, 58 S. Ct., 18.

In *Thomas v. Texas,* 212 U. S., 278, 53 L. Ed., 512, it is said: "Whether such discrimination was practiced in this case was a question of fact and the determination of that question adversely to plaintiff in error by the trial court and by the court of criminal appeals was decisive so far as this Court is concerned, unless it could be held that this decision constituted such abuse as amounted to an infraction of the Federal Constitution."

The following motion was made by defendant on 15 November, 1938: "Now comes the defendant, James Henderson, charged with the crime

of murder in the first degree, through his counsel, Alan A. Marshall and W. F. Jones, and respectfully moves this honorable court that the trial of this cause be continued, for that: The defendant was apprehended and placed in custody on or about the 8th day of November, 1938, and since that time has been held incommunicado by the law enforcement officers of the city of Wilmington and New Hanover County and the State of North Carolina, and that shortly after the 8th day of November, 1938, the said defendant was removed to the State Prison in Raleigh, North Carolina, and was confined there until the 14th day of November, at which time he was returned to the city of Wilmington, North Carolina, arriving in Wilmington, North Carolina, in the custody of several officers at or about noon on the 14th day of November, 1938, and that about 10:30 a.m., on the 14th day of November, 1938, the Honorable W. H. S. Burgwyn, judge presiding, informed Alan A. Marshall that he was going to appoint the said Marshall to represent the said defendant and requested him to be present at 2:30 on that day, at which time the defendant would be arraigned, whereupon the said Alan A. Marshall prayed the court to appoint another attorney to assist him in the presentation of the defense of the said James Henderson, which prayer was granted by the court; that at or about 2:30 on the 14th day of November, Alan A. Marshall and W. F. Jones presented themselves before the court, and for the first time saw the defendant, James Henderson, in court. The defendant was arraigned and pleaded 'Not guilty,' whereupon the court instructed the court reporter to let the records show that Alan A. Marshall and W. F. Jones were thereby appointed to represent the defendant and as counsel for the defendant have not had sufficient time in which to discuss the case with the client to investigate the facts and the law applicable to the cause, and, in brief, have not, in their opinion, had sufficient time in which to properly prepare the case for the defendant and present his defense in an adequate way as the said defendant is entitled to by law."

"The court finds as a fact that immediately after the arraignment of the defendant the court requested the solicitor for the State to give to the counsel for the defendant the names of each and every witness for the State whom they might have a desire to examine. Whereupon, the solicitor did give to the counsel for the defendant the names of the witnesses, and other evidence in writing which he proposes to introduce against the defendant, and the court now asks the defendant's counsel if there is anyone in the State of North Carolina they desire as a witness in this case. (Mr. Marshall): 'So far as we know there is no specific witness, or no specific information. Therein lies the point of our motion for continuance. We feel, and respectfully submit to your Honor, that we have not had time (barely twenty-four hours as a matter

of fact) to talk, first to this man; to talk to the witnesses whom he has given us, and to delve into the law applicable to the case, and attempt to present his case in an adequate way. Lack of time for the disclosure of information materially goes to the soul of our motion.' (Court:) Upon the completion of the selection of the jury tonight, if you desire further time, I will continue the trial of the case until morning for you. . . . Let the record show that after the jury has been selected, sworn and impaneled, counsel for the defendant signified their readiness to proceed."

"This Court has wisely left the matter in the sound discretion of the court below unless there is 'palpable abuse' or 'gross abuse' of this discretion. This Court in a most thorough opinion, citing a wealth of authorities, said in *S. v. Sauls,* 190 N. C., 810 (813): '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," . . . "palpable abuse" . . . or "gross abuse" . . .' *S. v. Rhodes,* 202 N. C., 101 (102-3); *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)." *S. v. Godwin, ante,* 49.

The record discloses that the court below was right in its discretion in refusing a continuance. The defendant confessed to the crime and had numerous witnesses to testify as to his drinking that night. If the case had been continued it would not have advantaged defendant. The charge of the court below is not in the record and the presumption of law is that the court fairly charged every phase of the law applicable to the facts, including that of intoxication affecting defendant's capacity to form sufficient intent to kill the deceased with premeditation and deliberation with malice aforethought. The defendant in his testimony said, "The officers explained she was hit and I said, 'I must have did it.' I didn't deny hitting her and I still don't." The facts in the record against the defendant are sordid and repulsive—all the evidence indicates that while drinking defendant raped the deceased and brutally murdered her with a lug wrench, wounds were on her head and elsewhere on her person. If the jury had been composed entirely of persons of the Negro race, from the evidence the verdict could not have been otherwise.

On this record there is no prejudicial or reversible error.

No error.

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

(Filed 16 June, 1939.)

1. Sheriffs § 2—

While the office of sheriff is provided for by Art. IV, sec. 24, of the State Constitution, the right of the sheriff to appoint deputies is a common law right and deputies appointed by the sheriff are public officers, but their duties and authority relate only to ministerial duties imposed by law upon the sheriff, in the performance of which they act for the sheriff in his name and right.

2. Jails § 1—

The duties of a jailer are those prescribed by statute and those recognized by common law, and he has no authority by virtue of his office to serve processes or make arrests except, perhaps, in preventing an escape.

3. Same—Positions of deputy sheriff and jailer are separate and distinct.

Where a person appointed by the sheriff as a deputy is also appointed by him as jailer, and subsequent to an act authorizing the county commissioners to designate the jailer (Public-Local Laws of 1935, ch. 201) the commissioners permit him to continue his employment as jailer and pay him the salary fixed by the commissioners, such person necessarily acts either in his capacity as deputy sheriff by appointment of the sheriff or as jailer by virtue of his employment by the county, the two positions being separate and distinct.

4. Master and Servant § 39d—Evidence held insufficient to support finding that employee was injured and killed in the course of his employment as jailer.

The evidence tended to show that the deceased employee had been appointed by the sheriff as a deputy and had been employed by the county as jailer, that while in the jail he was advised that a man in the vicinity of the jail had shot his wife, that he left the jail and was killed while attempting to arrest the man as he was preparing to flee. *Held:* In attempting to make the arrest the employee was acting in his capacity as deputy sheriff, such act being outside the scope of his employment as jailer, and the evidence is insufficient to support a finding by the Industrial Commission that he was fatally injured in an accident arising out of and in the course of his employment as jailer.

CLARKSON, J., dissenting.

DEVIN, J., dissenting.

SCHENCK, J., concurs in the dissenting opinion of DEVIN, J.

APPEAL by defendants from *Sinclair, Emergency Judge,* at January-February Term, 1939, of ALAMANCE. Reversed.

Proceeding under North Carolina Workmen's Compensation Act to determine liability of defendants to plaintiff, an employee of Alamance County.

This cause was here at the Spring Term, 1938, and was remanded, with directions that the Industrial Commission clarify an alternative finding that the deceased either as a deputy sheriff or as jailer, or in the dual capacity of deputy sheriff-jailer, suffered an injury by accident arising out of and in the course of his employment resulting in his death, by definitely finding whether the deceased suffered such injury by accident arising out of and in the course of his employment as jailer.

Pursuant to an order of remand by the court below in accord with the opinion of this Court, *Gowens v. Alamance County,* 214 N. C., 18, and after notice to the parties, the Industrial Commission entered its opinion in which it is stated:

"The full commission, after reviewing the evidence and file in this case, now finds as a fact that the said Lawrence Gowens did suffer an injury by accident arising out of and in the course of his employment as jailer on July 31, 1936, resulting in his death.

"This finding is made as a supplement and in addition to the findings heretofore made and set out in the record." Thereupon an award was made and the defendants appealed. When the cause came on to be heard in the Superior Court the court below sustained the finding of the commission and affirmed the judgment awarding compensation to plaintiffs. Defendants excepted and appealed.

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

BARNHILL, J. Upon the rehearing the Industrial Commission adopted and reaffirmed its former findings. They now stand as the findings in this cause except as they are modified by the conclusion of the Commission that the deceased at the time of his injury and death was acting as jailer.

In the opinion of the hearing commissioner, approved by the full commission, we find the following resume of the evidence, to wit: "The evidence discloses that on the day Lawrence Gowens was killed he was at the jail about his duties, and was called to come immediately to the home of one Bob Campbell, who lived just two doors from the jail, nearly in the back yard of the jail, and was advised that the said Campbell had shot his wife. The deceased went immediately to the home of said Bob Campbell where the wife of Campbell had been seriously wounded by a gunshot inflicted upon her by her husband, Bob Campbell, and he, Deputy Sheriff Gowens, the deceased, thereupon found Campbell armed with a shotgun and in the act of leaving his home, and when

the deceased attempted to arrest the said Campbell and deter him from fleeing, he was fatally shot by Campbell, from which injuries he died within a short while thereafter."

In the original award the commission held that deceased acted in a dual capacity and undertook to treat the positions held by him as one. It concluded that he acted either in the capacity of deputy sheriff in charge of the jail or as jailer authorized to perform the duties of a deputy sheriff.

While these two offices, or positions, are usually held by one person for convenience and efficiency, they are separate and distinct. The Constitution provides for the office of sheriff. N. C. Const., Art. IV, sec. 24. There is no constitutional authority for appointment of deputies sheriff. The right of the sheriff to appoint deputies is a common law right. "The deputy is an officer coeval in point of antiquity with the sheriff." *Lanier v. Greenville,* 174 N. C., 311, 93 S. E., 850; *Borders v. Cline,* 212 N. C., 472, 193 S. E., 826. He is the deputy of the sheriff, one appointed to act ordinarily for the sheriff and not in his own name, person or right, and although ordinarily appointed by the sheriff, is considered a public officer. 57 C. J., 731, Sec. 4. The duties and authority of a deputy sheriff relate only to the ministerial duties imposed by law upon the sheriff. *Borders v. Cline, supra.*

Likewise, the position of jailer is one of common law origin and has existed from time immemorial. The statute, C. S., 3944, provides that: "The sheriff shall have the care and custody of the jail in his county; and shall be, or appoint, the keeper thereof." The duties of the jailer are those prescribed by statute and such as were recognized at common law.

In Alamance County, until 1935, the sheriff had the right to appoint the jailer under the provisions of C. S., 3944, and of ch. 559, Public-Local Laws 1927. The Legislature, by ch. 201, Public-Local Laws 1935, repealed ch. 559, Public Laws 1927, and vested in the Board of Commissioners of Alamance County "full power and authority to name and designate the jailer and such other assistants as in the opinion of said board shall be necessary to properly maintain, operate and supervise the said jail and the inmates therein, and to prescribe the rules and regulations and general policies of such operation, maintenance and supervision of said jail, and to prescribe the duties of the said jailer and his assistants."

After the enactment of ch. 201, Public-Local Laws 1935, the commissioners of Alamance County permitted the deceased, who had theretofore been appointed jailer by the sheriff, to continue his employment as such without any new appointment. They paid him his salary fixed by the commissioners and the turnkey fees allowed by law. The mere fact that they did not specifically reappoint him did not affect his posi-

tion as an employee of the county from and after the enactment of the recited statute.

We have been unable to find in the common law, or in the decisions or statutes of this State, any declaration or provision which could be interpreted as vesting in the jailer any authority to serve process or make arrests. Whenever he undertook to do so, except perhaps in attempting to recapture a prisoner who had escaped from his custody, of necessity, he was acting in his capacity as deputy sheriff, and not as jailer.

There is no such position as deputy sheriff-jailer known to the law. When the deceased undertook to act in given instances he was acting either as jailer by virtue of his employment by the county, or as deputy sheriff under his appointment by the sheriff.

As stated in the original findings of the commission, when the deceased went to the scene of the shooting and found Campbell, the man who had shot his wife, armed with a shotgun and in the act of leaving his home, "Deputy Sheriff Gowens, the deceased," attempted to arrest him. In so doing he was acting in his capacity as a deputy sheriff. If he was undertaking to act in his capacity as jailer, then his act in attempting to arrest Campbell was entirely outside the scope of his employment as jailer, and the injuries he received in attempting to make the arrest did not arise out of or in the course of his employment by the county as such. No other conclusion is permissible.

That he was undertaking to act as deputy sheriff is not only supported by the specific findings of fact by the commission, but by other evidence in the record which tends to show that a person nearby called to the wife of the deceased, informed her of the shooting, and inquired for the sheriff. In consequence of the information and the inquiry for the sheriff, his deputy, the deceased, as it was his duty to do as deputy sheriff, responded.

In the liability policy issued by the defendant the deceased was named as an employee of the county. He received an injury which caused his death. If the fact that, although the deceased was insured, he cannot recover, makes this appear as a hard case, we must bear in mind that the defendant Indemnity Company contracted to pay only in the event the defendant county was liable.

As there is no evidence in the record to support the conclusion that the deceased suffered an injury by accident arising out of and in the course of his employment as jailer, the judgment below must be

Reversed.

CLARKSON, J., dissenting: In the judgment of Sinclair, J., in the court below is the following: "And it further appearing to the court,

pursuant to the direction of the Supreme Court, the said Industrial Commission has made the following finding of fact, to wit:

" 'The Supreme Court remanded this cause to the Industrial Commission asking: "Did Lawrence Gowens suffer injury by accident arising out of and in the course of his employment as jailer?"

" 'The Full Commission, after reviewing the evidence and file in this case, now finds as a fact that the said Lawrence Gowens did suffer an injury by accident arising out of and in the course of his employment as jailer on July 31, 1936, resulting in his death.'

"And it appearing to the court, upon reviewing all of the evidence set out in the record, that the deceased, Lawrence Gowens, was duly and regularly employed as jailer in Alamance County, and that he was serving in that capacity at the time of his fatal injury and death, and that for more than 20 years it had been the custom in Alamance County for the jailer to be deputized by the sheriff, and that pursuant to the said custom the said Lawrence Gowens as jailer was so deputized: And it further appearing to this court that there is sufficient evidence in the record in this cause to support the said finding of fact by the Industrial Commission, and being of the opinion that this constitutes the only question of law before this court on this appeal, it is therefore considered, ordered and adjudged that the several assignments of error of the defendants on appeal be and they are hereby overruled, and the said supplemental award, finding of fact and conclusion of law by the Industrial Commission are hereby approved and affirmed. It is further considered, ordered and adjudged that the defendants pay the compensation to the dependents of the said Lawrence Gowens, all in accord with as set out in the award and supplemental award heretofore entered in this cause by the said Industrial Commission, together with all costs of this action."

N. C. Code, 1935 (Michie), sec. 4544, is as follows: "Every sheriff, coroner, constable, officer or police, *or other officer,* entrusted with the care and preservation of the public peace, who shall know or have reasonable ground to believe that any felony has been committed, or that any dangerous wound has been given, and shall have reasonable ground to believe that any particular person is guilty, and shall apprehend that such person may escape if not immediately arrested, shall arrest him without warrant, and may summons all bystanders to aid him in such arrest."

In *S. v. Pugh,* 101 N. C., 737 (740), is the following: "The jury ought not to weigh the conduct of the officer as against him in 'gold scales'; the presumption is he acted in good faith. This is the rule applicable in such cases as the present one, as settled in *S. v. Stalcup,* 2 Ired., 50; *S. v. McNinch,* 90 N. C., 696." (The F. A. McNinch in

the above case was the father of Hon. F. A. McNinch, who was chairman of the Federal Power Commission and now chairman of the Federal Communications Commission.) *S. v. Jenkins,* 195 N. C., 747.

Lawrence Gowens was performing his duty in the jail as jailer. "Other officer" in the above act includes "jailer." Immediately back of the jail "nearly in the back yard of the jail" a shot rang out, someone was shot (Robert Campbell had shot his wife). Mrs. Gowens, the jailer's wife, testified: "I ran in the house and called him (her husband) and he went right on down." In calling distance of the jail was Campbell and when Gowens attempted to arrest him, Campbell, who had shot his wife immediately before, killed Gowens. Lawrence Gowens was an employee of the county of Alamance. The premium had been paid to the Hartford Accident and Indemnity Co., and the company had compensation coverage for the county.

Deputies and jailers, since 30 March, 1939, by act of the General Assembly, have been clearly brought within the purview of the Workmen's Compensation Act. See ch. 277, Public Laws 1939. In view of this liberal extension of coverage, the present decision seems unwarranted.

The Industrial Commission made an award to the widow and her five children and this was approved and affirmed by the court below. The main opinion reversing the Industrial Commission, I think too narrow and attenuated and sticking in the bark. Must the jailer sit with his hands folded when an emergency arises? In taking prisoners and bringing them back from the jail to the courtroom or courthouse to be tried, if an escape is attempted, shall the jailer do nothing? If a mob assembles outside the jail can the jailer not go out of the jail and attempt to disperse them? In the shadow of the jail there was an emergency call, a man had shot his wife. The jailer, on the call of his wife, ran out to arrest the offender and was killed. Surely she and her five children should not be barred on a technicality from an award. He acted as an officer in good faith. This emergency call should not be used against him and his conduct weighed in "gold scales." A fine-spun argument should not prevail in a case like this. The Workmen's Compensation Act should be construed liberally in the interest of humanity. The Industrial Commission and court below should not be overruled.

DEVIN, J., dissenting: The Industrial Commission found as a fact that the deceased suffered an injury by accident arising out of and in the course of his employment as jailer, resulting in his death. If there is any evidence to support this finding the judgment below should be affirmed. An examination of the testimony in the record discloses that the witness H. J. Stockard testified that the deceased had gone to arrest

Campbell, but it does not appear that Stockard was present on the occasion or had any personal knowledge of what took place. The only witness testifying of personal knowledge was Mrs. Lawrence Gowens, the wife of deceased. She said: "On the date my husband was killed I was at home at the jail. . . . I heard a shot and I went to the front porch. There was a man working on the telephone post and he called me and asked if the sheriff was there—said somebody had a gun down street and had shot somebody. I ran in the house and called him (deceased) and he went right on down. The jail house is on the corner of Maple Avenue and Elm Street. The Campbell house is two doors below the jail—the second door below the jail, on Elm Street, immediately back of the jail." That is all the testimony in the record relating to the circumstance of his death. It was admitted that he was killed by a gunshot fired by Campbell.

While the original hearing commissioner made findings of fact as to the manner in which the deceased came to his death (quoted in the majority opinion), the case on appeal agreed to by counsel, constituting the record before us, contains no testimony to support such finding. The only witnesses on this record whose testimony referred in any way to the manner of his death were H. J. Stockard and Mrs. Lawrence Gowens, herein above quoted.

Considering this testimony, it seems unquestionable that the deceased was on duty as jailer at the time of his injury. He had charge of the jail premises and of the prisoners. From Mrs. Gowens' testimony it appears that he received warning that there was a man with a gun in the street immediately back of the jail—a man who had just shot someone—and that the jailer went right out. It was his duty as jailer to investigate any menace or disturbance in the immediate vicinity of the premises and prisoners which he had in charge. Whether his purpose was to make an arrest or to investigate a happening which might affect his charge, was a matter of inference to be drawn from the facts in evidence. The conclusion that he went out of the jail to make an arrest as deputy sheriff does not necessarily follow. Nor does it necessarily follow because he was outside the jail at the time of his injury that he was not attempting to perform some duty in connection with his employment as jailer.

If there be any reasonable inference from the testimony to support the finding of the Industrial Commission that the deceased suffered an injury by accident arising out of and in the course of his employment as jailer, the ruling of the court below was correct. I think the evidence as reported permits such an inference, and that the judgment sustaining the award of compensation to the widow should be affirmed.

SCHENCK, J., concurs in this opinion.

BEST & COMPANY, INC., v. A. J. MAXWELL, COMMISSIONER OF REVENUE.

(Filed 16 June, 1939.)

1. Constitutional Law § 3b—

The Federal Constitution is a grant of powers, and powers not therein granted nor prohibited by it to the States are reserved to the States or to the people. Tenth Amendment of the Federal Constitution.

2. Taxation § 7—Tax on display of samples in hotel room or temporarily occupied house held not void as burden on interstate commerce.

The provisions of ch. 127, sec. 121 (e), of the Revenue Act of 1937 imposing a tax upon the display of samples of goods in a hotel room or temporarily occupied house for the purpose of securing orders for the retail sale of such goods by any person, firm or corporation not a regular retail merchant in the State does not impose a burden upon interstate commerce and is valid, since the tax is imposed alike upon residents and nonresidents engaged in the activity defined and is a use tax levied upon the local use of hotel rooms and temporarily occupied houses for the purpose of promoting retail sales by persons not otherwise taxed as retail merchants, and since the activity taxed is a preliminary and nonessential activity transpiring prior to the securing of orders for interstate shipment, in which activity the seller may or may not engage at his election.

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

STACY, C. J., dissents.

APPEAL by defendant from *Frizzelle, J., at* 16 January Term, 1939, of WAKE. Reversed.

This is a civil action to recover $250.00 in taxes paid defendant under protest, by virtue of ch. 127, sec. 121, subsec. e (Revenue Act, 1937), of the Public Laws of 1937. It is agreed by the parties that plaintiff is not a regular retail merchant in North Carolina and has no regular place of business in this State; but that plaintiff is a New York corporation having its principal office in New York City. It is likewise agreed that just prior to 9 February, 1938, plaintiff rented for several days a display room in the Robert E. Lee Hotel, in Winston-Salem, and there displayed samples and secured retail orders for merchandise, later filled by shipment from the New York office, and that the tax here in dispute was levied upon this activity of plaintiff.

From a judgment for the plaintiff in the sum of $250.00, with interest, defendant appealed to this Court. The only exception and assignment of error is to the signing of the judgment.

Manly, Hendren & Womble and W. P. Sandridge for plaintiff.

Attorney-General McMullan and Assistant Attorneys-General Bruton and Wettach, and Bailey & Lassiter, amicus curiæ, for defendant.

CLARKSON, J. The only question raised by this appeal: Is the State tax upon the display of samples, goods, etc., (a) in a hotel room, or house rented or occupied temporarily, (b) for the purpose of securing orders for the retail sale of such goods, etc., (c) by a person, firm or corporation, not a regular retail merchant in the State, invalid as violative of the Commerce Clause of the Constitution of the United States, Art. I, sec. 8 (3)? We think not.

The act is not challenged as violative of any other provision of either the State or Federal Constitutions. The single question presented for our determination: Does the facts in this case violate the constitutional grant to Congress of the power "to regulate commerce with foreign nations and among the several states and with the Indian tribes?" This clause, and the remainder of the Federal Constitution, is significantly lacking in any prohibition of the taxation of commerce carried on within the borders of any state, and the right of the state to tax such intrastate commerce is not questioned. Further, the Federal Constitution nowhere *expressly* prohibits the taxation of interstate commerce by a state, or even its direct regulation. The Commerce Clause merely gives to Congress the power to "regulate" commerce among the states. It is well to remember that the Federal Government is one of granted power only; the Tenth Amendment to the Constitution (and North Carolina would not ratify the Constitution until the Bill of Rights had been adopted) declares, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states, respectively, or to the people." The "Commerce Clause" has come to be written in capital letters rather by reason of more recent judicial interpretation of the clause than by the clear, expressed intent of the constitutional fathers. The express retention by the states of powers not delegated to the Federal Government argues strongly against the existence of any implied power of the Federal Government (growing out of the Commerce Clause) to strike down a state tax on commercial activity carried on within the borders of the taxing state. Unless the implied prohibition of taxes definitely burdening interstate commerce (developed and given expression in *Robbins v. Taxing District,* 120 U. S., 489; *Real Silk Hosiery Mills Co. v. Portland,* 268 U. S., 325, and numerous interim cases) reaches to, and renders immune from state taxation, the commercial activity here taxed, the instant case represents a valid exercise of the state taxing power. The Supreme Court of the United States has long recognized the force of these considerations and has heretofore indicated that implied prohibitions growing out of the Commerce Clause must, necessarily, be reluctantly and rarely applied. "Whatever amounts to a more or less constant practice, and threatens to obstruct or unduly to burden the freedom of interstate commerce is

within the regulatory power of Congress under the commerce clause, and it is primarily for Congress to consider and decide the fact of danger and meet it. This Court will certainly not substitute its judgment for that of Congress in such a matter unless the relation of the subject to interstate commerce and its effects upon it are clearly nonexistent." *Stafford v. Wallace,* 258 U. S., 495 (521); *Board of Trade v. Olsen,* 262 U. S., 1 (37); see, also, *Walton v. State of Missouri,* 91 U. S., 275. Nor, by the same standard, can it be presumed that the Supreme Court of the United States will substitute its judgment as to the valid exercise of a state legislature's taxing power for that of the state legislature, unless the tax act "clearly" and "unduly" burdens the "freedom of interstate commerce." ". . . Property within the state, privileges granted by the state, and intrastate commerce done within the state are uniformly held proper subjects of state taxation." Powell, "Indirect Encroachments on Federal Authority by the Taxing Powers of the States, 5 Selected Essays on Constitutional Law," at p. 391; also see pp. 418, 470.

It then becomes pertinent to determine whether it can be fairly said that the instant act, in this case, clearly constitutes a direct and undue burden upon interstate commerce. The measure is clear and concise; before it is applicable there must be the following requisites set forth in the law: (a) the act, *i.e.,* the display of samples, goods, etc., (b) the place, *i.e.,* in a hotel room or temporarily occupied house, (c) the mental element, or purpose, *i.e.,* for the purpose of securing orders for retail sale of the goods, etc., and (d) the person, *i.e.,* one not a regular merchant. In essence, the tax is one imposed upon anyone, not otherwise taxed as a retail merchant, who uses a North Carolina hotel room or temporarily occupied house, for commercial display purposes in the interest of retail sales. It is a use tax, levied in the State of North Carolina upon profitable and commercial activity which has otherwise escaped taxation and which, therefore, discriminates against no one but seeks to remove a discrimination previously existing against regular, taxed, retail merchants. Under this statute the act taxed must occur in North Carolina, and the room where the act transpires must be within the State. The taxed activity must be directed at the retail trade in North Carolina, seeking to reach personally the citizens and residents of this State. The measure does not in any way impinge upon the activities of the wholesale trade, nor does it discriminate against nonresidents. All citizens and residents of North Carolina, and nonresidents alike (other than retail merchants who have already been taxed for their commercial activities) who engage in the taxable activity are liable for the tax. The taxed act is a local one, involving the use of purely local property.

The tax in no way hampers the movement of the samples, goods, etc., or of the merchandise sold, in interstate commerce. The tax in no way regulates the interstate or out-of-state activity of the person seeking to sell by display in North Carolina, nor does it in any way interfere with sales by sample by house-to-house canvassers. Finally, the measure leaves open to the seller the choice as to the manner of soliciting retail sales by display; only when he seeks to localize his commercial activity by temporarily establishing himself at a particular rented and temporary location within this State in his activity in displaying samples and seeking orders subjected to taxation. Although such activity may be in the twilight zone of interstate commerce, it does not enter that enchanted realm. Although such displaying by sample may ultimately result in orders which will flow into interstate commerce, such commercial activity cannot cloak itself in immunity from taxation merely by calling the magic words, "Interstate Commerce." The use of North Carolina real estate for the purpose of displaying samples is commercially intended to result in interstate commerce, but this preliminary activity is merely a separate and distinct effort of the seller seeking, as in the instances of magazine and billboard advertising, to stimulate the desire for the seller's goods. *Western Livestock v. Bureau of Revenue,* 303 U. S., 250.

The display use of hotel rooms and temporarily rented property here taxed is not a usual, necessary, or essential part of a commercial, retail business. It is a preliminary and incidental activity which, at the election of the seller, may or may not transpire prior to the beginning of the flow of events which constitute the movement of goods in interstate commerce. There is a striking analogy here to production, which has consistently been held not to constitute interstate commerce. *Carter v. Carter Coal Co.,* 298 U. S., 238. As *Justice Brandeis,* speaking for the Court in *Chassaniol v. Greenwood,* 291 U. S., 584 (587), so aptly remarked with reference to ginning and warehousing cotton, these are but "steps in preparation for the sale and shipment in interstate or foreign commerce. But each step prior to the sale and shipment is a transaction local to Mississippi, a transaction in intrastate commerce." The use of North Carolina realty to display samples is likewise but a step "in preparation for the sale and shipment in interstate . . . commerce," and is essentially intrastate and local in nature. As was said by *Justice Bradley* in *Coe v. Errol,* 116 U. S., 517 (525), "There must be a point of time when they cease to be governed exclusively by domestic law and begin to be governed and protected by the national law of commercial regulation, and that moment seems to us to be a legitimate one for this purpose, in which they commence their final movement for transportation from the State of origin to that of their

destination." *Justice Bradley* was there speaking of certain logs hauled to a river, but if the orders sought by plaintiff is substituted as the *res* under consideration, the logic of the proposition is compelling that certainly not earlier than the actual placing of the orders with plaintiff can its commercial activity be considered as a part of interstate commerce. No phase of the question is better settled than the fundamental that the mere fact that the products of domestic enterprise are ultimately intended to become subjects of interstate commerce is not sufficient to stamp them with the immunities attaching to interstate commerce proper. *Kidd v. Pearson,* 128 U. S., 1 (21); *Heisler v. Thomas Colliery Co.,* 260 U. S., 245 (259); *Champion Refining Co. v. Corporation Commission,* 286 U. S., 210 (235).

The displaying of samples in temporary quarters, here taxed, was peculiarly a local and intrastate act, outside the realm of interstate commerce, because such term can "never be applied to transactions wholly internal, between citizens of the same community, or to a polity and laws whose ends and purposes and operations are restricted to the territory and soil and jurisdiction of such community." *Veazie et al. v. Moore,* 14 How., 568 (573). Such a local, business activity which is separate and distinct from the transportation and intercourse which is interstate commerce is not freed from state taxation "merely because in the ordinary course such transportation or intercourse is induced by the business." *Western Livestock v. Bureau of Revenue,* 303 U. S., 250 (253), and cases cited. In the same case, at p. 254, *Justice Stone,* speaking for the Court, reiterates the fundamental that, "It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business. 'Even interstate business must pay its way. *Postal Telegraph-Cable Co. v. Richmond,* 249 U. S., 252 (259), 39 S. Ct., 265, 266, 63 L. Ed., 590," and other cases cited. In the *Western Livestock case, supra,* the state privilege tax was upheld under a view which we think equally applicable here, to wit, that "the burden on interstate business is too remote and too attenuated."

A casual reading of many of the recent pronouncements of the Supreme Court of the United States apparently indicates a gradual broadening of the Federal power over interstate commerce by liberalizing the definition of what falls within that category, with an accompanying, and even more desirable, broadening of the states' taxing power over matters touching the fringe of the garment of interstate commerce. This latter tendency is indicated by two complementary but distinct developments, the one marked by a narrowing of the compass of what constitutes a direct and undue burden on interstate commerce, and the other by a stricter and more rigid interpretation as to what constitutes discrimina-

tion against interstate commerce. See "Sales and Use Taxes: Interstate Commerce Pays Its Way," Warren & Schlesinger, 38 Col. Law Rev., 49 (Jan., 1938), for a collection of a number of these cases. These developments argue strongly for the validity of the instant tax.

In *Coverdale v. Pipe Line Co.*, 303 U. S., 604, a state tax upon the production of power to drive gas into interstate commerce was approved. The displaying of goods here taxed is merely a similar preliminary activity seeking to "drive" orders into interstate commerce. In *Nashville, C. & St. L. Ry. Co. v. Wallace,* 288 U. S., 249, a state tax on storage of gasoline brought into the state through interstate commerce and ultimately used directly in interstate commerce was upheld, such a tax being considered too remote and too indirect a burden upon interstate commerce to justify its being stricken down. Here we have a similar situation, a local, commercial activity within North Carolina which follows the arrival of plaintiff's representative and precedes the sending of any orders to plaintiff. In *Southern Pac. Co. v. Gallagher,* 59 S. Ct., 389 (decided 30 January, 1939), the California Use Tax was upheld as applicable to equipment bought out of the State and brought into the State for installation on interstate, transportation equipment; there *Justice Reed,* for the Court, found a "taxable moment" at the point where the goods came to rest in the State and before they were installed on the interstate equipment. In the instant case there is no need for such search for a taxable moment, as the taxed activity was clearly localized in North Carolina; the displaying of the samples was part of a carefully planned campaign, after an elaborate, personalized canvass by mail of large numbers of North Carolina citizens who were considered potential customers. As was pointed out in the *Gallagher case, supra,* "A tax on property or upon a taxable event in the state, apart from operation, does not interfere. This is a practical adjustment of the right of state to revenue from the instrumentalities of commerce and the obligation of the state to leave the regulation of interstate and foreign commerce to the Congress." Also, it was there said: "The taxable event is the exercise of the property right in California"; here the taxable event is the exercise of the temporary property right in the hotel room or rented house to display samples commercially for retail purposes. *Pacific Telephone & Telegraph Co. v. Gallagher,* 59 S. Ct., 396, a companion case decided on the same day, again approved the California Use Tax as applied to supplies brought into the State for use in interstate telephone and telegraph communication.

Even earlier, in *Eastern Air Transport, Inc., v. South Carolina Tax Commission,* 285 U. S., 147, and in *Henneford v. Silas Mason Co.,* 300 U. S., 577, the validity of the fundamental theory of the modern "use tax" had been approved; in the latter case, *Justice Cardozo,* for the

Court, used these significant words in concluding the opinion: "A legislature has a wide range of choice in classifying and limiting the subjects of taxation. *Bell's Gap R. Co. v. Pennsylvania,* 134 U. S., 232 (237); *Ohio Oil Co. v. Conway,* 281 U. S., 146 (159). The choice is as broad where the tax is laid upon one or a few of the attributes of ownership as when laid upon them all. *Flint v. Stone Tracy Co.,* 220 U. S., 107 (158-9). . . . Such questions of fiscal policy will not be answered by a court. The legislature might make the tax base as broad or as narrow as it pleased."

The courts have not been alone in noting the economic imperative that "interstate business must pay its way." Students of taxation have become increasingly aware that a judicial overemphasis upon the doctrine of immunity of interstate commerce from state taxation amounts to discrimination against intrastate business. Lutz, H. L., Public Finance, 3rd ed. (1936), p. 326. State tax administrators have found it difficult to reach taxpayers in interstate commerce even when the plain and obvious intent was to tax them on the same basis as those engaged in intrastate commerce. R. M. Haig, "The Coördination of the Federal and State Tax Systems," Proceedings of the National Tax Association (1932), p. 220; Marvel Stockwell, "The Coördination of Federal, State and Local Taxation," The Tax Magazine (April, 1938), p. 198-9. None too soon, perhaps, the Supreme Court of the United States appears to have adopted a new approach to the problem of state taxation as it relates to interstate commerce, an approach involving a new emphasis upon the preservation of equality of tax burden between competing business enterprises. See William B. Lockhart, "The Sales Tax in Interstate Commerce," 52 Harvard Law Review (Feb., 1939), p. 617.

The tax here discussed in a part of a comprehensive, state tax program designed to reach and to tax equally and fairly all types of commercially remunerative activity which has the protection of our laws. Local mercantile businesses, which for the most part are small, are subject to taxation; the commercial activity of plaintiff, which is a comparatively large business enterprise, has heretofore escaped taxation in the State. If this tax fails in its effort to secure from plaintiff its proportionate contribution in taxes for the privileges and protections which it enjoys within the State, the immunity of plaintiff from taxes in this State will be complete. The reasoning leading to such a result we do not find persuasive. We do not find in the grant of power to Congress to regulate interstate commerce any implied prohibition which strikes down the tax here levied. Rather do we find in the reservation to the State of powers not granted to the United States (U. S. Constitution, X Amendment), coupled with the retention in the people of this State of "all powers not delegated" by our Constitution (N. C. Constitution,

Art. I, sec. 37), a mandate of organic law which is compelling in its implications. "In selecting the objects of taxation, in the classification of business and trades for this purpose, and in allocating to each its proper share of the expenses of government, the General Assembly has been given a wide discretion. The continued maintenance of government itself as a great communal activity in behalf of all the citizens of the State is dependent upon an adequate taxing power." *Tobacco Co. v. Maxwell, Commissioner of Revenue,* 214 N. C., 367 (371-2).

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

Reversed.

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

STACY, C. J., dissents.

CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM, 1939

NANCY JOHNSON, ADMINISTRATRIX OF S. L. JOHNSON, DECEASED, v. FOREMAN-BLADES LUMBER COMPANY.

(Filed 20 September, 1939.)

1. Master and Servant § 55c—

The notice of appeal from an award of the Industrial Commission to the Superior Court which was served on plaintiff failed to state to which Superior Court the appeal would be taken. Plaintiff accepted service of such notice and waived "further notice." *Held:* The acceptance of service by plaintiff waived additional or more explicit notice and waived the insufficiency of the notice served, and plaintiff's motion to dismiss the appeal for defective notice was properly overruled.

2. Master and Servant § 55g: Appeal and Error § 6g—

While plaintiff's motion to dismiss defendant's appeal from an award of the Industrial Commission to the Superior Court should be determined by the Superior Court prior to the consideration of the cause on its merits, where the award in favor of plaintiff is affirmed, plaintiff is not prejudiced by the order in which the matters were considered by the Superior Court and may not complain thereof in the Supreme Court.

3. Master and Servant § 55d—

The findings of fact of the Industrial Commission as to the manner and place at which an employee is injured is conclusive on appeal when supported by competent evidence.

4. Master and Servant § 38: Admiralty § 1—

The admiralty and maritime jurisdiction of the United States (Art. III, sec. 2, of the Federal Constitution) does not preclude the application of a state law when the occurrence upon which the state law is invoked has

no direct relation to navigation or commerce and the application of the state law does not interfere with the harmony and uniformity of the general maritime law.

5. Same—Workmen's Compensation Act held applicable to injury of barge worker received while on land.

Findings of fact of the Industrial Commission, supported by competent evidence, were to the effect that defendant's employee was temporarily employed in pumping water from a barge which was being loaded with logs on a navigable river, that the barge careened, that the employee fell or jumped from the shore side of the barge and was actually killed on land as a result of the barge crushing him. It further appeared that the barge was without means of propulsion and was at the time incapable of navigation, and that both the employee and the defendant had accepted, and were amenable to, the North Carolina Workmen's Compensation Act. *Held:* The N. C. Industrial Commission had jurisdiction to hear and determine the claim for compensation for the employee's death, its jurisdiction not being ousted by the admiralty and maritime jurisdiction of the United States.

APPEAL by plaintiff and defendant from *Cowper, Special Judge,* at May Term, 1939, of PASQUOTANK. Affirmed.

This was a proceeding under the North Carolina Workmen's Compensation Act. From an order of the Industrial Commission awarding compensation to plaintiff on account of the death of her intestate, defendant appealed to the Superior Court. In the Superior Court plaintiff entered special appearance and moved to dismiss the defendant's appeal. Plaintiff's motion was overruled and the award in favor of plaintiff was affirmed. From judgment affirming award of compensation, defendant employer appealed to the Supreme Court. From that portion of the judgment below which overruled her special appearance and motion to dismiss, plaintiff also appealed.

H. S. Ward for plaintiff, appellant.
McMullan & McMullan for defendant, appellee.

PLAINTIFF'S APPEAL.

DEVIN, J. The procedural question presented by the plaintiff's appeal arose in a proceeding instituted under the North Carolina Workmen's Compensation Act for compensation on account of the death of plaintiff's intestate. The defendant employer has its principal office and place of business in Pasquotank County. From an award by the Industrial Commission in favor of plaintiff, defendant gave notice of appeal. Of this appeal counsel for defendant had served upon plaintiff and her counsel the following notice: "You, and each of you are hereby notified that an appeal in the above entitled proceeding has been taken by defendant from the award of the North Carolina Industrial Commission

to the Superior Court of North Carolina." Upon this notice counsel for plaintiff made the following notation: "Service accepted, this 16th day of March, 1939, and further notice waived." Pursuant to the notice of appeal the Industrial Commission certified transcript of record, by inadvertence, to Beaufort County, where, upon motion of plaintiff, it was dismissed 12 April, 1939, and by consent of plaintiff the original transcript of record made by the Industrial Commission was sent to the Superior Court of Pasquotank County. On 14 April, 1939, the Industrial Commission certified the record to Pasquotank County, where the cause came on regularly for hearing at May Term of said court. The trial judge rendered the following judgment: "This cause came on for hearing on appeal of defendant from judgment of award by the Industrial Commission of North Carolina in favor of plaintiff, against defendant company, employer, and being heard upon the merits, at the conclusion of which plaintiff's special appearance and motion to dismiss the appeal was overruled. Upon said hearing the court adjudges that the judgment and report of the Industrial Commission be, and same is, in all respects confirmed."

Appellant insists that his motion to dismiss should have been allowed because the notice of appeal given to the plaintiff and her counsel merely stated that an appeal had been taken from the award of the Industrial Commission to the Superior Court of North Carolina without giving notice of the particular court to which the appeal would be taken and where it would be heard. While the notice was in that respect insufficient, counsel for plaintiff accepted service of this notice and waived "further notice." This must be held to constitute a waiver of additional or more explicit notice and a waiver of the insufficiency of the notice received.

While the judge below should have ruled upon plaintiff's motion to dismiss the appeal before deciding the cause on its merits on defendant's appeal, it is not perceived that plaintiff was thereby disadvantaged. The decision on the merits having been made in favor of plaintiff, no cause of complaint on this score is apparent. *Bank v. Derby,* 215 N. C., 669.

Upon the facts presented by the record, we conclude that the plaintiff's motion to dismiss defendant's appeal was properly overruled, and that the judgment in that respect must be affirmed.

DEFENDANT'S APPEAL.

Defendant challenges the correctness of the judgment below on the ground that the North Carolina Industrial Commission, before whom the proceeding was instituted, and the Superior Court of Pasquotank County, where it was heard and determined on appeal, were without

jurisdiction, in that the claim was cognizable only under the admiralty laws and maritime jurisdiction of the United States (U. S. Const., Art. III, sec. 2).

The Industrial Commission found the facts to be that the death of plaintiff's intestate resulted from an accident arising out of and in the course of his employment by the defendant Foreman-Blades Lumber Company, and that the claim was within the jurisdiction prescribed by the North Carolina Workmen's Compensation Act; that the deceased at the time of his injury and death was an employee of defendant Lumber Company, and that while he was "temporarily employed to pump water from a barge which was leaking and being loaded with logs, the logs started rolling, the barge careened toward the channel, the plaintiff's (intestate) fell or jumped from the shore side of the barge and was actually killed on land as the result of the barge crushing the deceased." It is not controverted that Roanoke River at the place of the injury was navigable. It appears from the findings of fact that no injury occurred to plaintiff's intestate while he was on the barge, but that the force which caused his death was applied after he had jumped or fallen upon land. These findings of fact by the Industrial Commission are supported by competent evidence, and are therefore conclusive on appeal. On the facts thus established the defendant contends the jurisdiction of the State court under the North Carolina statute is divested, and that this proceeding should be dismissed for want of jurisdiction.

The Constitution of the United States (Art. III, sec. 2) extends the judicial power of the United States "to all cases of admiralty and maritime jurisdiction." The application of admiralty law and jurisdiction to injury by accident occurring to persons while employed on or near navigable waters in connection with maritime pursuits, as affected by state laws providing workmen's compensation, has been considered in numerous cases by the Supreme Court of the United States, beginning with *Sou. Pacific Co. v. Jensen,* 244 U. S., 205. In that case, a stevedore, for the purpose of unloading a ship which was lying in navigable water ten feet from the pier, operated an electric freight truck over a gangplank to and from the ship. He was killed while backing his truck into the hatchway of the ship. It was held that admiralty law applied to the exclusion of remedies under the provisions of the New York Workmen's Compensation Act.

In *Railroad v. Towboat Co.,* 23 How., 209 (quoted in *Atlantic Transport Co. v. Imbrovek,* 234 U. S., 52), the Court said: "The jurisdiction of courts of admiralty, in matters of contract, depends upon the nature and character of the contract; but in torts, it depends entirely on locality." The line of distinction, however, is not always easily determined. As expressed in the words of *Mr. Justice Holmes* in *United*

States v. Evans, 195 U. S., 361, "The precise scope of admiralty jurisdiction is not a matter of obvious principle or of very accurate history."

In *Grant Smith-Porter Company v. Herman F. Rohde,* 257 U. S., 469, 66 Law Ed., 321, where the claimant received injury while at work as a carpenter on a partially completed vessel lying at a dock, the Court said: "In *Western Fuel Co. v. Garcia* (257 U. S., 233) we recently pointed out that, as to certain local matters, regulation of which would work no material prejudice to the general maritime law, the rules of the latter might be modified or supplemented by state statutes. The present case is controlled by that principle. The statute of the state applies and defines the rights and liabilities of the parties. The employee may assert his claim against the Industrial Accident Fund to which both he and the employer have contributed as provided by the statute, but he cannot recover damages in an admiralty court. This conclusion accords with *Southern Pacific Co. v. Jensen,* 244 U. S., 205; *Chelentis v. Luckenbach S. S. Co.,* 247 U. S., 372; *Union Fish Co. v. Erickson,* 248 U. S., 308; and *Knickerbocker Ice Co. v. Stewart,* 253 U. S., 149. In each of them the employment or contract was maritime in nature and the rights and liabilities of the parties were prescribed by general rules of maritime law essential to its proper harmony and uniformity. Here the parties contracted with reference to the state statute; their rights and liabilities had no direct relation to navigation, and the application of the local law cannot materially affect any rules of the sea whose uniformity is essential." To the same effect is the holding in *Millers' Indemnity Underwriters v. Braud,* 270 U. S., 59, and in *Alaska Packers Assn. v. Industrial Commission,* 276 U. S., 467, where claimant was injured while pushing a stranded boat into navigable water. See, also, *Messel v. Foundation Co.,* 274 U. S., 427, where the injury complained of was to a workman engaged in making repairs to a vessel in navigable waters. It was there held in effect that the state law might be resorted to for the remedy, but not for substantive right.

In *State Industrial Commission of New York v. Nordenholt Corporation,* 259 U. S., 263, it was said: "When an employee working on board a vessel in navigable waters sustains personal injuries there, and seeks damages from the employer, the applicable legal principles are very different from those which would control if he had been injured on land while unloading the vessel. In the former situation the liability of employer must be determined under the maritime law; in the latter, no general maritime rule prescribes the liability, and the local law has always been applied. The liability of the employer for damages on account of injuries received on shipboard by an employee under a maritime contract is matter within the admiralty jurisdiction; but not so when the accident occurs on land."

In *T. Smith & Son, Inc., v. Fannie Robinson Taylor,* 276 U. S., 179, 72 Law Ed., 520, where a longshoreman at work on a wharf unloading a vessel, was struck by a loaded sling and precipitated into the river, the Court used the following language: "Deceased was engaged in maritime work under a maritime contract. If the cause of action arose upon the river, the rights of the parties are controlled by maritime law, the case is within the admiralty and maritime jurisdiction, and the application of the Louisiana Compensation Law violated section 2 of Art. III. But, if the cause of action arose upon the land, the state law is applicable. Plaintiff in error concedes that the stage and wharf on which deceased was working are to be deemed an extension of the land and that the state law would apply if he had been injured or killed by falling on the landing-place. It argues that as no claim was made for injuries sustained while deceased was on land and as the suit was solely for death that occurred in the river, the case is exclusively within the admiralty jurisdiction. But this is a partial view that cannot be sustained. The blow by the sling was what gave rise to the cause of action. It was given and took effect while deceased was upon the land. It was the sole, immediate and proximate cause of his death. The substance and consummation of the occurrence which gave rise to the cause of action took place on land."

In *Emerson F. Minnie v. Port Huron Terminal Company,* 295 U. S., 647, 79 Law Ed., 1631, where a longshoreman at work on the deck of a vessel lying in navigable waters, was struck by a swinging hoist and knocked on the wharf, the Court said: "We have held that the case of an employee injured upon navigable waters while engaged in a maritime service is governed by the maritime law. *Southern Pacific Co. v. Jensen,* 244 U. S., 205; *Grant Smith-Porter Co. v. Rohde,* 257 U. S., 469. It is otherwise if the injury takes place on land. *State Industrial Commission v. Nordenholt Corp.,* 259 U. S., 263; *Nogueira v. New York, N. H. & H. R. R. Co.,* 281 U. S., 128. In the instant case, the injury was due to the blow which petitioner received from the swinging crane. It was that blow received on the vessel in navigable water which gave rise to the cause of action, and the maritime character of that cause of action is not altered by the fact that the petitioner was thrown from the vessel to the land." To similar effect is the holding in *Kenward v. Admiral Peoples,* 295 U. S., 469.

In the recent case of *Carlin Construction Co. v. Heaney,* 299 U. S., 41, where claimant instituted proceeding before the New York State Industrial Board for compensation from employer for injury received while being transported on a ferry boat operated under contract by employer, an award under the provisions of the Workmen's Compensation Law was upheld. The court in that case quoted with approval this state-

ment of a pertinent principle: "An award under the Workmen's Compensation Law is not made on the theory that a tort has been committed; on the contrary, it is upon the theory that the statute giving the commission power to make an award is read into and becomes a part of the contract." The Court, in further amplification of principles which we think applicable to the case at bar, used this language: "This Court has often ruled that the maritime law cannot be modified by state enactments so as materially to interfere with its essential uniformity. *State Industrial Commission v. Nordenholt Corp., supra.* But this doctrine, we think, has no application in the circumstances here presented. The present attempt is to enforce a liability assumed by employer and insurance carrier under a non-maritime contract. All parties, as well as the accident, were within the limits of New York State. The contract had no direct relation to navigation; to enforce it against the parties before us will not materially interfere with the uniformity of any maritime rule. There is no claim against the ship or her owner; their rights are not in issue. . . . The respondent here seeks to enforce a contract of employment which had no direct and immediate relation to navigation, business or commerce of the sea. *North Pacific S. S. Co. v. Hall Bros. Marine R. & Shipbuilding Co.*, 249 U. S., 119, 125, 63 L. Ed., 510, 512; 39 S. Ct., 221; Benedict, Admiralty, 5th Ed., sec. 63."

This Court has heretofore considered a similar question in *Cromartie v. Stone,* 194 N. C., 663, 140 S. E., 612, where it was held that an action to recover damages for the negligent killing of one employed in rafting logs on a navigable river was properly brought in the State court according to common law principles, and that the jurisdiction was not confined to the courts of the United States.

Here the deceased, ordinarily employed in other work by defendant, was assigned temporarily to the task of pumping water out of a barge lying alongside the bank of a navigable river. The barge had no means of propulsion, and was at the time incapable of navigation. The deceased and the defendant had each accepted, and were amenable to, the provisions of the North Carolina Workmen's Compensation Act. The work upon which deceased was engaged had no direct relation to navigation or commerce of the sea. While the State statute may not affect the general maritime law beyond certain limits, if its application works no material prejudice to the characteristic feature of the general maritime law nor interferes with the proper harmony and uniformity of that law, the rules of the latter may be modified, and remedies made available in accordance with the laws of the State. *Grant Smith-Porter Ship Co. v. Rohde, supra.*

We conclude that plaintiff's claim was properly cognizable by the North Carolina Industrial Commission, and that upon appeal duly per-

fected the Superior Court had jurisdiction to hear and determine. No other error is suggested. The judgment of the court below upholding an award by the Industrial Commission in favor of the plaintiff is affirmed.

On plaintiff's appeal: Affirmed.

On defendant's appeal: Affirmed.

STATE v. RALPH WILSON.

(Filed 20 September, 1939.)

1. Criminal Law § 63—

The Superior Court has the power to suspend execution of a sentence in a criminal prosecution for a period of five years, ch. 132 (4), Public Laws of 1937, notwithstanding that the maximum imprisonment authorized for the offense of which defendant is convicted is two years.

2. Same—Terms upon which execution was suspended held to require payment of fine and that defendant remain law-abiding.

Upon conviction of defendant of a misdemeanor, judgment was entered that defendant be imprisoned in the county jail for a term of eight months, with further provision that execution of the judgment should be suspended upon the payment of a fine and upon further condition that defendant remain law-abiding for a period of five years. *Held:* The condition upon which execution was suspended was twofold; first, the payment of the fine and, second, that defendant remain law-abiding for a term of five years; and upon conviction of defendant of a subsequent violation of the criminal law within the period of five years, the order of the court putting into effect the suspended execution is proper, notwithstanding defendant had paid the fine, defendant's contention that judgment suspending execution did not contemplate imprisonment if the fine should be paid, being untenable.

3. Criminal Law § 62—

Ordinarily, the terms upon which a sentence is suspended must be sufficiently definitive to permit enforcement ministerially by its inherent directions, and a judgment which imposes propositions in the alternative is void.

4. Same—Condition upon which execution was suspended held not void as being alternative.

Upon conviction of defendant of a misdemeanor, judgment was entered sentencing him to imprisonment in the county jail for a term of eight months, with provision that execution of the judgment be suspended upon payment of a fine and upon further condition that defendant remain law-abiding for a period of five years. *Held:* The effect of the provision suspending execution was to impose a fine, to be paid forthwith, and to suspend the execution of that portion of the judgment referring to im-

prisonment upon the condition defendant remain law-abiding for a period of five years, and therefore the judgment is not in the alternative and is valid, the court having the power to impose both the sentence of imprisonment and the fine and to suspend the one and execute the other.

5. Criminal Law § 63—

A defendant who is present and remains silent is presumed to accept the conditions upon which execution of his sentence is suspended.

6. Criminal Law § 81b—When record discloses that defendant had violated terms of suspended execution it will be presumed that court considered facts in ordering execution to be put into effect.

When execution is suspended upon condition that defendant remain law-abiding during a period of five years, and it appears of record that defendant was convicted of subsequent violation of the criminal law during that period, it will be presumed that in entering a subsequent order putting into effect the suspended execution the court properly considered the facts of record, and such order will be upheld notwithstanding that it fails to set forth the facts upon which execution was ordered, there being no request by defendant that the facts be found.

STACY, C. J., dissenting.

BARNHILL and WINBORNE, JJ., concurring in dissent.

APPEAL by defendant from *Alley, J.*, at June Term, 1939, of STOKES. Affirmed.

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

Petree & Petree and Folger & Folger for defendant, appellant.

SEAWELL, J. The judgment from which appeal was taken was rendered at June Term, 1939, of Stokes County Superior Court, and reads as follows: "Saturday, July 1, 1939, Superior Court of Stokes County. State *v.* Ralph Wilson. In Nos. 47 and 50, April Term, 1938, the Solicitor having made a motion to put the judgment into effect, and it appearing to the court that the terms of said suspended sentence have been violated by the defendant, it is ORDERED that a capias issue to put the said judgment into effect. To the order of the court to put into effect the sentence imposed at April Term, 1938, the defendant, Ralph Wilson, excepts and gives notice of appeal to the Supreme Court; notice of appeal given in open court; further notice waived. Appeal bond in the sum of $50.00 adjudged sufficient; appearance bond in the sum of $500.00 required."

Prior to the rendition of this judgment, that is, at April Term, 1938, the defendant, with a codefendant, Hobe Bennett, waived bill and pleaded guilty in cases Nos. 47 and 50 on the docket at said term upon a charge of transporting intoxicating liquor, and the following judgment

was entered: "Judgment of the court is that the defendants, and each of them, be confined in the common jail of Stokes County for a term of 8 months, and be assigned to work on the public highways under the supervision of the State Highway & Public Works Commission. Suspended upon payment of a fine of $100.00 each and the cost of the action, and upon the further condition that the defendants be and remain law-abiding for a term of five years."

Between the dates of these sentences, that is, at the April Term, 1939, of Stokes County Superior Court, the defendant Wilson was convicted of forcible trespass (No. 34 of that term), and the prayer for judgment in that case was continued, with a reservation that sentence might be pronounced at the same term or any subsequent term.

The judgment at the July Term, 1939, was made upon a motion to put the judgment of April Term, 1938 (on the submission of defendant on the transportation charge), into effect, upon the ground that he had violated the same by failing to be and remain a law-abiding citizen.

It will be observed that the condition attached to the suspension of sentence ran for a period of five years from the pronouncement of judgment, while the offense for which the defendant was pronounced guilty is a misdemeanor not of the class subjecting the offender to imprisonment in the State's Prison (C. S., 4173), and the punishment was by fine or imprisonment, or both, as in ordinary misdemeanors, in which at common law imprisonment may not exceed two years. The judgment putting the former sentence into effect was entered less than two years after conviction and within the five years during which the condition had to run.

In *S. v. Tripp,* 168 N. C., 150, 152, 83 S. E., 630, the Court, per *Justice Hoke,* said: "The power of a court, having jurisdiction, to suspend judgment on conviction in a criminal case for determinate periods and for a reasonable length of time has been recognized and upheld in several decisions of our Court, as in *S. v. Everitt,* 164 N. C., 399; *S. v. Hilton,* 151 N. C., 687; *S. v. Crook,* 115 N. C., p. 760." Since that time the period during which the execution of a sentence in a criminal case may be suspended on conditions has been fixed as five years, regardless of the term of imprisonment authorized by statute—chapter 132, Public Laws 1937, sec. 4, quoted below.

The principal challenge to the validity of the judgment is that it is alternative and that, upon a fair interpretation, it was not the intention of the court to impose a sentence of imprisonment should the fine be paid, and that to require the payment of the fine and imprisonment also would subject defendant to double jeopardy or double punishment.

As a matter of interpreting the intention of the court, the point is not tenable. The condition upon which the judgment of imprisonment was

to be enforced contains two distinct propositions, to wit: (a) The payment of the fine of $100.00; and (b) remaining a law-abiding citizen for a term of five years; and the full condition is not discharged by compliance with one of them. The view that the court intended that the defendant should not suffer imprisonment if he should pay the fine cannot be sustained, since such a construction would totally disregard the requirement that defendant be and remain of good behavior for the specified term. In fact, it seems to us that the fine was to be paid immediately, as no future time was set for its payment, and, in that event, if the contention of the defendant is to be accepted, the further condition enjoined by the court would be meaningless surplusage.

Nor is the judgment alternative, although an alternative is presented to the convicted defendant whether he shall remain a good citizen or be subject to imprisonment. An alternative judgment is a judgment "for one thing or another" (33 C. J., p. 1197), which does not specifically and in a definitive manner determine the rights of the parties. A judgment is said to be alternative because it requires the performance of one or more alternative propositions and is incapable of enforcement because the selection involves a function which may be performed only by the court, and such a judgment is void. *Strickland v. Cox,* 102 N. C., 410, 9 S. E., 414; *S. v. Hatley,* 110 N. C., 522, 14 S. E., 751. With some exceptions, not necessary to consider here, it must be sufficiently definitive to permit enforcement ministerially by its inherent directions. The sentence before us meets this test.

If any confusion exists, it arises out of the fact that the fine itself appears in the condition; but it is a fine and is so denominated. Since in criminal procedure the court has no right to impose a fine except as a punishment for an offense or require one to be paid in any other connection, although in form it may appear as a condition, it must be presumed that this court did impose the fine, and the condition supposed to be annexed was that it should be paid forthwith. The court had plenary power to impose both the sentence of imprisonment and the fine. No question could be raised as to the power to execute the one and suspend the other. Although in imposing both more orderly language might have been used, the whole judgment admits of no doubt that its effect was to impose the fine and imprisonment and to suspend that portion of the judgment referring to imprisonment upon the condition that the defendant remain a law-abiding citizen for the five-year period designated. If that had not been true, it was the privilege of the defendant at the term when the sentence was imposed to demand a modification and an unrestricted discharge upon the payment of the fine. While such a motion might have resulted in a more logically worded sentence, it is inconceivable that while the matter was *in fieri* a discharge of that sort

would have been granted, as we interpret the intention and the effect of the judgment challenged.

The defendant was present and by his silence was presumed to accept the conditions imposed. *S. v. Everitt,* 164 N. C., 399, 79 S. E., 274.

The questions raised in this case have an added importance because the State has recently entered into the administration of an extensive program of probation, under chapter 132, Public Laws of 1937 (see *supra*), under which a large and active department has been created. The act cited frankly makes probation depend on the power of judges to suspend judgments upon conditions outlined in the act, the more important of which relate to good behavior. Before we criticize too much the phrasing of the judgment in the case at bar, we should consult this statute. Doubtless the learned judge who imposed the sentence had it before him at the time, since it had been in effect more than a year. It provides in part: "Section 1. Suspension of Sentence and Probation. That after conviction or plea of guilty or *nolo contendere* for any offense, except a crime punishable by death or life imprisonment, the judge of any court of record with criminal jurisdiction may suspend the imposition or the execution of a sentence and place the defendant on probation or may impose a fine and also place the defendant on probation."

"Sec. 3. Conditions of Probation. That the court shall determine and may impose, by order duly entered, and may at any time modify the conditions of probation and may include among them the following, or any other: That the probationer shall: . . . (g) *Pay a fine in one or several sums as directed by the court.*"

"Sec. 4. Termination of Probation, Arrest, Subsequent Disposition. That the period of probation or suspension of sentence *shall not exceed a period of five years* and shall be determined by the judge of the court and may be continued or extended within the above limit."

It seems to us that this statute should determine the case before us, both as to the inclusion of the fine in the conditions of probation or suspension of judgment and the term during which it is within the jurisdiction of the court to fix the period of probation and the running of the condition.

While the facts upon which the court put in force the suspended sentence do not appear in the judgment itself, no request was made that such facts be found. The record was before the court as it is given here, for its inspection, and, under the circumstances, there is a presumption that it was properly considered. There is no contention by the defendant that his conviction for a violation of the criminal law during his period of probation was improper or that it improved his status as a law-abiding citizen.

The judgment is

Affirmed.

STACY, C. J., dissenting: I am not able to share the confidence with which the majority opinion starts and ends. My apprehensions are more nearly expressed about the middle of the opinion, where the going is not quite so easy, and it is conceded that "more orderly language might have been used" in imposing the judgment at the April Term, 1938.

Under the judgment in question the defendant has paid a *fine* of $100 and is now to serve a term of eight months on the roads. It is difficult to extract this meaning from the language employed. Even this Court is put to the necessity of transposition and interpretation. Nor is the probation statute particularly helpful in the premises. To "impose a fine and also place the defendant on probation" is not the same as to suspend judgment of imprisonment "upon the payment of a fine . . . and upon the further condition that the defendant be and remain law-abiding for a term of five years." See *S. v. Bennett,* 20 N. C., 170; *S. v. Warren,* 92 N. C., 825; *S. v. Crook,* 115 N. C., 760, 20 S. E., 513; *S. v. Jaynes,* 198 N. C., 728, 153 S. E., 410; *S. v. McLamb,* 203 N. C., 442, 166 S. E., 507; *S. v. Godwin,* 210 N. C., 447, 187 S. E., 560; 8 R. C. L., 244.

It was said in *Yu Cong Eng v. Trinidad,* 271 U. S., 500, "That a statute which requires the doing of an act so indefinitely described that men must guess at its meaning, violates due process of law." If such be the rule in respect of statutes, what shall be said of ambiguous judgments? The answer was given in *S. v. Gooding,* 194 N. C., 271, 139 S. E., 436.

A defendant ought not to be required to guess at the meaning of a suspended judgment. The matters involved—the enforcement of the criminal law and the liberty of the citizen—are worthy of exactitude.

BARNHILL and WINBORNE, JJ., concur in dissent.

STATE OF NORTH CAROLINA, ON RELATION OF ALBERT R. THACKER, ADMINISTRATOR OF GEORGE R. THACKER, DECEASED, v. FIDELITY & DEPOSIT COMPANY OF MARYLAND AND AMERICAN SURETY COMPANY OF NEW YORK.

(Filed 20 September, 1939.)

1. Clerks of Court § 18—

Clerks of the Superior Court are insurers and guarantors of funds coming into their hands by virtue or color of their offices.

2. Same: Principal and Surety § 5a—

Failure of a clerk of the Superior Court to account for funds received by virtue or color of his office upon demand raises the presumption that the money was misappropriated and converted upon receipt, and places the burden upon the clerk or his surety to show the contrary.

3. Principal and Surety § 5b—

An official bond of a clerk of the Superior Court is liable only for default occurring during the term for which the bond was given and cannot be held liable for default occurring during a prior or a subsequent term, even though the principal and surety on the bonds for the other terms of office be the same.

4. Limitation of Actions § 3f—Time from which statute begins to run on bond of clerk.

The statute of limitations on the bond of a clerk of the Superior Court begins to run at the time of default, which, upon failure of the clerk upon demand to account for funds received by virtue or color of his office, presumptively occurs the date the funds were received, or, upon failure of demand, default occurs upon failure of the clerk to account either to the *cestui que trust* or to the successor clerk at the expiration of the term during which the funds were received, even though the clerk succeeds himself, C. S., 439, and therefore the statute begins to run, at the latest, at the expiration of the term during which the default in fact occurs.

5. Same: Limitation of Actions § 2c—Actions against sureties on clerk's bonds for terms expiring more than six years prior to institution of action held barred.

This action was instituted against the sureties on successive bonds of a clerk of the Superior Court to recover for loss of a part of funds paid into the hands of the clerk to the use of plaintiff's intestate. It appeared that at the time the funds were paid into the hands of the clerk, intestate was *sui juris* and had full knowledge of the facts, and that the loss was sustained in an investment of the funds made by the clerk in good faith. It further appeared that the bonds of defendant sureties were executed for terms expiring more than six years prior to the institution of the action. *Held:* Since each of the bonds is liable only for default occurring during the term for which it was given, and since the statute of limitations began to run, at the latest, at the expiration of the said terms, the action against defendant sureties is barred by the six-year statute of limitations. C. S., 439..

6. Limitation of Actions §§ 3f, 4—C. S., 441 (9), held not applicable in this action against sureties on clerk's bonds.

Ordinarily, the statute of limitations on the bond of a clerk of the Superior Court begins to run upon default and not upon discovery, C. S., 439, and when funds are paid into the clerk's office to the use of a person who is *sui juris* and knows that the funds are subject to his demand, and the clerk invests such funds in good faith, the provisions of C. S., 441 (9), have no application in an action against successive sureties on the clerk's bonds to recover the loss sustained through such investment.

THACKER *v.* DEPOSIT CO.

APPEAL by plaintiff from *Gwyn, J.*, at May Term, 1939, of ROCKINGHAM. Affirmed.

Civil action against the sureties on the official bonds of the clerk of the Superior Court of Rockingham County to recover balance due on an amount received by the clerk under color of his office, which, on demand, has not been paid.

The parties waived trial by jury and the cause was tried upon stipulations of fact and such additional facts as the court might find from the evidence offered, it being agreed that the court should hear the evidence and find additional facts not incorporated in the stipulations.

From the stipulations and facts found by the court the following facts appear:

On 7 February, 1910, there was paid into the office of the clerk of the Superior Court of Rockingham County the sum of $3,226.32 to the use of George R. Thacker, who was then *sui juris*. This fund remained in the hands of the clerk and upon the appointment of Major Thomas Smith, as clerk, to fill an unexpired term, he received from his predecessor clerk, by virtue and under color of his office, $4,489.59, representing the original sum with accrued interest. On 16 July, 1926, Smith, clerk, loaned said money, together with other funds, to the Farmers' Exchange, Inc. Said loan was evidenced by a promissory note payable to him, as clerk, and was secured by a trust deed on real estate. The loan was made without the knowledge of George R. Thacker and without any order of court authorizing the same. No portion of the principal or interest was paid by the Farmers' Exchange, Inc., which executed an assignment for the benefit of creditors 24 May, 1928. The deed of trust was thereafter foreclosed and plaintiff received out of the proceeds of sale, through the clerk, $2,137.29. No other funds are available out of the assets of the Farmers' Exchange, Inc. There is now due on said fund $1,995.46, with interest from 20 February, 1937, and interest on $4,989.59 from 30 March, 1936, for which judgment has been rendered against Smith, clerk. The plaintiff, administrator, made no demand upon the clerk for the payment of said sum received by him until 30 March, 1936. Demand was then made and the clerk failed to pay any part of said sum and has paid no part thereof except the sum of $2,137.29, representing proceeds of the foreclosure sale. Thus, the estate of George R. Thacker has suffered a loss in the amount represented by the judgment against the clerk.

Major Thomas Smith was duly appointed and qualified as clerk of the Superior Court of Rockingham County 5 December, 1925, for an unexpired term of one year. Having been reëlected from time to time to succeed himself, he qualified for, and served during, the terms from December, 1926, to December, 1930; from December, 1930, to December,

1934; and from December, 1934, to December, 1938. Apparently he is acting as clerk for the term beginning in December, 1938.

For the original one-year term, beginning 5 December, 1925, said clerk gave official bond in the sum of $10,000 with the defendant, Fidelity & Deposit Company of Maryland, as surety. For the term beginning on the first Monday in December, 1926, he gave his official bond in the sum of $10,000 with the defendant, American Surety Company of New York, as surety. For the term beginning the first Monday in December, 1930, he gave his official bond in the sum of $10,000 with the National Surety Company, as surety. For the term beginning the first Monday in December, 1934, he gave his official bond in the sum of $10,000 with the National Surety Corporation as surety.

The said clerk at no time since his original induction into office made the reports required by law to the board of commissioners of Rockingham County, and he has failed to give an itemized statement of funds held, with detailed information required by statute. He has failed to keep any book, record or list of investments, but the evidences of various investments made by him were placed in a folder and kept locked in a safe in the vault in his office. The trust fund ledger kept by him, which included the fund due to George R. Thacker, was kept in a vault in his office open to the public.

In investing the funds held to the use of plaintiff's intestate and in doing all acts and things concerning the same, the clerk acted in good faith and there is no evidence of any misappropriation or dishonesty on the part of the clerk.

At the time of the original deposit of said fund in the hands of the clerk in 1910 to the use of George R. Thacker, the said Thacker had knowledge thereof. From that date until the time of his death, neither the plaintiff's intestate nor anyone for him made any demand upon the clerk for an accounting. The plaintiff made the first demand 30 March, 1936.

George R. Thacker, plaintiff's intestate, died 1 September, 1934, and the plaintiff, Albert L. Thacker, qualified as administrator of his estate 1 October, 1934, and is now acting as such. In the course of the administration of said estate plaintiff made demand upon the clerk for an accounting and for the payment of the sum due the estate. Thereafter, plaintiff obtained judgment against the clerk for the balance due, after crediting the amount received from the proceeds of the foreclosure sale. The clerk having failed to account and pay over the amount due, the plaintiff instituted this action 31 January, 1939.

Upon the facts stipulated and found by the court, the court entered judgment: (1) That no default or loss occurred during the term covered by the bond executed by the defendant, Fidelity & Deposit Company of

Maryland; (2) that no default or loss occurred during the term covered by the bond executed by the defendant, American Surety Company of New York; (3) that if default or loss occurred during the term covered by either bond the facts constituting the fraud or mistake were not discovered prior to 30 March, 1936, the date of the demand; (4) that from an examination based exclusively upon the records in the office of the clerk of the Superior Court, neither the plaintiff nor his intestate, by the exercise of due diligence and reasonable prudence, could have discovered the default, fraud or mistake at any time prior to the institution of this suit; (5) that by due diligence and reasonable business prudence the plaintiff and the plaintiff's intestate could have discovered the default, fraud or mistake three years prior to the institution of the action; (6) that the plaintiff's cause is barred by the statute of limitations; and, (7) that plaintiff's action be dismissed at the cost of the plaintiff.

The plaintiff excepted and appealed.

Hunter K. Penn and D. F. Mayberry for plaintiff, appellant.
Smith, Wharton & Hudgins for defendants, appellees.

BARNHILL, J. Is the plaintiff's alleged cause of action against the defendants barred by the statute of limitations, C. S., 439? If this question presented by this appeal is answered in the affirmative—as it must be—it is unnecessary for us to discuss or decide whether the admitted default of the clerk occurred during either of the terms covered by the bonds executed by the defendants.

The clerk of the Superior Court is an insurer and guarantor of funds "which have come, or may come, into his hands by virtue of color of title," *Pasquotank County v. Surety Co.*, 201 N. C., 325, 160 S. E., 176; *Gilmore v. Walker*, 195 N. C., 460, 142 S. E., 579; *Marshall v. Kemp*, 190 N. C., 491, 130 S. E., 193; *Williams v. Hooks*, 199 N. C., 489, 154 S. E., 828; *Smith v. Patton*, 131 N. C., 396, and the surety upon his official bond must account for any default by the clerk during the term for which the bond was executed. *Gilmore v. Walker, supra*, and other cases cited.

Failure of the clerk to account for funds received by virtue or color of his office upon demand raises the presumption that the money was misappropriated and converted upon receipt, and the burden is upon the clerk or his surety to "show the contrary." *Gilmore v. Walker, supra; Pasquotank County v. Surety Co., supra; Williams v. Hooks, supra.*

Failure to account, upon demand made during the term the fund was received, constitutes default which starts the running of the statute of limitations, presumptively from the date the fund was received. In the absence of such demand, failure by the clerk to account for funds re-

ceived by virtue or under color of his office at the end of the term during which the fund was received constitutes a default and is a breach of his official bond. *Washington v. Bonner,* 203 N. C., 250, 165 S. E., 683. If the clerk accounts for and pays over to his successor funds received by him under color of his office, there is no breach of his official bond executed to cover the period of that particular term.

An official bond executed for a specified term is not liable for defaults of the principal during another term. A bond for one term is not liable for the nonperformance of the official duties of the principal during another and different term, even though the principal and sureties be the same for both terms. The two terms are separate and distinct and the bonds given by an officer, as security for the performance of his official duties during one term may not be held liable for derelictions occurring in another and different term. Each term "must stand on its own bottom." *Ward v. Hassel,* 66 N. C., 389; *S. v. Martin,* 188 N. C., 119, 123 S. E., 631.

The statute of limitations begins to run upon default and not upon discovery. *Bank v. McKinney,* 209 N. C., 668, 184 S. E., 506. This statute (C. S., 439) is applicable to the clerk of the Superior Court and the surety upon his official bond. *Lee v. Martin,* 186 N. C., 127, 118 S. E., 914; *Vaughan v. Hines,* 87 N. C., 445.

Thus, it appears that if there is a default it presumptively occurred at the time the money was received. If it is shown to the contrary, it occurred at the time established by the evidence, or in any event, when the clerk who had received the fund fails to account therefor to the successor clerk, even though he is the successor. There is no default, and the statute does not begin to run, so long as the clerk faithfully accounts for the fund in his hands either to the *cestui que trust* or to the successor clerk. Therefore, the statute of limitations begins to run, at the latest, at the expiration of the term during which the default, in fact, occurred.

Under these well established principles of law relating to official bonds of public officers and to the statute of limitations in respect to actions upon official bonds, it appears that if there was any default by the clerk during the term for which the defendant, Fidelity & Deposit Company of Maryland, became surety upon his official bond, the statute of limitations against any action upon said bond began to run, at the latest, on the first Monday in December, 1926, when Smith, clerk, qualified as successor for the four-year term ending on the first Monday in December, 1930, more than twelve years prior to the institution of this action. If there was any default during the four-year term ending on the first Monday in December, 1930, upon the official bond for which the defendant, American Surety Company of New York, was surety, the statute

began to run, at the latest, at the expiration of that term, on the first Monday in December, 1930, more than eight years prior to the institution of this action. As the statute provides a six-year period within which actions must be instituted upon official bonds, it follows that as to each of the defendants, plaintiff's action is barred.

The provisions of C. S., 441 (9), have no application to this case. It is admitted that the deceased was *sui juris* and that he at all times knew that the subject matter of this litigation was in the hands of the clerk, subject to his demand. No fraud or mistake is alleged or proven and the court below found that Smith, clerk, at all times acted in good faith.

This is one of those cases which present facts which are incomprehensible. More than $3,000 was paid into the hands of the clerk of the Superior Court of Rockingham County to the use of George R. Thacker in 1910. He had full knowledge thereof and yet he made no demand upon the then clerk, or his successors in office, for principal or interest at any time during his lifetime. The loss admittedly sustained is quite apparently attributable, in part at least, to the negligence of plaintiff's intestate.

The judgment below is

Affirmed.

GUY H. LENNON, R. B. LENNON, AND R. B. ETHERIDGE, TRADING AS VIRGINIA DARE TRANSPORTATION COMPANY, v. JOHN HABIT AND JOE HABIT, INDIVIDUALLY AND TRADING AS HABIT BROTHERS FREIGHT LINE, AND VIRGINIA-CAROLINA TRANSPORTATION COMPANY, INC.

(Filed 20 September, 1939.)

1. Contracts § 10: Carriers § 5—Option to sell franchise within stipulated time requires notice but not payment of purchase price nor approval of commissions within that time.

Defendants gave plaintiffs an option to buy at any time within 90 days their franchise as a common carrier at a stipulated price subject to the approval of the Interstate Commerce Commission and the State commissions having jurisdiction. *Held:* It was of the essence that plaintiffs give notice of their intention to exercise their option within the 90-day period but notice within that period made the agreement a binding contract of purchase and sale at the price and upon the condition stipulated, and it was not required that the purchase price be paid within the 90-day period nor that the commissions approve the transfer within that time.

2. Contracts § 20: Carriers § 5: Specific Performance § 3—Tender is not required of plaintiffs when on defendants' statements it would be futile.

Defendants gave plaintiffs an option to buy their franchise as a common carrier at a stipulated price within a period of 90 days, subject to the

approval of the commissions having jurisdiction. Plaintiffs instituted this action for specific performance, alleging that plaintiffs gave defendants notice of their intention to exercise the option within the time specified and that the parties to the contract filed an application for the transfer with the Interstate Commerce Commission, that the application was refused because it was not in proper form, and that defendants notified plaintiffs that they would take no further steps to secure the approval of the several commissions and that defendants had declared their intention not to carry out the contract. *Held:* Upon notification by plaintiffs of their intention to exercise the option it was the duty of the defendants to take all necessary steps required of them to secure the approval of the several commissions and to deliver the property in accordance with the contract, and since the allegations of the complaint are sufficient to disclose that tender on the part of plaintiffs, under the circumstances, would be futile, tender of the purchase price by plaintiffs was not required.

3. Carriers § 5: Specific Performance § 3—

In a suit to compel specific performance of a contract of sale of a franchise as a common carrier, made subject to the approval of the Interstate Commerce Commission and the State commissions having jurisdiction, defendant sellers' demurrer on the ground that it failed to appear from the complaint that the commissions would approve the transfer, is untenable, it being incumbent upon defendants under the terms of their contract to join in a proper application to the commission for such transfer.

4. Same—

The jurisdiction of the Interstate Commerce Commission does not preclude our courts from entertaining a suit to compel defendant sellers to join in making a proper application to the proper commissions for a transfer of their franchise to plaintiffs in accordance with their contract for the sale of such franchise.

APPEAL by plaintiffs from *Thompson, J.*, at Chambers in Elizabeth City, N. C., 1 July, 1939. Reversed.

The plaintiffs brought suit to compel specific performance of a contract entered into between it and the defendants for the sale and delivery of certain franchises and property of defendants' transportation business, known as "Habit Brothers Freight Line," and to recover damages for breach of the contract.

The contract set up in the complaint is as follows:

"AGREEMENT.

"THIS AGREEMENT, Made and entered into this 1st day of August, 1938, by and between John Habit and Joe Habit, Trading as HABIT BROS. FREIGHT LINE, parties of the first part, and GUY H. LENNON, R. B. LENNON, AND R. B. ETHERIDGE, Trading as VIRGINIA DARE TRANSPORTATION COMPANY, parties of the second part, WITNESSETH:

"That the parties of the first part, for and in consideration of the sum of THREE HUNDRED ($300.00) DOLLARS to them in hand by the parties of the second part paid, the receipt of which is acknowledged, do hereby agree to sell to the parties of the second part at the option of the parties of the second part at any time within ninety (90) days from the date hereof, for the purchase price of TWENTY-ONE THOUSAND, SEVEN HUNDRED ($21,700.00) DOLLARS, in addition to the Three Hundred ($300.00) Dollars already paid, the following property, to wit: Interstate Certificate No. 37015 issued by the Interstate Commerce Commission; North Carolina State Certificate No. 233; Virginia Certificate No. ....., and all other State and Federal franchises now or hereafter acquired; two (2) Chevrolet trucks, 1936 model; two (2) Ford trucks, 1937 model; one (1) Chevrolet truck, 1937 model; three (3) semi-trailers, and all other equipment of every description, including office equipment used in connection with the freight transportation business of the parties of the first part carried on under the above name (except garage equipment located in Edenton).

"In the event said option is exercised, the parties of the first part agree to deliver said property in as good condition as it now is, reasonable wear and tear excepted, and free of all liens and encumbrances.

"The exercise of this option is subject to the approval of the Interstate Commerce Commission, the North Carolina Utilities Commissioner and the Virginia State Corporation Commission, and in the event the sale is disapproved by any of said agencies, the Three Hundred ($300.00) Dollars paid as consideration for this option is to be returned to the parties of the second part.

"IN WITNESS of which the parties of the first part have hereunto set their hands and seals.

JOHN HABIT [SEAL]
JOE HABIT [SEAL]
By: JOHN HABIT [SEAL]
"Attorney-in-Fact."

Plaintiffs allege that at the time of the exercise of this contract they paid the $300.00 mentioned therein upon the contract price and subject to the terms of the contract.

The complaint further alleges that within the ninety-day period named in the agreement plaintiffs notified the defendants of their intention to exercise the option, and that they were ready, able, and willing to carry out its terms, and offered to give assurances to that effect. It is alleged that after this notice to defendants, a joint application was made to the Interstate Commerce Commission pursuant to the rules and regulations of that body, which said application was executed by Vir-

ginia Dare Transportation Company by Guy H. Lennon, and by Habit Brothers Freight Line by John Habit, and duly acknowledged; but that under the rules of the Interstate Commerce Commission it is required that when application so made is on behalf of partnerships each partner of the partnership shall execute and acknowledge the execution of the application, of which rule neither the plaintiff Guy H. Lennon nor the defendant John Habit were advised until the said application was made in good faith. That the petition was dismissed because it was not signed in accordance with the aforesaid rule.

It is alleged that when the plaintiffs were advised of this they immediately transmitted the information to John Habit and Joe Habit, individually, and that the request and demand was made on said defendants individually, and doing business as Habit Brothers Freight Line, that a further and additional application be executed and filed with the Interstate Commerce Commission, to obtain approval of said Commission for the transfer of the certificates and to prevent any dismissal of the petition theretofore filed, and that the said defendants John Habit and Joe Habit refused and continued to refuse to join in any further application, and that, thereby, the plaintiffs were prevented from obtaining approval by the said Commission.

It is alleged that John Habit, on behalf of Habit Brothers Freight Line, on 25 October, 1938, filed with the North Carolina Utilities Commission an application for the transfer or sale of the franchise certificate in question, and on 23 November, 1938, the said Utilities Commission issued its order directing the sale and transfer of Certificate No. 233 to the Virginia Dare Transportation Company, upon approval of the Interstate Commerce Commission.

That the Virginia State Corporation Commission has been advised by the plaintiffs of the proposed purchase by the Virginia Dare Transportation Company of the certificate issued by the Virginia State Corporation Commission, but no approval has as yet been issued, nor has the Commission refused to approve the sale.

It is further alleged that the defendants have failed and refused to comply with their agreement, and that they have stated to the plaintiffs that they do not intend to comply therewith, or to convey to the plaintiffs the certificates and property referred to in the agreement, and have failed and refused to comply with the rules of the Commission issuing the respective certificates with reference to the transfer thereof, and have advised the plaintiffs that they do not intend to do any act of assistance in approving the transfer and sale of certificates and property referred to in the agreement.

It is alleged in the complaint that the defendants demanded of the plaintiffs the payment of the full purchase price within the ninety-day

period of the option as a condition precedent to the transfer of the franchises and property.

The defendants filed a written demurrer to the complaint as not stating a cause of action, for that, as contended by them, the contract was for the transfer of motor carrier's certificates issued to defendants by the Federal Interstate Commerce Commission, the North Carolina Utilities Commission, and the Virginia State Corporation Commission, "which option was expressly subject to the approval of the said Commissions," and the transfer could not be made without the approval of said Commissions, which has not been given, and that this Court has no jurisdiction of any matter legally vested in the discretion of such Commissions.

Defendants further demur on the ground that the complaint does not state a cause of action for that (a) the option was limited to ninety days, and that this exercise by the plaintiffs was subject to the approval by the Commissions aforesaid, and the burden was, therefore, "entirely, or at least equally, upon the plaintiffs" to secure the approval by all three Commissions, and such approval has not been obtained; and that it "affirmatively appears that the opportunity to obtain the approval of the Interstate Commerce Commission within the time prescribed by the option, without which the option could not be exercised, was lost by failure of the plaintiffs to properly execute and acknowledge the application therefor"; (b) that it is not alleged or known that approval could have been had if application had been made in apt time, and it cannot be known, therefore, whether the plaintiffs suffered any loss; (c) that the option required the plaintiffs to pay the balance of the purchase price in ninety days from its date, which was not done; and (d) no tender was made, nor is it alleged that plaintiffs are now ready, able and willing to pay the purchase price.

The court sustained the demurrer, dismissing plaintiffs' action, and plaintiffs appealed.

Bailey & Lassiter and M. B. Simpson for plaintiffs, appellants.
W. S. Privott and W. D. Pruden for defendants, appellees.

SEAWELL, J. Passing the fact that the interpretations placed by defendants on a number of the substantial allegations in the complaint lead to statements and assumptions in the demurrer contradictory to these allegations, fairly interpreted, we do not agree with the interpretation which the court below evidently placed upon the contract, nor with the legal inferences which it drew in sustaining the demurrer.

It is not necessary to set out in great detail the considerations which have led us to this conclusion, but we do not regard the contract as

requiring the full payment of the purchase price within the ninety-day period during which the option had to run, but only as requiring this to be done when the defendants were in position to transfer, and did within reasonable time transfer, the unencumbered property to the plaintiffs.

Certainly, in so far as notice that the plaintiffs intended to exercise the option of purchase, time was of the essence of the contract, and this had to be done within the ninety-day period; but payment within that period was not of the essence of the contract. The notice within the ninety days was sufficient to make it a binding contract of purchase and sale at the price and upon the conditions named, none of which conditions necessarily, and as a matter of law, operated to defeat the contract by reason of nonperformance within the option period. *Davis v. Martin,* 146 N. C., 281, 59 S. E., 700; *Timber Co. v. Wilson,* 151 N. C., 154, 65 S. E., 932; *Wachovia Bank & Trust Co. v. United States,* 98 Fed. (2d), 609.

This view of the contract disposes of much of the objections of the defendants which prevailed in the lower court.

The contract calls for a delivery free from encumbrance. It was the duty of the defendants, upon notice of the plaintiffs that they intended to exercise the option, to take all necessary steps to deliver to the plaintiffs the unencumbered title to the property. The complaint alleges that defendants have notified the plaintiffs that they will take no steps to secure from the several Commissions the approval necessary to the delivery of the property, apparently basing their refusal on the mistaken notion that the expiration of the ninety-day period of the option foreclosed any rights the plaintiffs had to the enforcement of the contract or for damages for its breach. The complaint also alleges that they have declared their intention not to carry out the contract for the delivery of the property at all.

Even if the plaintiffs had been required by the contract to pay all the purchase price within the ninety days—which is not conceded—sufficient matter appears in the allegations of the complaint to justify a submission to the jury of the readiness and ability of the defendants to comply with their duty to see that plaintiffs receive an unencumbered title.

Tender is not required where on defendant's statements it would be futile. *Bateman v. Hopkins,* 157 N. C., 470, 73 S. E., 133; *Samonds v. Cloninger,* 189 N. C., 610, 127 S. E., 706; *Wachovia Bank & Trust Co. v. United States, supra.*

Apparently at one time the defendants themselves took the view that the contract might be complied with, although the purchase price had not all been paid within the ninety-day period, since they joined with the plaintiffs in a petition to the Interstate Commerce Commission to

approve the sale and the transfer about six days before the expiration of the period.

It seems clear to us that such approval need not have been made necessary under the terms of the contract during the ninety-day period. At any rate, the defendants may not speculate upon the probability of an adverse ruling by the various Commissions concerned, based upon their present attitude of unwillingness, or for any other reason, since under the circumstances of this case it was their duty at least to join in any application made to the Commissions in furtherance of the purpose of their contract, which the complaint alleges they have failed to do.

The fact that the trade between plaintiffs and defendants could not be consummated without the approval of the Interstate Commerce Commission does not affect the jurisdiction of this Court of the subject matter of this action, as set out in the complaint.

We have refrained from discussing any matter not necessary to a consideration of the demurrer.

The complaint alleges a cause of action, and the judgment sustaining the demurrer is

Reversed.

G. W. HARRIS, JOHN BARNES, A. C. O'BRIEN, J. B. GLOVER, L. A. WELLS, B. A. SCOTT, G. B. SHOTWELL AND F. H. HICKS, IN BEHALF OF THEMSELVES AND ALL OTHER CITIZENS, RESIDENTS AND TAXPAYERS OF DABNEY SCHOOL DISTRICT, VANCE COUNTY, N. C., v. THE BOARD OF EDUCATION OF VANCE COUNTY AND E. M. ROLLINS, COUNTY SUPERINTENDENT OF SCHOOLS OF VANCE COUNTY.

(Filed 20 September, 1939.)

1. Mandamus § 1—

Mandamus will lie against a municipal corporation or a public official only when the defendant is under a clear legal obligation to perform the act sought to be required, and only at the instance of those having a clear legal right to demand its performance, and further, the writ will lie only when there is no other legal remedy.

2. Mandamus § 2b—

Mandamus will not lie to control the exercise of a discretionary power nor to compel a board to reverse its action theretofore taken in determining a matter in its discretion, and an allegation that defendant acted "wrongfully, unlawfully, unjustly, arbitrarily and without just cause or reason" in determining a discretionary matter is not sufficient to support an application for a writ of *mandamus*.

3. Mandamus § 3: Schools § 22—

Private citizens of a school district have no legal right in connection with the election and approval of a principal for such district, and therefore may not maintain a suit to compel the county board of education to approve the election of a principal by the district school committee.

4. Same—

The members of a district school committee may not maintain an action to compel the county board of education to approve their election of a principal, since their statutory duty in regard to the matter requires only that they elect a principal and, if the election is disapproved, that they elect another.

5. Mandamus § 1: Schools § 22—Mandamus will not lie when plaintiff must establish his right thereto by competent proof, since his right to the relief is in doubt.

A person elected principal of a school by the district school committee is not entitled to *mandamus* to compel the county board of education to approve his election upon his allegation that the county board of education acted wrongfully, arbitrarily and without just cause and reason in disapproving his election, since *mandamus* will lie only to enforce a clear legal right and his right to the relief remains in doubt until he establishes by competent proof that the action of the county board of education in disapproving his election was void for want of good faith.

6. Mandamus § 2b: Schools § 22—County board of education has discretionary power to approve or disapprove election of teachers by local school authorities.

The statute imposing the duty upon the county board of education to approve the election of teachers by the district school committee vests in the county board of education the discretionary power to approve or disapprove elections by the local authorities, in the best interest of the community, and the courts will not control the exercise of such discretion or compel the county board to reverse action taken by it, since action taken under the compulsion of the courts would not be in the exercise of discretion by the county board as contemplated by the statute.

7. Schools § 22—

While a person elected principal by the district school committee is not entitled to *mandamus* to compel the county board of education to approve his election upon his allegation that the county board disapproved his election unlawfully and arbitrarily, he may be entitled to a mandatory injunction, upon proper pleadings and proof that the county board acted in bad faith, to compel the county board to act upon his election and to grant or withhold its approval in good faith in the proper exercise of its discretionary power.

8. Schools § 22—

The county board of education is not authorized to elect a principal of a school unless it appears that the local school authorities are in disagreement as to such election, and therefore, in a suit to compel the county board to approve an election made by the local school authorities, a plea in abatement on the ground that the county board had already elected another to the position is properly overruled in the absence of a showing of disagreement by the local school authorities.

9. Pleadings § 23—

Where it is determined on appeal that defendants' demurrer in plaintiffs' suit for *mandamus* should have been sustained but that plaintiffs, upon the facts alleged, may be entitled to a mandatory injunction, the

action need not be dismissed, but the court below may permit the filing of additional or amended pleadings and order the cause transferred to the civil issue docket of the county in which the cause of action arose in order to save time and costs.

APPEAL by defendants from *Thompson, J.*, at July Term, 1939, of VANCE. Reversed.

Application for writ of *mandamus*, heard on demurrer.

The school committee of Dabney School District in Vance County elected the plaintiff, B. A. Scott, as principal of the school for the 1939-1940 term. The defendants disapproved the election. Thereafter, on petition of citizens of the school district, the defendants refused to reconsider the action or to assign any reason therefor. Thereupon, certain of the plaintiffs instituted this proceeding in the nature of an application for a writ of *mandamus* "directing and commanding them (the defendants) to approve the reëlection of the said B. A. Scott as principal of the Dabney High School for the ensuing school year."

When the cause came on to be heard before the judge below the defendants demurred to the complaint filed upon eight several grounds set out in the demurrer. Before ruling on the demurrer the court permitted the plaintiffs, J. B. Shotwell and F. H. Hicks, members of the Dabney School District Committee, and B. A. Scott, the principal elected by the local committee, to make themselves parties plaintiff and to adopt the complaint theretofore filed. The defendants likewise filed a plea in abatement for that the defendants, acting under the provisions of chapter 358, Public Laws 1939, have elected and contracted with one M. H. Randolph as a teacher-principal of said school.

The court entered its order denying the plea in abatement and overruling the demurrer. The defendants excepted and appealed.

Gholson & Gholson and W. H. Yarborough for plaintiffs, appellees.

A. A. Bunn and J. H. Bridgers for defendants, appellants.

BARNHILL, J. It is well established by the decisions of this Court that *mandamus* is available against a municipal corporation or public official to compel the performance of a ministerial duty. But those seeking the writ must have a clear legal right to demand it and the board must be under a legal obligation to perform the act sought to be required. *Rollins v. Rogers,* 204 N. C., 308, 168 S. E., 206; *John v. Allen,* 207 N. C., 520, 177 S. E., 634; *Mears v. Board of Education,* 214 N. C., 89. The writ will not be issued to enforce an alleged right which is in doubt. *Hayes v. Benton,* 193 N. C., 379, 137 S. E., 169; *Cody v. Barrett,* 200 N. C., 43, 156 S. E., 146; *Powers v. Asheville,* 203 N. C.,

2, 164 S. E., 324. "The function of the writ is to compel the performance of a ministerial duty—not to establish a legal right, but to enforce one which has been established. The right sought to be performed must be clear and complete." *Wilkinson v. Board of Education,* 199 N. C., 669, 155 S. E., 562. The writ issues only when there is no other legal remedy. *Hayes v. Benton, supra; Cody v. Barrett, supra; Mears v. Board of Education, supra; Powers v. Asheville, supra; Rollins v. Rogers, supra.* The court below will not and cannot undertake to control the discretionary power of the defendants. *Hayes v. Benton, supra.* The allegation that the defendants acted "wrongfully, unlawfully, unjustly, arbitrarily and without just cause or reason" is not sufficient to support an application for a writ of *mandamus. Ewbank v. Turner,* 134 N. C., 77.

While the plaintiffs, other than B. A. Scott, no doubt, are vitally concerned about the school of their district and the personnel of the teachers therein, they possess no legal right in connection with the election and approval of a principal such as would entitle them to maintain an action against the defendants (hereinafter referred to as county authorities) to compel them to approve the election of a principal by the district school committee (hereinafter referred to as district authorities). It, therefore, clearly appears that there was error in the judgment of the court below in overruling the demurrer as to the plaintiffs who are private citizens of the district.

When the school committee elects a principal their duty is fully performed in respect thereto unless the election is disapproved by the county authorities, in which event it is the duty of the district authorities to proceed to elect another principal. Likewise, therefore, the demurrer should have been sustained as to the plaintiffs who are members of the local committee, who, incidentally, are plaintiffs as individuals and not in their official capacity.

Was there error in overruling the demurrer as to B. A. Scott (hereinafter referred to as plaintiff)?

Before the plaintiff becomes entitled to the position to which he was elected by the district authorities his election must be approved by the county authorities. The election has been disapproved. The plaintiff's right to the office does not now exist and depends upon proof by him that the action of the county authorities in disapproving his election was void for want of good faith. The allegations in the complaint do not disclose that he has a clear legal right to the remedy sought. This right is in doubt and remains in doubt until he establishes, by competent proof, the allegations contained in his complaint. *Ewbank v. Turner, supra,* is almost directly in point. There the Dentistry Board declined to approve the examination of the plaintiff and to issue license. The allega-

tions as to the arbitrariness of the action of the board are almost identical with those contained in the complaint of the plaintiff and the writ was denied.

The writ of *mandamus* compels action—it does not determine how the defendant shall act. *Key v. Board,* 170 N. C., 123; *Board v. Board,* 150 N. C., 116. Nor does it undertake to control the discretion vested in the defendant as a governmental agency or official. And the provision in the statute that the election of a principal by the district authorities is subject to the approval of the county authorities imposes upon the county authorities the discharge of a discretionary duty. The primary and controlling significance of the word "approve" imposes the exercise of discretion and judgment. The requirement that the election of a principal by the local authorities is subject to the approval of the county authorities was intended to and does confer upon the latter the power to give or withhold their approval as their judgment may dictate, having regard to the best interest of the community affected. *Lane v. Insurance Co.,* 142 N. C., 55; *Key v. Board of Education, supra.*

The allegations of the complaint, if accepted as true, do not disclose that the plaintiff has a clear legal right to the office or position of principal of Dabney High School. The county authorities have acted adversely to his claim. His right is in doubt and depends upon his ability to show that the action of the county authorities was void for want of good faith. Furthermore, the board has acted and the court may not, by writ of *mandamus,* direct them to reverse their action.

An approval of the election by them under compulsion of a court order would not constitute the approval contemplated by the statute. See *Hayes v. Benton, supra.*

The plaintiff has an adequate remedy. He may sue for damages. *Ewbank v. Turner, supra.* He may, upon proper pleadings and upon a finding by the court, upon a hearing, that the action of the county authorities was in fact arbitrary and capricious and actuated by selfish and personal motives, apply for and obtain a mandatory injunction compelling the defendants to proceed to act upon the election and to grant or withhold their approval in good faith, uninfluenced by selfish or personal motives. This is as far as the courts may go in controlling the action of administrative units or governmental agencies. When a public official fails to act in accord with the wishes of the majority of those whom he serves, the relief is usually through the ballot box.

Controversies such as this between agencies created to conduct and control the public schools of the State and who are supposed to coöperate to that end should be adjusted around the council table and not in the courts.

The school law provides that "in the event the local school authorities herein provided for are unable to agree upon the nomination and election of teachers, the County Board of Education shall select the teacher or teachers, which selection shall be final for the ensuing term." It does not appear that the local school authorities are in disagreement as to the election of a principal so as to vest the County Board of Education with authority to elect a principal to this office. Therefore, there is no error in so much of the judgment as overrules the plea in abatement.

The action need not be dismissed. The court below may in its discretion permit the filing of additional or amended pleadings to the end that the plaintiff may seek to establish such right as he may have. While the summons was returnable before the judge, in Chambers, in a county other than its issuance, the cause may be transferred to the civil issue docket of Vance County. This does no one any detriment, saves time and costs and avoids the unseemly counter-marching incident to the old practice when a plaintiff was put out of one court by one door and was left to guess by which door he should come back into the same room. The necessary parties have been served with summons and are in court. The transfer of the case to the civil issue docket harms no one. *Ewbank v. Turner, supra.*

The judgment below is

Reversed.

MINNIE MERCER SMITH v. PILOT LIFE INSURANCE COMPANY.

(Filed 20 September, 1939.)

1. Insurance § 30c: Evidence § 37—Held: Proper predicate was laid for admission of secondary evidence relating to receipt for insurance premium.

Defendant insurer's liability on the policy in suit was dependent upon whether the second installment of the first annual premium had been paid. Plaintiff beneficiary testified that she had searched her home and the effects of herself and her husband, the insured, and a box in which her husband kept his papers at the place where he worked, without finding the receipt for the second installment of the first annual premium, that her husband had showed her the receipt and had put same in his uniform, and that the uniform had been burned at the undertaker's establishment to which her husband's body had been taken after the fatal accident. Plaintiff's testimony was corroborated by testimony of the owner of the undertaking establishment that he had burned the uniform that was on the body of the deceased when it was brought to his place of business. *Held:* Plaintiff's evidence laid proper predicate for admission of secondary evidence as to the contents of the receipt.

2. Evidence § 37—

Whether sufficient foundation has been laid for the admission of secondary evidence is for the determination of the court, and if the adverse party desires the court to find the facts relative thereto he must aptly make request therefor, and in the absence of such request he waives his right and the Supreme Court will consider the record evidence in the light most favorable to the party offering the secondary evidence in determining its sufficiency to show that proper predicate had been laid.

3. Insurance § 30c—Conflicting evidence held to raise issue of fact as to whether premium had been paid.

Defendant insurer's liability upon the policy in suit depended on whether the second installment of the first annual premium had been paid. Plaintiff laid proper foundation for the admission of secondary evidence, and testified that her husband, the insured, had shown her a premium receipt identical with the receipt for the first installment of the first annual premium, except for the dates, and testified as to the dates on the second receipt, which would have kept the policy in force until after the death of the insured. Defendant insurer introduced evidence that no payment of the second installment of the first annual premium had been made, either to it or its local agent, and that no receipt therefor had been issued by it or its agent. *Held:* The conflicting evidence of payment raises an issue for the determination of the jury, and defendant's motion to nonsuit was properly overruled. C. S., 567.

4. Insurance § 30c: Evidence § 39—

The policy in suit provided that premiums were payable at the home office, or to the insurer's local agent in exchange for the insurer's official receipt. *Held:* Testimony of insurer that its local agent was without authority to collect the premiums in question is incompetent as tending to contradict the written terms of the policy contract.

5. Evidence § 33: Insurance § 30c—

Defendant insurer's liability depended on whether the second installment of the first annual premium had been paid. *Held:* Testimony of an insured under another policy as to the premium receipts received by him from insurer is properly excluded as being *inter alios*.

6. Judgments § 33a—

A judgment as of nonsuit will not bar a subsequent action on the same cause of action unless the evidence in the second action is substantially the same as that in the first, and where the difference in the evidence in the two actions is substantial and material, the denial of the defendant's motion to dismiss the second action on the ground that the prior judgment constituted a bar is properly denied.

APPEAL by defendant from *Carr, J.*, at January Term, 1939, of PASQUOTANK. No error.

McMullan & McMullan for plaintiff, appellee.

J. Kenyon Wilson and Smith, Wharton & Hudgins for defendant, appellant.

SCHENCK, J. This is an action on an insurance policy for the sum of $2,500, issued by the defendant upon the life of Levy Hinton Miller, now deceased, in which the plaintiff, his wife, was the beneficiary, wherein the jury rendered the following verdict:

"1. Was the policy of insurance, No. 157810, issued by the defendant on life of Levy Hinton Miller, in force and effect at the time of said Levy Hinton Miller's death, as alleged in the complaint? Answer: 'Yes.'

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

From judgment predicated upon the verdict the defendant appealed, assigning errors.

The premiums on the policy were computed on an annual basis, but by a rider attached thereto it was provided that "Each annual premium may be paid in twelve (12) monthly installments of $4.94 each, due on the 5th day of each month, beginning with the date of this policy." The policy was dated 5 December, 1935, and the first installment on the first annual premium was duly paid.

The second installment on the first annual premium was due on 5 January, 1936. The rider attached to the policy likewise provided that "non-payment of any installment when due, or within one month (not less than thirty-one days) thereafter, automatically voids this policy . . ." If the second installment on the first annual premium was paid on 5 January, 1936, or within thirty-one days thereafter, the policy was retained in effect until 5 February, 1936, and thirty-one days thereafter, or into the month of March, 1936. The insured was killed on 28 February, 1936.

The plaintiff alleges and contends that the second installment on the first annual premium was paid within the time provided by the policy. The defendant denies that such second installment was ever paid.

The plaintiff relied principally upon her own testimony to the effect that after 5 January, 1936, her husband, the insured, showed to her a receipt from the defendant for the second installment on the first annual premium, and that this receipt was similar to the receipt for the first installment on the first annual premium (which was introduced in evidence) except the date thereon was 5 January, 1936, instead of 5 December, 1935—that the two receipts were signed by the same parties.

The defendant objected to this testimony upon the ground that the receipt for the second installment on the first annual premium would be the best evidence of its contents, and that the plaintiff had not laid the proper foundation for the introduction of secondary evidence thereof. This objection is untenable, since the witness, the plaintiff, testified that she had searched the home of the deceased and herself, the clothes of

the deceased and a box, in which the deceased kept some papers at the place where he worked, for the receipt without avail, and that she had ascertained that the uniform which the deceased had on at the time of his death, and into the pocket of which she had seen the deceased place the receipt, had been burned or destroyed when the deceased's mangled body was taken to the undertaker's establishment.

Walker, J., in *Avery v. Stewart*, 134 N. C., 287 (290), quotes with approval Wharton on Evidence, secs. 141, 142, as follows: "The production of proof, satisfactory to the court, that it is out of the power of the party to produce the document alleged to be lost, and of its prior existence and genuineness, is a prerequisite condition of the admission of secondary evidence of its contents. The question of such admissibility is for the courts. Loss, like all evidential facts, can be only inferentially proved. . . . It is not necessary, therefore, to prove exhaustively that the paper exists nowhere. It is sufficient if the party offering parol proof shows such diligence as is usual with good business men under the circumstances."

We think that the plaintiff's testimony as to the search which she made for the lost receipt, corroborated as it was by the testimony of the witness Ziegler that he burned or destroyed the uniform which was on the deceased when his mangled body was brought to his undertaking establishment, laid sufficient foundation for the admission of secondary evidence as to the contents thereof. If the defendant desired to have the court find the facts relative to the search made, it had the right to request that such be done, but having failed to insist upon this right it waived it, and must abide the consequences. "If there is sent with the record the evidence of the loss instead of the judge's finding of facts, this Court will consider the evidence in the most favorable light for the appellee, but will of course pass upon the sufficiency of the evidence to show that proper search has been made." *Avery v. Stewart, supra.*

The appellant contends that even if the evidence as to the loss of the receipt for the second installment on the first annual premium and as to its contents be admitted, its demurrer to the evidence under C. S., 567, should have been sustained. This contention is untenable.

The evidence, when taken in the light most favorable to the plaintiffs, tends to show the issuance of the insurance policy on the life of the deceased, payable to the plaintiff on 5 December, 1935, the death of the deceased on 28 February, 1936, the issuance of a receipt for the first installment on the first annual premium on 5 December, 1935, and the issuance of a similar receipt on 5 January, 1936, for the second installment on the first annual premium, which kept the policy in effect until 5 February, 1936, and thirty-one days thereafter, or until after the death of the deceased.

While the defendant introduced evidence to the effect that no payment had been made to it, either at its home office or to its local agent, upon the second installment on the first annual premium, and that no receipt had been issued by it, either at the home office or by its local agent, for the payment of such installment, the credibility of this evidence was challenged by evidence of the plaintiff, and thereby an issue was raised. This issue was properly submitted to the jury. *Ferrell v. Ins. Co.*, 207 N. C., 51.

The testimony of H. C. Beeson, defendant's cashier, to the effect that the local agent White was without authority to collect the second installment on the first annual premium of the policy involved was properly excluded, since to have admitted such testimony would have been to permit the witness to contradict the policy contract of the parties, which provided that "All premiums are payable at the Home Office of the Company, but may be paid on or before the dates due to the company's agent in exchange for the company's official receipt, signed by one of the officers referred to below and countersigned by the agent."

The testimony of Herman H. Meads as to the receipts he received from the defendant for premiums paid by him on a policy of life insurance were properly excluded as being *inter alios*.

The defendant offered before the court, in the absence of the jury, the complaint, the answer, evidence and judgment of nonsuit in a former action by the plaintiff against the defendant and moved the court to find as a fact that the pleadings and evidence in this case were substantially the same as in the former case, and to dismiss the action. This motion was denied and the defendant excepted. This exception is untenable, since there is a substantial addition to the evidence in the former case in the evidence in the present case. In the present case, but not in the former case, the witness Ziegler testified in effect that he burned or destroyed the uniform which the deceased wore at the time he was killed when his mangled body was brought to his undertaking establishment, and the plaintiff testified in the present case but not in the former case that she saw the deceased place the receipt for the second installment on the first annual premium in the pocket of his uniform. It has been uniformly held by this Court that a judgment as of nonsuit will not bar a subsequent action on the same cause of action where the evidence in the second action is not substantially the same as the evidence in the first action. *Hampton v. Spinning Co.*, 198 N. C., 235, and cases there cited; *Swainey v. Tea Co.*, 204 N. C., 713. The difference in the evidence in the two cases here involved was not only substantial but material. The testimony as to the placing of the receipt in the pocket of his uniform by the deceased and as to the burning or destruction of the uniform by the undertaker, if believed, tended strongly to establish the

former existence of such receipt, as well as its destruction, both of which facts were material to the plaintiff's alleged cause of action.

We have examined the exceptions to portions of the charge, but are of the opinion that when the charge is read contextually and as a whole it is free from prejudicial error.

No error.

STATE v. CHARLES FAIN.

(Filed 20 September, 1939.)

1. Criminal Law § 33—

The competency of a confession is a preliminary question for the trial court, and its ruling thereon will not be disturbed if supported by competent evidence.

2. Criminal Law § 50a—

The comment of the trial court upon the admission of defendant's confession in evidence that the court had held the confession competent because it appeared that it was taken without hope of reward or without extortion or fear, after defendant had been duly warned of his rights, amounts to no more than stating that the confession had been admitted in evidence and the reasons for admitting it, and will not be held for error as an expression of opinion by the court prohibited by C. S., 564.

3. Criminal Law § 81c—

When defendant is charged with two separate capital offenses, and there is plenary evidence to support the jury's verdict of guilty on each count, defendant's exception to the court's failure to submit the question of his guilt of a lesser degree of one of the crimes charged is immaterial, since it does not affect the validity of the verdict of guilty as to the other crime.

APPEAL by defendant from *Nettles, J.*, at March-April Term, 1939, of CHEROKEE.

Criminal prosecution tried upon indictment charging the defendant with burglary in the first degree, and with rape.

Verdict: Guilty of burglary in the first degree as charged in the first count, and guilty of rape as charged in the second count in the bill of indictment.

Judgment: Death by asphyxiation.

The defendant appeals, assign errors.

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

D. H. Tillitt and C. E. Hyde for defendant.

STACY, C. J. The scene of the crimes of which the defendant has been convicted was a hospital in Murphy, Cherokee County; the time before dawn or about 3:30 a.m., 29 January, 1939.

The first count in the indictment is directed to the time, manner and intent with which the defendant entered the hospital; the second is addressed to his attack upon a nurse employed therein. *S. v. Allen,* 186 N. C., 302, 119 S. E., 504. The details of the offenses are not material to a proper solution of the questions of law presented by the appeal. It is enough to say the evidence is so full and complete that its sufficiency is not challenged by demurrer or motion to nonsuit. It supports the verdict on both counts. Indeed, it may not be amiss to call it compelling.

The defendant offered no evidence before the jury. His only challenges are: First, to the competency of his written confession as evidence; second, to the court's comment upon its voluntariness; and, third, to the court's instruction to the jury not to consider a verdict of burglary in the second degree.

It is the established procedure with us that the competency of a confession is a preliminary question for the trial court, *S. v. Andrew,* 61 N. C., 205, to be determined in the manner pointed out in *S. v. Whitener,* 191 N. C., 659, 132 S. E., 603, and that the court's ruling thereon will not be disturbed, if supported by any competent evidence. *S. v. Moore,* 210 N. C., 686, 188 S. E., 421. No error has been made to appear in the admission of the confession in evidence. *S. v. Alston,* 215 N. C., 713. Hence, the defendant's first exception is not sustained.

The second exception is directed to the court's comment upon the defendant's confession as evidence, namely, "which the court has held to be competent in this case because it appears that the confession was taken without hope of reward or without any extortion or fear, and that it was fairly taken after the prisoner had been duly warned of his rights." This did not constitute an expression of opinion, such as is prohibited by C. S., 564, for the judge said no more than that the confession had been duly admitted in evidence, and he gave the reasons for admitting it. In this respect, the case of *S. v. Davis,* 63 N. C., 578, would seem to be "straight up and down" with the instant case.

The third exception is to the court's instruction to the jury that "there is no evidence in this case of burglary in the second degree and you need not consider that offense in your deliberations." 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." The pertinent decisions are to the effect that this statute does not, as a matter of law, require or authorize the trial court to instruct the jury that such a verdict may be rendered independently

of all the evidence. *S. v. Morris,* 215 N. C., 552. It has not been held, however, so far as we are aware, that the trial court may withhold such a verdict from the jury's consideration. *S. v. Ratcliff,* 199 N. C., 9, 153 S. E., 605. The exception is not material in the instant case as it does not go to the validity of the verdict on the second count, which is also a capital offense. Hence, for this reason, we make no definite ruling upon the point.

Our conclusion is, that the record contains no exceptive assignment of error which should be sustained. The verdict and judgment will be upheld.

No error.

THE FIRST & CITIZENS NATIONAL BANK OF ELIZABETH CITY, PLAINTIFF, v. W. E. HINTON, GEORGIA HINTON AND HUSBAND, R. L. HINTON, DEFENDANTS.

(Filed 20 September, 1939.)

Bills and Notes § 17—When liability of surety is discharged by compromise and settlement, maker is entitled to credit only for amount actually paid.

The payee of a note, by compromise and settlement, accepted cash and lands at an agreed value from the surety or accommodation endorser in full satisfaction of the surety's liability, and credited the note with the sum total of the cash and the value of the lands at the price agreed. *Held:* The maker is not entitled to a credit on the note for the full amount of the surety's liability, but only to the credit entered on the compromise and settlement, since payment by the surety does not discharge the maker, and since there is no obligation between the surety and maker that the surety shall pay the debt, and the parties being jointly and severally liable to the payee or holder in due course. C. S., 3101.

APPEAL by defendant W. E. Hinton from *Carr, J.,* at February Term, 1939, of PASQUOTANK. Affirmed.

J. Kenyon Wilson for plaintiff, appellee.

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

SEAWELL, J. R. L. Hinton was an accommodation endorser on three notes of the defendant W. E. Hinton to the plaintiff bank, aggregating $14,500. The plaintiff elected to bring an action against R. L. Hinton alone (*Bank v. Carr,* 130 N. C., 479, 41 S. E., 876, and cases cited), and obtained judgment for the amount of his liability. The defendant

W. E. Hinton, indebted to the plaintiff in a much larger sum, made a promissory note to the plaintiff, consolidating the indebtedness, in the sum of $32,728.01, which included the amount of the notes endorsed by R. L. Hinton and represented by the judgment against him. Subsequently, the bank sought to have execution on its judgment against R. L. Hinton, and the said Hinton brought suit to enjoin the plaintiff from enforcing the judgment. The grounds set forth are not material to a decision of this controversy.

The plaintiff also brought a suit against W. E. Hinton upon the consolidated note of $32,728.01.

The two cases were consolidated for a hearing. Pending the hearing a compromise was effected between plaintiff and R. L. Hinton, whereby the latter paid the plaintiff $7,000 and conveyed certain lands at an agreed value in consideration of the cancellation of the judgment against him, and the judgment was accordingly canceled by order of the court. The defendant W. E. Hinton contended before the trial judge, and contends here, that he is entitled to have the entire amount of the judgment against R. L. Hinton—$14,500—credited as a payment on his $32,728.01 liability to plaintiff. The trial judge took the view that he was entitled only to the amount actually paid the plaintiff and could not avail himself of the full $14,500 as a credit. This is the only question before the court.

The defendant W. E. Hinton had no interest in the judgment obtained by the plaintiff against R. L. Hinton and no equity in its enforcement, and his own obligations to the bank were neither determined nor affected thereby. Certainly any payment made by R. L. Hinton to the bank would inure to the benefit of both, since it reduced the debt; and, correspondingly, any payment made by the maker, W. E. Hinton, would have a like effect for the same reason. C. S., 3101. But while a release of the maker from his obligation releases the surety or endorser (*Lumber Co. v. Buchanan,* 192 N. C., 771, 136 S. E., 129), since it discharges the debt, and while partial release has the same effect *pro tanto,* the release of the surety or accommodation endorser does not relieve the principal debtor. There is no obligation between the maker and the accommodation endorser that the latter shall pay the debt, and there is no equity in favor of the maker to require that the endorser shall do so. As to the payee or holder in regular course, these are severally, as well as jointly, bound.

The compromise arrangement between the plaintiff and R. L. Hinton was merely a release of the latter as endorser, and doubtless the inducement thereto on the part of the bank was that it was realizing all it reasonably could from the security.

Consolidation of these cases had no effect upon the individual rights of the parties. There is nothing affirmatively appearing in the record from which it could be inferred that the compromise was made in the interest of W. E. Hinton, and no presumption to that effect can be indulged.

The substitution, *pro tanto,* of R. L. Hinton for the bank as subrogated payee did the defendant W. E. Hinton no financial harm, since he is bound for no more than the actual sum paid by his endorser, and is credited by the same amount on his obligation to the bank. *Pace v. Robertson,* 65 N. C., 550. There is no room beyond that for speculation either upon his endorser or upon the bank by reason of the compromise.

The maker of the note, W. E. Hinton, should be morally gratified, and certainly must be legally content, that his accommodation endorser sustained no heavier loss through his default.

The defendant Hinton is entitled to credit only for the amount actually paid, and the judgment is, therefore,

Affirmed.

STATE v. S. L. FREEMAN, W. O. GORE, AND WILLIAM J. PRESTON.

(Filed 20 September, 1939.)

Criminal Law § 56: Taxation § 23—Statute held not to impose tax on business of employing peddlers, and motion in arrest on warrant charging that offense is allowed.

Even conceding that ch. 127, Public Laws of 1937, renders persons employing peddlers liable for the peddlers' tax therein imposed on their employees, defendants' motion in arrest of judgment on a warrant charging that they "engaged in the business of employing peddlers without obtaining licenses to do so" fails to charge a crime, since the statute does not require a license to "engage in the business of employing peddlers," and defendants' motion in arrest of judgment for uncertainty and failure to charge them with the commission of a crime is allowed.

APPEAL by defendants from *Cowper, Special Judge,* at February Term, 1939, of PASQUOTANK.

Criminal prosecutions, tried upon warrants charging that the defendants did, on or about 1 June, 1938, in Elizabeth City, Pasquotank County, "unlawfully, willfully, engage in the business of employing peddlers on a salary or commission basis without obtaining State and/or County and/or City license so to do."

From special verdict, pronouncements of guilty and judgments thereon, the defendants, and each of them, appeals, assigning errors.

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

J. Henry LeRoy for defendants.

STACY, C. J. The motions in arrest of judgment for uncertainty in the warrants and failure to charge the defendants with the commission of a crime must be allowed on authority of *S. v. Julian,* 214 N. C., 574, 200 S. E., 24; *S. v. Williams,* 210 N. C., 159, 185 S. E., 661; and *S. v. Ingle,* 214 N. C., 276, 199 S. E., 10.

Our attention has been called to no statute, county or city ordinance, requiring a license to "engage in the business of employing peddlers." Even if it be conceded, as the State contends, that under ch. 127, Public Laws 1937 (Revenue Act), any person, firm or corporation "employing the services of another as a peddler" is made liable for the peddler's tax therein imposed, it does not follow that the employer must obtain a license as well as the peddler employed. *S. v. Smith,* 211 N. C., 206, 189 S. E., 509.

Whether the defendants would be liable for failure to procure licenses for peddlers employed by them is not presented by the record.

Judgment arrested.

W. B. GARRETT v. E. H. TRENT

and

S. W. TURNER v. E. H. TRENT.

(Filed 20 September, 1939.)

Judgments § 22c—

It is error for the court to set aside a judgment on the ground of excusable neglect, C. S., 600, in the absence of a finding that defendant has a meritorious defense.

Two cases consolidated. Appeal by plaintiffs from order of *Alley, J.,* at June Term, 1939, of ROCKINGHAM, setting aside judgments on the ground of excusable neglect, C. S., 600.

Sharp & Sharp and Joe W. Garrett for plaintiffs, appellants.

Glidewell & Glidewell for defendant, appellee.

PER CURIAM. There is an absence of any finding of the fact by the court that the defendant had meritorious defenses, and for this reason the judgments should not have been set aside. *Cahoon v. Brinkley,* 176 N. C., 5; *Hooks v. Neighbors,* 211 N. C., 382.

Reversed.

ELY LILLY & COMPANY v. L. S. SAUNDERS, TRADING AS SAUNDERS DRUG STORE.

(Filed 27 September, 1939.)

1. **Constitutional Law § 6b—**

In determining the validity of a statute permitting the establishment of minimum retail sale prices on trade-marked goods, the courts are concerned solely with the legislative power to enact such statute, the question of public policy upon the conflicting economic theories being for the Legislature to determine.

2. **Constitutional Law § 12: Monopolies § 1—North Carolina Fair Trade Act held not to create or tend to create monopoly in violation of Art. I, sec. 31.**

The North Carolina Fair Trade Act, ch. 350, Public Laws of 1937, permitting the manufacturer or distributor of trade-marked goods to establish the minimum retail sale price of such goods by contract with wholesalers and retailers, and providing that sale by retailers not parties to the contracts at prices less than those stipulated in the contracts should be deemed unfair competition, is not void as creating or tending to create monopolies in contravention of Art. I, sec. 31, of the State Constitution, since the restrictions imposed by the act are limited and apply solely to trade-marked goods in their vertical distribution from manufacturer or distributor through the wholesalers and retailers to the consumer, which goods are sold by the retailer in competition with goods of the same general class of other manufacturers or, in the case of patented goods, in competition with comparable products of other manufacturers, and therefore the act does not create or tend to create a monopoly by horizontal agreements between persons in the same business in competition with each other.

3. **Constitutional Law § 12: Monopolies § 1—Definition of monopoly.**

Monopoly is ownership or control of so large a part of the market supply or output of a given commodity as to stifle competition, restrict freedom of commerce and give control of the price; and while restraint of trade may be an instrument of monopoly, it does not, in itself, constitute monopoly or necessarily lead thereto, nor does the common law definition of monopoly import to that term as used in the Constitution prohibition against all price fixing agreements, since the common law recognized exceptions for the protection of good will, and while public policy condemned conspiracies and agreements to raise prices to the public detriment, it did not seek to obtain the lowest possible price to the consumer on every commodity.

4. **Constitutional Law § 3a—**

The Constitution must be construed as stating fundamental concepts in broad and comprehensive terms, anticipating implementation by statute or liberal construction by the courts to meet changing conditions.

5. **Constitutional Law § 18—North Carolina Fair Trade Act held not to deprive noncontracting retailers of any property right.**

The North Carolina Fair Trade Act, permitting the establishment of minimum retail prices on trade-marked goods by agreement, does not

deprive a retailer not a party to a contract with the manufacturer or distributor of any property right in preventing such retailer from selling the trade-marked article at a price less than that stipulated by contract, since such retailer acquires title with knowledge and subject to the stipulations relative to the minimum retail price permitted by the law in protecting the property right of the manufacturer or distributor in his trade-mark and good will, which property right subsists while the goods bear his trade-mark, even after he has parted with title of the commodity itself. Art. I, sec. 17, of the State Constitution.

6. Constitutional Law § 4c—North Carolina Fair Trade Act held not unconstitutional as delegation of legislative authority.

The North Carolina Fair Trade Act is not unconstitutional as a delegation of legislative authority, since the act is complete in itself and requires no action on the part of any agency to put it into operation; nor does it grant authority to others to fix the prices of commodities generally, but merely lifts the ban against price-fixing contracts in the sale of trade-marked commodities and protects the owner or distributor of such trade-marked commodities against nullification of his agreements relating to minimum retail sale price by sale at less than the minimum price on the part of noncontracting retailers, which restrictions are in the interest of the owner or distributor, the contracting retailers, and the public generally, in the legitimate protection of the owner's or distributor's property right in his trade-mark and good will.

7. Statutes § 2—Statute regulating trade is not special act if its application is based on reasonable classifications and applies equally to all coming therein.

The Legislature has the power to regulate trade by general statute, the inhibition of Art. II, sec. 29, applying solely to such regulation by private, special, or local law; and a law regulating trade will be held general and not inhibited by this section of the Constitution if its application is limited to classifications based on reasonable distinctions and is not arbitrary or capricious and applies equally to all persons or things coming within the classifications regulated, which classifications may be made either directly or by provision of the act exempting from its operation classifications based upon reasonable distinctions and consonant with the general purpose of the act.

8. Statutes § 2—

The North Carolina Fair Trade Act in limiting its application to commodities bearing a trade-mark and in exempting from its operation such commodities when sold to particular classes of persons, sets up reasonable classifications and applies uniformly to all persons or things coming therein, and therefore is a general act regulating trade and does not contravene Art. II, sec. 29, of the State Constitution.

9. Trade-marks § 4—

The provision of the North Carolina Fair Trade Act making its violation actionable at the suit of any person damaged thereby authorizes a suit by a manufacturer or distributor protected by the act against a noncontracting retailer to permanently enjoin such retailer from selling trade-marked commodities of the manufacturer or distributor in violation of the act upon allegations of accrued and prospective irreparable damages.

10. Same—

The fact that a manufacturer or distributor of trade-marked commodities permits the sale of such commodities to a non-contracting retailer does not preclude the manufacturer or distributor from maintaining a suit against such retailer under the North Carolina Fair Trade Act, since the manufacturer or distributor has the option to obtain a contract or rely upon the statute, and since the sale to the noncontracting retailer does not confer upon him the right to violate the statute with reference to which he is deemed to have contracted in making the purchase.

11. Same—

The fact that a retailer makes a reasonable profit upon trade-marked articles is no defense in a suit against such retailer for selling such articles at a price below that allowed by the North Carolina Fair Trade Act, since the standard of the statute is one of retail price and not of reasonable profit.

12. Same—

The fact that the prices of the restricted number of manufacturers manufacturing a product pursuant to patent licensing agreements are practically the same is no defense in an action by one of such manufacturers against a retailer for selling the product manufactured by him in violation of the North Carolina Fair Trade Act, since the substantial identity of price as fixed by the several competing distributors is not unlawful in the absence of an agreement between them to so fix the price.

BARNHILL, J., dissenting.

APPEAL by plaintiff from *Stevens, Jr., J.*, at March Term, 1939, of NEW HANOVER. Reversed.

The plaintiff, a manufacturer of pharmaceutical and biological commodities, which it sells and distributes under its own identifying brands, brought this action under chapter 350, Public Laws of 1937, known as the "North Carolina Fair Trade Act," to restrain the defendant, a retail druggist, from selling these products at cut rate prices, in violation of the statute. The case was heard before Stevens, Jr., J., at March Term, 1939, New Hanover Superior Court, upon an agreed statement of facts, without the intervention of a jury.

The act under consideration aims at the maintenance of resale prices and purports to protect manufacturers, producers, and the general public against "injurious and uneconomic practices in the distribution of competitive commodities bearing a distinguishing trade-mark, brand or name." For convenient reference and understanding of its effect pertinent parts of the statute are reproduced here:

"Sec. 2. No contract relating to the sale or resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or distributor of such commodity and which commodity is in free and open competition with commodities of

the same general class produced or distributed by others, shall be deemed in violation of any law of the State of North Carolina by reason of any of the following provisions which may be contained in such contract: (a) That the buyer will not resell such commodity at less than the minimum price stipulated by the seller. (b) That the buyer will require of any dealer to whom he may resell such commodity an agreement that he will not, in turn, resell at less than the minimum price stipulated by the seller. (c) That the seller will not sell such commodity: (1) To any wholesaler, unless such wholesaler will agree not to resell the same to any retailer unless the retailer will in turn agree not to resell the same except to consumers for use and at not less than the stipulated minimum price, and such wholesaler will likewise agree not to resell the same to any other wholesaler unless such other wholesaler will make the same agreement with any wholesaler or retailer to whom he may resell; or (2) to any retailer, unless the retailer will agree not to resell the same except to consumers for use and at not less than the stipulated minimum price."

"Sec. 6. Willfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of this act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby."

The defendant insists that this statute is contrary to common law and public policy, as an attempted restraint of trade, and that it is void for unconstitutionality, as contravening Article I, sections 1, 7, 17, and 31, and Article II, section 29, of the State Constitution.

It appears from the stipulations that the plaintiff had entered into a substantial number of contracts of the nature designated in the act with various dealers in the State of North Carolina, under which its products were sold and distributed. The defendant was not a party to any of these contracts, but knew of their existence and purport and the resale prices fixed therein, and, claiming to do so as a matter of right, dealt in and resold products of the plaintiff, bearing its distinguishing brands, at prices lower than those so fixed. These commodities were not acquired under any of the exceptive provisions of the act set out in section five.

The products put upon the market by plaintiff and sold at retail by defendant, under the conditions above named, are divided, for the purpose of convenient consideration, into three classes:

CLASS I. Products falling within this class are those which are not protected by any patent but which are marketed by the plaintiff in common with many other manufacturers of pharmaceutical and biologi-

cal products. In this classification the products produced by plaintiff are sold in North Carolina and throughout the United States in free and open competition with identical or substantially identical commodities produced and distributed by others, and each manufacturer is free to establish and does in fact establish its own selling prices for such commodities.

For example, "Hepicoleum" is a trade-mark which identifies a concentrate of vitamins "A" and "D" manufactured and sold by the plaintiff. There are eight or more preparations of this character manufactured and sold by various other manufacturers and commonly known to the medical and pharmaceutical professions. They are used where deficiencies of vitamins A and D are indicated, and a large number of other producers are engaged in marketing concentrates of vitamins A and D independently of the plaintiff.

CLASS II. Products falling within this class are those which are marketed exclusively by the plaintiff under patents owned or controlled by the plaintiff or under which plaintiff has been granted an exclusive license. Products in this class are not in competition with identical products produced by other manufacturers. They are, however, sold in North Carolina and throughout the United States in free and open competition with comparable products produced by other manufacturers, and each of said manufacturers is free to establish and does in fact establish its own selling prices for such products.

As an example, from the agreed facts, "Amytal" is a trade-mark which identifies iso-amyl ethyl barbituric acid manufactured and sold by the plaintiff exclusively under a patent owned by it. It is one of fifteen or twenty commercially available compounds derived from barbituric acid known to the trade as barbituric acid derivatives. They are sedatives and hypnotics and are sold by all the producers for the same therapeutical purposes.

CLASS III. Products falling within this class are those which are marketed by a restricted number of manufacturers pursuant to the terms of patent licensing agreements. The products of any given manufacturer which fall in this class are sold in North Carolina and throughout the United States in competition with the identical product or products sold by other licensed manufacturers. In some instances, products in this classification are also in competition with unpatented products which are represented, advertised, and sold for the same conditions, indications, and purposes as the patented products are advertised, represented, and sold.

Other stipulations relate to the damage to plaintiff's business either accrued or likely to accrue because of the alleged unlawful practices of defendant and their threatened continuance.

The trial judge did not give consideration to the application of the statute to the several classes of commodities thus described, but declared the law to be unconstitutional and void, and declined to enjoin the defendant from the cut rate practices declared therein to be unlawful. From this, the plaintiff appealed.

Carr, James & LeGrand, Walton M. Wheeler, Jr., J. C. B. Ehringhaus, and Charles Aycock Poe for plaintiff, appellant.
Kellum & Humphrey for defendant, appellee.

SEAWELL, J. The endeavor to secure favorable recognition by the courts of agreements looking to the maintenance of resale prices, unaided by positive legislative enactment, may be said to have culminated in *Dr. Miles Medical Co. v. John D. Park Sons & Co.*, 220 U. S., 373, 55 L. Ed., 502, in so far, at least, as Federal action was concerned. In that case such contracts were held to be invalid at common law and under the Sherman Anti-Trust Act.

The opinion in that case has been criticized for its want of reality in approach—in not making a sufficient analysis of economic conditions involved in the factual situation presented, in which it was thought there might be found some basis for exception to the legal categories applied. Harvard Law Review, Vol. 49, p. 811; Kale's "Contracts and Combinations in Restraint of Trade," ch. 4; "The Maintenance of Uniform Resale Prices," 64 U. of Pa. L. R., 22. In this connection see dissenting opinion of *Justice Holmes.*

If the transfer included no more than a mere commodity, involving nothing in which the seller had any further property or interest, the doctrinal aspects of voluntary sale might be satisfied in the expression of the court: "The complainant having sold its product at prices satisfactory to itself, the public is entitled to whatever advantage may be derived from competition in the subsequent traffic." But the fact is that the producer, along with the commodities sold, must, perforce, permit the use of the good will of his business and his brand, and also their abuse, if the law can go with him no further. He is under the compulsion to sell under inadequate protection or withdraw from the market altogether. This good will is as much property as is coal or pig-iron or wheat, subject to audit, appraisal, taxation, purchase and sale, and is the most valuable asset of many businesses. But, unlike the tangibles mentioned, it is vulnerable to assault through the brand which symbolizes it, since it is built up principally through reputation and may be destroyed by its loss.

But the *Dr. Miles Medical Co. case, supra,* dealt only with contract and did not discourage legislative action in reaching the desired result.

Such statutes have been enacted in most of the states, at least forty-three in number. As these came up for review there followed, of necessity, a re-orientation of the subject in the courts; consideration was shifted from the validity and effectiveness of contract to the power of the states to enact laws having a like purpose and effect. These laws are similar in expression and practically identical in principle and have been sustained uniformly by the courts of last resort in the respective states of enactment, where tested. The single exception our research discloses, is found in *Bristol-Myers Co. v. Webb's Cut Rate Drug Co.,* 188 So., 91 (Fla.). There the act was stricken down because it did not conform to section 16, Article III, of the Florida Constitution, in that the text of the law was not disclosed in the title. Those which have reached the Supreme Court of the United States have been upheld. *Max Factor & Co. v. Kunsman,* 5 Cal. (2d), 446, 55 P. (2d), 177, 299 U. S., 198, 81 L. Ed., 122; *Pyroil Sales Co. v. The Pep Boys, etc.,* 5 Cal. (2d), 784, 55 P. (2d), 194, 299 U. S., 198, 81 L. Ed., 122; *Seagram Distillers Corp. v. Old Dearborn Distributing Co.,* 363 Ill., 610, 2 N. E. (2d), 940, 299 U. S., 183, 81 L. Ed., 109, 106 A. L. R., 1476 (see annotations); *Houbigant Sales Corp. v. Ward's Cut Rate Drug Store,* 123 N. J. E., 40, 196 Atl., 683; *Bourjois Sales Corp. v. Dorfman,* 273 N. Y., 167, 7 N. E. (2d), 30, 110 A. L. R., 1411; *Weco Products Co. v. Reed Drug Co.,* 255 Wis., 474, 274 N. W., 426, are typical and leading cases. These by no means exhaust the list.

The Illinois Fair Trade Act, identical in many respects with the North Carolina Law, and similar in principle throughout, was upheld in *Old Dearborn Distributing Co. v. Seagram Distillers Corp.,* 292 U. S., 183, 81 L. Ed., 109, 106 A. L. R., 1476, and the opinion of the Court, *per Justice Sutherland,* distinguishes the *Dr. Miles Medical Co. case, supra,* and pictures it as forecasting judicial approval when the Court should have before it appropriate legislation.

Courts were quick to realize that the enactment of Fair Trade Acts rendered obsolete the reasoning of many of the prior decisions. Formerly, in the absence of legislative determination, most courts had pronounced such trade agreements contrary to public policy. But, under the Fair Trade Acts, the public policy of such agreements received express approval from the legislatures. No longer were the courts compelled to face the difficult task of determining public policy. The task of the courts became the relatively simple one of deciding whether legislatures have power to validate resale price maintenance contracts.

But in some important respects the final protection accorded to trade-marked goods marks a more fundamental change in attitude than might be involved in a mere acceptance of a statutory declaration of public policy—a break with accepted theory in which many of the stricter

doctrines now urged upon us have been modified or abandoned. It is simply one of those situations in the law which, with some emphasis, marks today from yesterday. Not that the change in the attitude of the courts has been arbitrary—on the contrary, the intervening period has been one of rational adjustment, in which we are compelled to recognize a degree of perpendicular thinking as contrasted with the parallelism of precedent, which, ordinarily, rides decorously with the stream and, dispensing with unnecessary judicial travail, nicely carries the burden of decision. In such a broad field the effect of judicial policy, inevitably developed, cannot be ignored. In a number of jurisdictions resale price contracts had been upheld, but there is no doubt that *Dr. Miles Medical Co. v. John D. Park Sons & Co., supra,* represented the prevailing judicial attitude toward the subject. The dissenting opinion of *Justice Holmes* in that case put the spot light on the pivotal principle: "The most enlightened judicial policy is to let people manage their own business in their own way, unless the ground of interference is very clear."

A statement of the situation which invited this reaction suggests the basic principles of court approval. "There is nothing immoral in resale price maintenance. It is one of those policies that happen to be arbitrarily prohibited by the Government. The whole foundation of trade is in maintaining stabilized prices. While it may be to the temporary advantage of a department store to increase its own sales of unbranded merchandise by using trade-marked merchandise as a leader at a cut price, yet the ultimate repercussions on commerce are of the most serious character. This has resulted in grave injury to the development of trade-marked merchandise upon which the country's commercial scheme of doing business has been largely founded. Trade-mark merchandising means merchandise that is extensively advertised, and being extensively advertised, must live up to high quality. There must be quantity production to support the expenditure of advertising with a correspondingly relatively low, but stabilized price. This gives labor steady and gainful employment, results in large purchasing power and places the stamp of identification of the trade-mark of the manufacturer on the goods with the resulting requirements of integrity in production and honor in selling for public protection. To permit the ultimate distribution of such merchandise to wreck the entire foundation of this business structure for a temporary personal profit is a shortsighted policy that should be condemned and prohibited in the strongest terms." Toulmin, Trade Agreements and the Anti-Trust Law, 1937. Statements and counter statements make a voluminous record. See hearings before Committee on Interstate and Foreign Commerce in House of Representatives on H. R. 13,305 (63rd Congress, 2nd and 3rd Sessions); H. R. 13,568 (64th Congress, 1st and 2nd Sessions).

The courts may not dispute with the Legislature any conclusion it has reached upon evidence *pro* and *con,* with regard to the verity of the economic conditions thus pictured. They are only concerned with finding whether these furnish reasonable grounds for the distinctions on which the statutes are made to depend. There seems to be little divergence of opinion on this point.

Outstanding in the rationale of the cited cases upholding Fair Trade Acts are certain key principles: The validity of the distinction between the trade-marked commodity and a commodity as such in relation to freedom of trade; the persisting property right in good will and brand after the producer has parted with the commodity; the involvement of these in resale transactions, and the paramount necessity of their protection; and the limitations in the act itself preserving competition.

We have made this approach to the case at bar because we recognize as true that: "upon this point a page of history is worth a volume of logic." *Mr. Justice Holmes* in *New York Trust Co. et al. v. Eisner,* 256 U. S., 345, 349, 65 L. Ed., 963.

The later enacted Miller-Tydings Act (August, 1937), which amends the Sherman Anti-Trust Act and the Federal Trade Commission Act (section 5), by removing resale price contracts of the nature here considered from the prohibition of the Sherman Act and declaring them not to be an unfair method of competition, renders academic any discussion of the effect of *Old Dearborn Distributing Company v. Seagram Distillers Corp., supra,* on interstate transactions, if it has any. But in sustaining the Illinois Fair Trade Act in that case the Court dealt with many questions arising under the Fourteenth Amendment and Due Process Clause of the Federal Constitution practically identical with those which have been raised in the case at bar under our own Constitution, and resolved them against the contentions of the defendant.

The first in importance of these questions concerns the Anti-Monopoly Clause of the State Constitution: Does the North Carolina Fair Trade Act create or tend to create a monopoly such as is declared in Article I, section 31, of the Constitution, to be against the genius of a free people and not to be allowed?

The Constitution speaks of monopoly—the accomplished fact—and not of the means by which it may be created. As to the former, when it is shown to exist, there can be no difference of opinion as to the duty of the Court; as to the latter, it is obvious that discriminating intelligence is required to draw the line beyond which private activity encroaches upon public convenience. A similar difference exists between the Sherman Anti-Trust Law and the Clayton Amendment. The former deals with consummated combinations and considers the purpose, reasonableness, and effect of agreements, whether offending the law. The

latter denounces acts which Congress assumes may lead to such monopolies and is made effectual by the simple process of tagging. Thornton, "Combinations in Restraint of Trade," p. 836; *Standard Fashion Co. v. Magrane-Houston Co.,* 258 U. S., 346; *Hopkins v. United States,* 171 U. S., 578, 42 L. Ed., 290; *United States v. Standard Oil Co.,* 17 Fed., 177, 221 U. S., 1, 55 L. Ed., 619.

What is monopoly? Definitions in this field are evolved under the necessity of administration and the term has been uniformly regarded as descriptive rather than precisely definitive. Without reference to the historical common law definition, this Court, in *S. v. Coal Co.,* 210 N. C., 742, 747, has given, by adoption and approval, two consistent definitions which we repeat: "A monopoly consists in the ownership or control of so large a part of the market supply or output of a given commodity as to stifle competition, restrict the freedom of commerce, and give the monopolist control over prices." Black's Law Dictionary (3d Ed.), p. 1202. "In the modern and wider sense monopoly denotes a combination, organization, or entity so extensive and unified that its tendency is to suppress competition, to acquire a dominance in the market, and to secure the power to control prices to the public harm with respect to any commodity which people are under a practical compulsion to buy." *Commonwealth v. Dyer,* 243 Mass., 472. Definitions, similar in content, are numerous.

Restraint of trade is, in many instances, no doubt, an instrument of monopoly, but it is not monopoly. Both the economic and legal history of the subject refute the assumption that any and all restraint either constitutes monopoly or necessarily leads to it. *Max Factor & Co. v. Kunsman, supra.*

The self-limiting character of the restrictions imposed by the act under review takes it out of the class of restraints which may lead to monopoly. If we concede that the term "monopoly," as used in the Constitution, covers substantial and comprehensive general control of commerce in necessary commodities, to the injury of the public, and that this may result from an unreasonable restraint of trade, we are still far from bringing the statute within its necessary condemnation, since it is lacking in the outstanding essentials of monopoly as above defined, a sufficiently extensive control of general commerce in such commodities and the resulting injury to the public; nor does it deny to any member of the public a free and equal opportunity to do anything which he might theretofore have done as a matter of common right. The freedom to do as one may wish with the good will, brand, or trade-mark of another has never been conceded by the law.

The agreements authorized by the law are vertical—between manufacturers or producers of the particular branded commodity and those

handling the product in a straight line down to and including the retailer; not horizontal, as between producers and wholesalers or persons and concerns in competition with each other in dealing with like commodities. The law does not authorize cross agreements between competitors. Whatever agreements are permitted, all face one way; they apply only to commodities produced by the manufacturer, bearing his trade-mark, brand, or name, and then only if they are in free and open competition with commodities of the same general class produced or distributed by others. The incidence of the law on trade, therefore, affects only that portion of the commodity in which the producer has already a lawful monopoly of ownership, and which goes into distribution in a volume which may be fairly measured by the popularity which the good will and identifying name have achieved, but which can never amount to the whole. *Old Dearborn Distributing Co. v. Seagram Distillers Corp., supra; Joseph Triner Corp. v. McNeil,* 363 Ill., 559, 2 N. E. (2d), 929, 104 A. L. R., 1435; *Max Factor & Co. v. Kunsman, supra.*

The proportion which the commodity affected bears to the whole is not a matter for our consideration where competition is substantial; but it must be remembered that the act applies not merely to medicinal preparations, where producers may be few, but to all commodities identified by name or brand, as to which, in many instances, competitors must be numerous. In *United States v. American Tobacco Co.,* 221 U. S., 104, 55 L. Ed., 663, and in *United States v. Standard Oil Company of New Jersey, supra,* the Government had to be content with breaking up these monopolies into a comparatively few competitive concerns.

It is not conceivable how any horizontal restriction of trade can be effected through the provisions of the statute. The restraint intended does not apply to the commodity, in its generic sense, upon which the manufacturer has expended his care and skill—it is the commodity plus the brand which identifies it, guarantees its quality, and is symbolic of the good will which rightfully belongs to the manufacturer. It is this alone which the statute desires to protect, and to the piratical use of which it applies restraint. As stated by *Justice Sutherland* in *Old Dearborn Distributing Co. v. Seagram Distillers Corp., supra:* "The ownership of the good will, we repeat, remains unchanged, notwithstanding the commodity has been parted with. Section 2 of the act does not prevent a purchaser of the commodity bearing the mark from selling the commodity alone at any price he pleases. It interferes only when he sells with the aid of the good will of the vendor; and it interferes then only to protect that good will against injury. It proceeds upon the theory that the sale of identified goods, at less than the price fixed by the ownership of the mark or brand is an assault upon the good will and

constitutes what the statute denominates 'unfair competition.' See *Liberty Warehouse Co. v. Burley Tobacco Growers Assn.*, 276 U. S., 71, 91-92, 96-97. There is nothing in the act to preclude the purchaser from removing the mark or brand from the commodity—thus separating the physical property, which he owns, from the good will which is the property of another—and then selling the commodity at his own price, provided he can do so without utilizing the good will of the latter as an aid to that end."

The common law emphasis on forestalling, regrating, engrossing and conspiracy to raise prices must not lead us to infer that the sole objective of public policy was to obtain the lowest possible price to the consumer on every commodity. That is both an economic fallacy and a misconception of law. The public is more interested in fair and reasonable prices which preserve the economic balance in advantages to all those engaged in the trade, with due regard to the consuming public, than it is in securing the lowest obtainable prices, when the inevitable tendency is to degrade or drive from the market "articles which it is assumed to be desirable that the public should be able to get." (*Justice Holmes,* dissenting in the Dr. Miles case.) On this phase of the subject the Supreme Court of the State of Washington, in *Fisher Flour Milling Co. v. Swanson,* 76 Wash., 649, 137 Pa., 144., 151, observed: "Finally it seems to us an economic fallacy to assume that the competition which in the absence of monopoly benefits the public is competition between rival retailers. The true competition is between rival articles. Fixing the price on all brands of high grade flour is a very different thing from fixing the price on one brand of high grade flour. The one means destruction of all competition and of all incentive to increased excellence. The other means heightened competition and intensified incentive to increased excellence." Our own laws implementing this section of the Constitution recognize that price-cutting, not born of fair or normal competition, may indeed be piratical, and a dangerous step toward monopoly. C. S., ch. 53, sec. 2563; *S. v. Coal Co.*, 210 N. C., 742, 188 S. E., 412.

No one has a vested interest in the common law. *Hurtado v. California,* 110 U. S., 516, 46 L. Ed., 697. The common law, proceeding *ex proprio vigore,* prior statutes, and public policy growing out of them, all must yield to the superior authority of the later enacted statute. Nor do we think that any contribution which the common law has made to the Constitution has given to the term "monoply" a rigor inconsistent with the foregoing reasoning. Any definition of "monopoly" which may be built up by aid of the common law rules against restraint of trade must carry with it those exceptions favoring agreements for the protection of good will—which had become an established doctrine of the

common law long before our first Constitution was adopted—and the concomitant principle that the reasonableness of the restraint must be measured by the adequacy of the protection necessary, even though it extends to the limits of the kingdom, if the good will has become national in extent. Thornton, Combinations in Restraint of Trade, pp. 60-71; *Leather Cloth Co. v. Lorsant,* L. R. 9, Eq. 345, 39 L. J., ch. 62; *Maxim Nordenfeldt v. Nordenfeldt,* L. R. 1, ch. 630, 651, 67 L. T., 177; Aff. A. C., 535, 63 L. J., 908, 71 L. T., 489; Benjamin on Sale, 7th Ed., pp. 536-546. It is as well to observe that while these cases relate to the protection of good will upon alienation, the same principle may fairly be extended to the protection of that good will while in the enjoyment of the original owner. There is no sound reason why it should be called into service only when it might serve as an obituary to his possession, or merely as a more effectual means of delivery. The real purpose is to protect the owner of the good will against assault from the most dangerous quarter.

In this and other jurisdictions this doctrine of the common law has been invoked not infrequently to modify the rigor of anti-monopoly statutes and to permit interpretation in the light of reason. *Mar-Hof Co., Inc., v. Rosenbacker,* 176 N. C., 330, 97 S. E., 169; *Morehead Sea Food Co. v. Way & Co.,* 169 N. C., 679, 86 S. E., 603.

The inconsequential margin over which the courts have battled is apparent on comparing the utmost this law can do with what the courts have already approved. The cumbersome and ineffective device of agency contracts fixing prices of retail sale have usually been upheld by the courts on the *alter ego* doctrine, which makes the producer the final seller. *United States v. General Electric Co.,* 272 U. S., 476, 71 L. Ed., 362. The doctrine itself is impeccable, but the reality of the device when applied to a distribution which the parties probably regard as final between themselves, and certainly desire to be so, is open to challenge. The point is that such a transaction has precisely the same incidence on the freedom of trade as does the present act, since it monopolizes exactly the same commodity—not merely *in quantum,* but in physical identity—and is nearer to monopoly in principle because it concerns the commodity as such. It illustrates the triumph of form over substance and leads to the thought that the producer always might have had the relief sought if he could come into court clothed in more formal and traditional habiliments.

Perhaps the most direct answer to the charge of monopoly made against this statute is contained in the provisions of the statute itself, under which it automatically ceases to operate where there is no competition. In a late case, *Goldsmith v. Johnson & Co.,* Maryland Court of

Appeals, 28 June, 1939, decided since the case at bar was argued before this Court, this was thought to be a sufficient answer, and with this we agree.

We are not unmindful of the constitutional imperatives upon which the defendant insists. But first it is necessary to understand what the Constitution requires. It is as little as we can do, out of respect to its framers, and the obvious purposes of such an instrument, to regard it as a forward-looking document, anticipating economic as well as political conditions yet to emerge. It is not a statute. Its concepts worthy of surviving are fundamentally stated and must be sufficiently generic and comprehensive to allow adjustment to the current needs of humanity. In this way only can we interpret it in terms of social justice so necessary to maintain its usefulness and to continue it in the public respect. The Anti-Monopoly Clause of the Constitution is couched in terms to meet this requirement. Like other clauses similarly phrased, it expects implementation by statute. Its terms are broad enough to afford recognition of the principles we have discussed, and the law is safely within the constitutional admonition.

Article I, section 17, of the Constitution provides: "No person ought to be . . . disseized of his freehold, liberties or privileges . . . or in any manner deprived of his life, liberty, or property but by the law of the land." It is contended that the statute delegates the power to fix the resale price on another's property, or directly or mediately fixes the price on a commodity at private sale with a like effect, in violation of this section. This is the objection repeatedly raised in the above cited cases under the similar provisions of the Federal Constitution. It has not received favorable consideration by the courts. *Old Dearborn Distributing Co. v. Seagram Distillers Corp., supra; Bourjois Sales Corp. v. Dorfman, supra; Pyroil Sales Co. v. The Pep Boys, supra.*

The restriction is not imposed after the acquisition of the property, and is not in derogation of an existing or established right. Under the statute it was a condition that had already attached to the property. It was known to the prospective purchaser, and he was under no obligation to assume it. Morally and legally he is presumed to have accepted the condition by his voluntary act of purchase.

As to the delegation of power, we do not understand that it is contended there is any delegation of the legislative function. On the face of it such a contention is untenable. The statute was complete when it left the hands of the Legislature. It required no person or group of persons or other external agency to further authorize it or put it in force. *Weco Products Co. v. Reed Drug Co., supra.*

But the law "delegates" nothing. At the most it lifts the ban supposed to exist by virtue, largely, of public policy, against contracts fixing

the resale price, and permits this to be done by contract between the manufacturer or producer and the purchaser, and does this partly in recognition of the continuing property right of the producer in the good will of his business which is involved in the transaction through the use of the symbolizing brand and partly in the recognition of the rights of others, including the honest purchaser, who expects to put these to a legitimate use in the resale of the branded commodity and loses money when it is cheapened by use as a bait for other sales. It is made binding on a purchaser who buys with a knowledge of the condition attached to the purchase.

"The statute is not a delegation of power to private persons to control the disposition of the property of others, because the restrictions already imposed with the knowledge of the prospective reseller runs with the acquisition of the purchased property and conditions it." 11 Am. Jur., p. 933; *Old Dearborn Distributing Co. v. Seagram Distillers Corp., supra; Joseph Triner Corp. v. McNeil, supra.*

The resale price is not fixed on any commodity, as such, and with respect to these the traditional rules demanding freedom of trade remain uninvaded. It is placed only on the branded commodity; and this Court, with the great majority of those which have preceded us in passing on similar laws, is of the considered opinion that the distinction is valid. Fixing the price, usually the most important incident of bargaining, and still so when the parties are equally related to the subject of the transaction is, in this instance, merely ancillary to the purpose of the law, which is to protect both the producer and the public—the one with respect to his good will, the other with respect to the quality and integrity of a desirable product. The restriction is imposed, as we have said, more with respect to the good will and brand than to the limited quantity of product, as such, which passes in the sale. A frank recognition of their relative importance demands that the minor consideration should give way, *ut res magis non pereat.* Laws protecting trade-marks, trade-names and brands from piracy are of no avail whatever when the abuse of them by a purchaser of branded products is uncontrolled. The producer is less hurt by pilfering than he is by sabotage.

"There is nothing sacrosanct about price." The right of the owner to fix a price on any commodity he sells is not absolute. To illustrate, if that were true the Second Section of the Robinson-Patman Amendment, standardizing prices by prohibiting discriminations, would array that act against both the Fourteenth and the Fifth Amendments to the Federal Constitution. It is a right created by law and subject to control by law when necessary to the just and orderly administration of government, with due regard to constitutional guaranties. Price restrictions

stand upon the same challenge before the law as any other restraint upon the use of property, and are concerned with the same constitutional provisions.

Nebbia v. New York, 291 U. S., 502, 78 L. Ed., 940, deals with governmental price-fixing and the fixing of that price on a general commodity having nothing to do with trade-mark or good will. But even so, the Court declined to limit the formula "affected with the public interest" to any business particularly constituted, as, for example, public utilities and the like, and held that a business was "affected with the public interest" when, for adequate reason, it was subject to control for the public good, making the final test to be whether the law was arbitrary in its operation and effect. See analysis of this case in Toulmin, Trade Agreements and the Anti-Trust Laws, p. 103. The marked tendency of the courts to discard the formula altogether as not being sufficiently definitive to distinguish the field of application is noted in the annotation to *Miami Laundry Co. v. Florida Dry Cleaning and L. Bd.,* 119 A. L. R., 956, 985. The subject seems of little application here, since the same court in *Old Dearborn Distributing Co. v. Seagram Distillers Corp., supra,* held that the Illinois act, which, as we have stated, is practically identical with ours at this point, does not constitute governmental price-fixing or, indeed, price-fixing in any sense offensive to the Constitution. By specific reference it distinguished from the case under consideration those cases referring to price restriction as an unconstitutional invasion of property right, holding that they had no application to the sale of branded commodities protected under the act. *Old Dearborn Distributing Co. v. Seagram Distillers Corp., supra,* at page 192.

Such a restriction is not confiscatory unless it is unreasonable or contrary to the principles of the Constitution reasonably interpreted; and one who invokes the aid of the Constitution in this respect must show that he has a title free from condition, at least with respect to the supposed invasion. This is not the position of the defendant.

We may concede that such a restriction upon the sale of a quantity of a commodity which has no distinction other than it belongs to the seller, where the seller parts with everything he has in it, and the commodity merges indistinguishably in the stream of trade, has always been considered against public policy, unlawful, confiscatory, unconstitutional, or, to sum it up in traditional style, "odious." But surely we have come a long way on this road since the *John Dyer case* (2 Henry 5, 5b, pl. 26), when the irate judge dismissing an action on a bond given upon a contract in partial restraint of trade said of the plaintiff: *"Et pur Dieu si le plaintiff fu icy, il ira al prison tanque il ust fait fine au roy."* Now the courts permit the law to do its own frowning, thus eliminating as a factor of decision the seductive influence of judicial pietism. Not

arbitrarily, but on principle, they recognize the wide difference between the sale of a general commodity, around which the rules of law were originally built up, and the sale of a trade-marked commodity, the very essence of which is the reputation of the product, the good will of the producer, the protection of which is necessary both to him, to the honest retailer, and equally important to the public, since under our highly developed long distance system of production and distribution it often affords the only available guaranty of quality. *Rabb v. Covington,* 215 N. C., 572. It is no longer a matter of trend—the thing lies within the beaten path of judicial decision. We are free to say that if the matter had been presented to us independently, without the aid of these authorities, we would not be disposed, in the face of the statute, to further adhere to a purely doctrinary point of view which now makes no contact with the subject otherwise than at very minor points of consideration, if at all. Forcing new situations into old categories is like putting new wine into old bottles. It strains the bottle.

In our opening analysis we stress the fact that the producer and seller of a branded commodity, along with the commodity itself, transfers the use of the good will, which use is made effectual by the use of the distinguishing brand or trade-mark. The quantity of commodity corporeally passed by the sale is always a relatively unimportant item, but the entire good will of the producer's business, with all of its force and effectiveness, is put behind the product in the hands of the retailer for use in inducing consumer purchase; and, conversely, the entire good will may be appropriated and prostituted by the cut rate dealer who uses it, not to promote the sale of the branded commodity, but to increase his sale in other commodities. In either case the entire good will is involved, and in a very real, if not technical, sense subjected to a servitude. On this principle there is no sound reason why, under favoring legislation, the parties should not be permitted to bargain with reference to the conditions upon which this servitude may be imposed, and none why this may not take the form of an agreement as to the resale price, the maintenance of which is to their mutual advantage. Some of the decisions find support for the provisions similar to those contained in Section Six in the principle that outside interference with such a contract is a proper subject for statutory prohibition, since, in somewhat similar circumstances, the Court itself has afforded relief.

In *Port Chester Wine and Liquor Shop, Inc., v. Miller Bros. Fruiters, Inc.,* decided by the Appellate Division of the New York Supreme Court on 28 January, 1938, an action by a retail dealer against another retailer cutting resale prices was sustained under a similar act. Without deciding that particular question here, the situation is at least illustrative of the soundness of the law, and we may infer from the agreed facts here

that a similar situation may exist among retailers who have complained to the plaintiff of the prevalence of this practice and threatened to discontinue handling the brands.

The power of the Legislature to pass a law of this nature has been questioned in view of Article II, section 29, of the Constitution, reading in part: "The General Assembly shall not pass any local, private, or special act or resolution relating to . . . regulating labor, trade, mining or manufacturing." It is contended that the exceptive provisions of section 5 so reduce the field of its application as to make it a special act forbidden by this clause of the Constitution.

The Constitution does not prohibit the Legislature from regulating trade in any of its branches or regulating it in any particular. It merely forbids such regulation by private, special, or local law. A general law is not rendered special because there has been excepted or excluded from its operation either persons or things to which, upon reasonable classification, according to the purposes of the law, it should not be applied. Such exceptions or exclusions must be germane to the purposes of the act, be founded on reasonable distinctions, and must leave, as a properly distinguishable class, all those persons or things which in the reasonable exercise of legislative discretion ought to be included, leaving out only those persons or things which may, with the same propriety, be excluded. The classification degrades the law only when it has no basis in reasoning or, otherwise expressed, is arbitrary and capricious. This statute does not attempt to validate all contracts containing resale price agreement, and it is just as assailable as a special law on that account as it is because of its express exclusions, if classifications are to be made by its antagonists on grounds even less reasonable than those which commended themselves to the Legislature. The law was intended to apply only to contracts and sales of a certain kind which it is the business of the statute to define. It need not follow any particular formula in doing so. It must be considered as a whole and the exceptions, germane to the purpose of the act and based on recognizable and reasonable distinctions, merely form a part of the process of classification. In our opinion they are so grounded. 59 C. J., pp. 732, 735, sections 319, 322; *Scarborough v. Wooten,* 170 P., 743, 23 N. M., 616; *State v. Atchison P. & S. F. Ry.,* 151 P., 305, 20 N. M., 562. The exceptions refer to conditions which the dealer is likely to experience if no such law was ever enacted, and the transactions are well outside of normal trade, to which the statute was intended to apply.

The violation of the law is made "actionable at the suit of any person damaged thereby." Under such general authorization an action to permanently restrain defendant from the practices complained of is proper, and the agreed facts afford sufficient ground for relief.

It has been suggested that the conduct of plaintiff in permitting a sale to the defendant, who refused to sign any contract fixing the resale price, is sufficient to estop it from equitable relief; but the evidence does not disclose that the plaintiff made any inducement to the defendant or gave him any reason to believe that the plaintiff intended to waive any of his rights under the law. It was optional with the plaintiff whether it obtained the contract or relied upon the statute, and the simple act of sale to defendant, without stipulating a resale price, did not carry with it an assumption that the defendant might violate the law or confer upon him the right to do so. If the law itself is valid, and we hold it to be so, it is a public statute which the defendant was bound to have in contemplation when he made the purchase.

In *Lentheric, Inc., v. Weissbards,* 122 N. J. Eq., 573, 195 Atl., 818, the argument was successfully made that where the plaintiff refused to sell to the defendant he was estopped in equity to assert his claim when defendant had obtained his goods elsewhere. Here we are confronted with the direct opposite of that argument. In our opinion, neither has merit.

Rather much argument was addressed to the court on the contention that defendant was making a reasonable profit on the sale of the products listed in the agreed facts. However such circumstance might affect the result on a trial for violation of some anti-trust law, where the effect on the public might be an issue, it cannot be considered here in the face of the statute, which it would completely defeat. The standard set is not one of reasonable profit, but of resale price.

Nor is relevant the fact that prices on commodities described under Class III, which have been fixed by competing distributors, are within one cent of parity. In the absence of agreement to that effect this has not been considered by this Court as sufficient even to support a charge of violating the Anti-Monopoly Statute. *S. v. Oil Co.,* 205 N. C., 123, 126, 170 S. E., 134, and the Supreme Court of the United States is in accord. *United States v. American Tobacco Co., supra.* This might occur through an unlawful agreement, certainly, if at all, *dehors* the operation of this law, or it might be the result of close competition as is now the case with the price of gasoline by the major oil companies, or it might be a case of "follow the leader," and it is not a violation of any law to copy the prices of a competitor.

We have nothing to do with the expediency of an economic experiment. Discussions of this subject, on which thousands of articles have been written and hundreds of arguments made, has left the lawmaking bodies and most of the courts convinced that there is a field here in which the protection of private right and the promotion of the public

welfare are not in irreconcilable conflict. The statute represents an attempt of the General Assembly to harmonize and apply these principles. In our opinion the provisions of the Constitution called to our attention do not defeat that legislative power. The propriety of its exercise is within the legislative discretion.

We conclude, therefore, that the statute under review is a constitutional and valid expression of the legislative will, and as such must be enforced.

The plaintiff is entitled to the relief prayed for in its complaint and judgment in the court below will be entered in accordance with this opinion.

The judgment is

Reversed.

BARNHILL, J., dissenting: The facts in this record, interpreted in connection with the legislation under consideration, are such that I find it impossible to concur in the majority opinion.

It is admitted that:

Plaintiff does not sell its commodities to retailers. It sells to wholesalers who in turn supply the retail dealers. It does not cater to the general retail trade in advertising its products to the consuming public, nor recommend nor encourage the resale of its products by retail druggists to members of the consuming public. Its policy of distribution is predicated upon the theory that medicinal products such as those manufactured, distributed and sold by the plaintiff should be used only under the supervision of a physician. It merely recognizes "the right of the retail druggist to resell certain of plaintiff's manufactured products directly to members of the public where not prohibited from making such sales by state or federal laws." Defendant was not guilty of any fraud or deception in acquiring the merchandise it retailed and it has not engaged in "price-cutting" as that term is ordinarily understood, but is making a reasonable profit. By the enforcement of the statute defendant will be required to increase the cost of the merchandise sold by it to the consuming public—arbitrarily and against its will—by at least eight per cent.

It further appears that: (1) Although the statute in question authorized it so to do, the plaintiff did not elect to bind itself to sell its commodities only to wholesalers who in turn contracted not to resell the same to retailers except upon contract to observe the stipulated minimum price. Instead plaintiff sold or permitted the sale of its commodities to the defendant knowing that the defendant had refused to enter into the stipulated contract or to regard the stipulated price. (2) Plaintiff undertook to classify customers in a manner not authorized by the

statute and to make the contract apply to only a part of the purchasing public. (3) Defendant by conducting a "cash and carry" business and by other efficient business practices is conducting its business at a cost less than that incurred by the average retailer and is seeking to pass on some of the benefits to the consuming public.

Plaintiff now seeks to impose upon noncontracting retailers the duty to observe the minimum prices provided in its contract with certain retailers. It proceeds under the terms of ch. 350, Public Laws 1937, known as the Fair Trade Act. The majority approves as constitutional this statute which not only validates price fixing contracts between manufacturers and retail distributors, but likewise makes such contracts binding upon other retail dealers not parties to such contracts.

As a result of this decision retail distributors who by conducting a "cash and carry" business and by other expense reducing business methods and practices are conducting their business at a cost less than that incurred by the average retailer and who are able and willing and are seeking to pass on some of the benefits to the consuming public by offering its merchandise at a lower price are compelled to sell to the public at an artificial and higher price than that which normally would be fixed by the forces at work in a competitive commercial world. This is price pegging with a vengeance—and the consuming public is compelled to pay an additional tribute to the retailer which the retailer himself does not want. The effect of this act goes well beyond what has been called "predatory price-cutting" for it fixes prices irrespective of the motives or purposes of the retailer in reducing prices, by shaving his margin of profit or otherwise. It promotes the establishment of manufacturer monoplies and retailer combinations in restraint of competition. It penalizes the initiative and efficiency of alert retailers and rewards the incompetent or inefficient. It increases prices demanded of the consumer. It aids one class of retailer against another competing class who through more efficient business methods are able to undersell—at a fair profit—their competitors. It is in a final analysis a shot aimed at a particular group of retail merchants—but unfortunately the load thereof strikes and inflicts a telling wound upon the mass of people who compose the consuming public. To the retailers it means elimination of price competition and better profits—to the consumer it means the loss of the benefits arising out of wholesome price competition, and it produces still higher cost of living.

Under an economic system founded upon competition every general restriction—that is, every restriction covering all or a controlling fraction of a given commodity—is essentially unreasonable, being neither fairly necessary to the protection of the manufacturer, who already has a monopoly, nor beneficial to the public, because it does not tend to

create an incentive to increase the excellence of the product in order to maintain the better price.

Nor are these social, economic and political weaknesses of the statute the only objections. There are reasons, both legal and equitable, why the plaintiff may not maintain its action.

The plaintiff is not entitled to equitable relief.

The act is declaratory of the public policy of the State. Enforcement thereof rests upon the Attorney-General and the solicitors of the State, except as otherwise expressly authorized in the act. It authorizes individual trade-mark owners to sue only in the event they are damaged by the action of a retailer in selling at less than the fixed price, and the plaintiff alleges no facts upon which the allegation that it has suffered damages may be predicated. It sells to wholesalers and not to retailers. So far as this record discloses, it is selling the same quantity at the same margin of profit as heretofore.

The statute does not authorize injunctive relief against threatened damage. In that connection plaintiff alleges that the contracting retailers are threatening to cancel contracts and it will thereby suffer irrevocable damages. Even if the plaintiff is authorized to seek injunctive relief this is a false premise as the contract expressly reserves in the retailer the right to cancel the contract. The cancellation thereof is the exercise of a right and not the commission of a wrong. It gives no cause of action, but is *damnum absque injuria.*

A retailer who is not a party to a price fixing agreement between the manufacturer and other retail dealers, does not, by selling such manufacturer's products below the retail price designated in such agreement, induce such other retail dealers to breach their agreement, and, consequently, the manufacturer may not enjoin him on that ground. The defendant is merely selling products at prices lower than those agreed upon by the plaintiff and other retailers. The fact that incidental thereto some of the contracting retailers may breach their agreements in order to meet competition cannot be laid at the door of this defendant in an attempt legally to charge it with the result of such breach. *Coty v. Hearn Department Stores,* 284 N. Y. S., 909.

The contracting retailers voluntarily entered into the stipulations contained in the contract. They may voluntarily abandon such contracts whatever the motivating cause of such abandonment may be. The plaintiff cannot complain that retailers are exercising or threatening to exercise this right and it suffers no damage by reason thereof. There is no suggestion in the record that the plaintiff will not sell the same quantity of merchandise to wholesalers as heretofore or that it will be required to sell at a less price. Therefore, there is no threatened damage.

Plaintiff does not come into court seeking equity with clean hands, but has put itself in a position which is destructive of its right, if any existed, to appeal to a court of chancery for relief.

It did not contract with retailers—as the act authorizes—that it would sell only to wholesalers who agreed to resell only to retailers who contracted to observe the stipulated price. It did agree to "use every reasonable means" permitted by law "to prevent the sale . . . at less than the minimum resale price" by others. In violation of this agreement on its part it put its commodity on the market for unrestricted sale and sold, or permitted the sale, to the defendant unconditionally, although it knew that the defendant had refused to sign the contract and had declined to agree to observe the stipulated price in the future. The defendant purchased plaintiff's commodities from recognized wholesale dealers in plaintiff's merchandise, which wholesale dealers the plaintiff could have bound—but did not—to sell only to those who agreed to observe the stipulated minimum price. Defendant purchased unconditionally under the circumstances indicated. It was guilty of no fraud or deception in the acquisition of title to the property. Necessarily, under the circumstances of this case, the plaintiff was a party to such acquisition in violation of its contract with other retailers. It was a party to the acquisition by the defendant of its commodities on an unconditional and unrestricted basis when the plaintiff had the right to contract not to sell to wholesalers who would resell to retailers who did not agree to observe the stipulated price, and it had the right in the first instance to sell only to those who agreed to observe such prices. Having been a party to the sale of the commodities to the defendant on an unrestricted basis in violation of the terms of its contract it should not now be heard in chancery to insist that the defendant deal with such commodities on a restricted basis, or to assert that in fact the commodities were acquired by the defendant conditionally.

It may be argued that the defendant in the facts agreed has stipulated away its right to insist that plaintiff has no standing in a court of equity. As to that I take the position that equity jurisdiction was conferred upon the courts with the laudatory purpose to make it possible to render justice to a litigant in the absence of a statute protecting his rights, to the end that no wrong should exist without a remedy. It was never intended that equity should aid a litigant to obtain an unjust end and the court *sue sponte* should refuse to entertain a suit, as here, where the claimant has himself failed to do justly and his own conduct has caused the condition about which he complains.

The act constitutes an unlawful and unconstitutional delegation of authority to fix standards of fair practice.

Section 6 makes it an act of unfair competition for a retailer to sell a commodity at a price less than the minimum stipulated in a contract

between some other retailer and the manufacturer or distributor. We merely look to the contract to determine what the standard of fair practice is below which the statute provides he shall not sell, and so, the standard is fixed by the manufacturer or distributor. Thus, noncompliance with the terms of the contract is made an act of unfair competition with the right in the manufacturer or distributor to set the standard of unfair competition. This is nothing more than a species of delegated authority.

Even if it be granted that the General Assembly may directly fix retail sales prices generally (an assumption not supported by the decided cases) it by no means follows that the General Assembly may delegate to private individuals the power to so affect the property rights of other retail dealers. Nor does it seem to me a sufficient answer to say that such a delegation of power merely permits the owner of a trade-mark or patent to protect his property by directing the resale thereof after he has parted with title thereto. As I later set out, it has long been settled that such patent or trade-mark owner may stipulate only as to the first sale of his product, but thereafter he has lost possession of his product by releasing it into the channels of commerce generally. He may not control the manner in which, or the price at which, later sales of his product are to be made. *Bement & Sons v. National Harrow Co.*, 186 U. S., 70; *Motion Picture Patents Company v. Universal Film Mfg. Co.*, 243 U. S., 502, and cases therein cited.

The extent to which legislative power may be delegated has heretofore been ably discussed by the present *Chief Justice*, who has defined, as clearly as the subject permits, the strict limitations imposed upon the General Assembly in delegating its powers. *Provision Co. v. Daves*, 190 N. C., 7. As developed in that case, the proposition that a General Assembly may not delegate its legislative powers is subject to three exceptions only; namely, (1) limited powers as to local legislation may be granted to municipal and *quasi*-municipal corporations; *State v. Simons*, 32 Minn., 540, 543; (2) limited powers to promulgate administrative regulations may be granted to recognized governmental agencies and instrumentalities; *S. v. Garner*, 158 N. C., 630; *S. v. R. R.*, 141 N. C., 846; and (3) limited powers as to the finding of facts may be granted to recognized governmental agencies and instrumentalities where the determination of certain facts may be essential conditions precedent to the invocation of particular laws; *S. v. R. R., supra; S. v. Hodges*, 180 N. C., 751; *Morgan v. Stewart*, 144 N. C., 424; *S. v. Dudley*, 182 N. C., 822; *Field v. Clark*, 143 U. S., 649. It is instantly apparent that the present case falls within neither of these three exceptions, as the delegation of the power to fix standards and prices here involved is made to private individuals (*i.e.*, manufacturers and retailers) and not to any governmental agency or instrumentality.

The delegation of price fixing power fails for a second reason, *i.e.*, no standard or yardstick to be used in fixing the prices is laid down in the act. Every delegation of power, to be upheld, must, in granting the power, lay down a "primary standard" (*Buttfield v. Stranahan,* 192 U. S., 470, 496; *Red "C" Oil Co. v. N. C.,* 222 U. S., 380, 394), or a "general rule" (*Union Bridge Co. v. U. S.,* 204 U. S., 364, 386) to be followed in discharging the delegated power. This "primary standard" or "general rule" serves a three-fold purpose; it clarifies the purpose and intent of the law, furnishes a measure of the power granted, and fixes the limits within which the power may be exercised. Nor have the requirements in this respect been recently relaxed. In *Panama Refining Co. v. Ryan,* 293 U. S., 388, 415, it was declared that, whenever there is an attempted delegation of power, the legislative body must "perform its function of laying down policies and establishing standards" where it attempts to leave to "selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the Legislature is to apply." There it was stated, at page 415, that the fatal weakness of the N. I. R. Act was that it was a grant of "unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down." The instant Fair Trade Act has a similar shortcoming. It grants to private individuals the right to fix prices without laying down any standard or fixing any limits regulating those prices, and, further, it leaves entirely to certain individuals the choice as to whether minimum resale prices shall be fixed or not—which right some of such individuals may choose to exercise while others decline to do so. The constitutional requirement that there shall be a "primary standard" or "general rule" was again affirmed in *Schechter Corp. v. U. S.,* 295 U. S., 495, 541, where it was declared that the attempted delegation of power was unsuccessful because the legislative body failed "to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure."

It may be said further that the statute is arbitrary, discriminatory and unreasonable as applied to one who not being a party to such a contract sells products of a manufacturer at a price lower than that designated by the manufacturer between it and other retailers, because it attempts to compel one not a party to a price fixing contract to sell at prices fixed by others. *Doubleday D. & Co. v. Macy & Co.,* 269 N. Y., 272, 103 A. L. R., 1325; *Seeck & Kade v. Tomshinsky,* 269 N. Y., 613; *Coty v. Hearn Department Stores,* 284 N. Y. S., 909.

In this connection, it may be noted that the act is objectionable for the further reason that it does not necessarily apply to all trade-mark owners, producers and distributors. It becomes operative only as to those who elect to contract—binding noncontracting retailers dealing in

the same commodities. Likewise, it not only authorizes such trademark owners as elect to do so to contract to fix such standards, but they are authorized to change the standard from time to time, so that what constitutes unfair competition today may by the act of the distributor in reducing prices be perfectly lawful tomorrow. What is unfair competition may thus vary from time to time at the will of the distributor.

To restate concisely, this act fails as an attempted delegation of power in that (1) legislative power may only be delegated to governmental agencies or instrumentalities, not to private individuals (as here attempted), and (2) a delegation of legislative power must always be accompanied by a statement of a "primary standard" or "general rule" regulating and limiting the exercise of such power, and such a "primary standard" or "general rule" is lacking here where there is a blanket grant of power to manufacturers and some retailers to fix prices which will be binding upon all retailers and consumers.

The act is essentially a price fixing statute.

If considered without regard to section 6 thereof the Act might well be sustained on the theory that it merely changes the common law rule and makes lawful contracts fixing minimum retail prices. When considered as a whole it goes far beyond this purpose and becomes essentially a price fixing statute. The noncontracting retailer is not required to sell at not less than a stipulated price by reason of the contract. He is compelled so to do by the act. We merely look to the contract to determine what the minimum price is, below which the statute provides he shall not sell.

If we consider the statute general in nature and of necessity all-embracing, then it fixes, or permits the fixing of retail prices as well where the evils of price-cutting are absent as where they are present. Such a law which in effect spreads an all-inclusive net for the feet of everybody upon the chance that while the innocent will surely be entangled in its meshes some wrongdoers also may be caught is not permissible. *Tyson & Bro.—United Theatre Ticket Offices v. Banton,* 271 U. S., 418, 429.

The Legislature is not only without authority to delegate to a private individual or a corporation the right to fix prices, it is without constitutional power to fix prices at which commodities may be sold, services rendered, or property used, unless the business or property involved is "affected with a public interest." *Chas. Wolff Packing Co. v. Court of Industrial Relations,* 262 U. S., 522.

Legislative price fixing is an unconstitutional restriction upon the right of a private dealer to fix his own prices. *Fairmont Creamery Company v. Minn.,* 274 U. S., 1, 71 L. Ed., 893; *Williams v. Standard Oil Co.,* 278 U. S., 235, 73 L. Ed., 287; *Chas. Wolff Packing Co. v.*

Court of Industrial Relations, supra; Ribnik v. McBride, 277 U. S., 350, 72 L. Ed., 913; *New State Ice Co. v. Liebmann,* 285 U. S., 262, 76 L. Ed., 747.

By virtue of sec. 6 of the Act, when a manufacturer and a single North Carolina retailer contract to maintain a price schedule for the resale of trade-marked or identified products, such price schedules become binding upon all other North Carolina retailers of these products. Accordingly, A. by contracting with B. can compel C. and D. to sell A.'s goods at prices agreeable to A. and B. but not agreeable to C. and D. Thus, A. and B. seek to achieve by mandate of law what they cannot achieve by contract with C. and D. The effect of the act is to extend the manufacturer's ownership of commodities marketed by it under a distinguishing trade-mark, brand or name after he has sold them into the normal channels of commerce, with the result that the dealer-purchaser loses the right to sell his goods bought for resale at figures of his own choosing. This right to fix the price at which one will sell his property is itself a well recognized property right. *Tyson & Bro.—United Theatre Ticket Offices v. Banton, supra; Wolff Packing Co. v. Court of Industrial Relations, supra; Ribnik v. McBride, supra; Williams v. Standard Oil Co., supra; New State Ice Co. v. Liebmann, supra.* As these cases point out, this property right is one which a General Assembly may not destroy by fixing mandatory prices. Granted that such resale price maintenance contracts as here considered may be validated by the General Assembly as to the contracting parties, when the effect of the act (as here) is to make that price schedule binding upon other and noncontracting parties, as to these latter parties the Act constitutes price fixing by legislative mandate. Whether the prices are fixed by the Legislature directly or are made binding by act of the Legislature in delegating the power to fix prices to private individuals, the prices when fixed become binding upon an unwilling citizen.

Under the doctrine of *Wolff Packing Co. v. Court of Industrial Relations, supra,* the power of a legislature to regulate prices was specifically limited to those businesses which are distinctly "clothed with a public interest." Further, as explained in *Nebbia v. New York,* 291 U. S., 502, 507, "clothed with a public interest" is synonymous with "affected with a public interest" and as such refers to those businesses so definitely tinged with a public interest that they are rendered subject to the exercise of the police power. As that case points out, there are but three types of businesses which may be termed "clothed with a public interest": (1) Certain businesses which historically, and somewhat arbitrarily have long been so considered; (2) businesses operating under public grants and franchises imposing the duty to serve any member of the public demanding same; and (3) businesses which, by reason of their

peculiar relation to the public, are regarded as having granted to the public extensive powers of regulation.

Since the instant Act is not limited to particular trades, but extends to all retailers selling goods bearing trade-mark, label or name, it is apparent that there was no legislative intent to limit the act to those businesses affected or clothed with a public interest. Since it does not appear that there was a legislative intent to declare any retail businesses clothed with a public interest and since it is impossible to determine from the act which retail trades the Legislature intended to be regarded as such, in my opinion, this Court is without power to select the retail drug business (as would be necessary in the instant case) and pronounce it to be such a business, and the majority opinion does not undertake to do so.

To restate more concisely, this Act fails in that, (1) it destroys a property right of retail dealers, *i.e.*, the right to fix the prices at which they will sell their goods, and (2) it does not purport to declare any retail business clothed or affected with a public interest so as to justify price fixing within that business, and without such a declaration every price-fixing act is invalid as being outside the constitutional exercise of the police power.

The statute is in conflict with N. C. Const., Art. I, sec. 17.

As heretofore pointed out, the right of the owner of property to fix the price at which he will sell it is an inherent attribute of the property itself.

The whole spirit and purpose of the Constitution is to protect the liberties and property rights of the citizens of the State. Any act which arbitrarily destroys or impairs the right of the individual to the free use and enjoyment of his property for the benefit of a special group in order to permit this group to fix prices is diametrically opposed to the genius of a free people and should not be allowed to stand. The act under consideration is an attempt by legislation to deprive the non-contracting retailer of this right to the free use and enjoyment of his property and is in direct violation of N. C. Const., Art. I, sec. 17.

The act is a special act relating to trade.

N. C. Const., Art. II, sec. 29, provides that: "The General Assembly shall not pass any . . . special act . . . regulating . . . trade . . . or manufacturing . . . any local, private or special act or resolution passed in violation of the provision of this section shall be void." The effect of this provision is to render void any act regulating trade or manufacturing which is not a general law. *S. v. Dixon,* 215 N. C., 161. The word "trade" has been frequently defined by this Court and its legal significance is discussed in the *Dixon case* at page 164. It comprehends "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." *S. v. Worth,* 116 N. C., 1007, 21 S. E., 204. As the present act seeks to regulate contracts and sales relating to retail trade in commodities not "affected with a public interest," the act, it seems to me, falls squarely within the constitutional prohibition, unless it can be held to be a general law. What, then, is a "specific" law? It is one which does not include all of the persons within a given class, but relates to less than the entire class, or one which relates only to a particular section of 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. Highway Commission,* 90 Mont., 152, 300 P., 549; *City of Springfield v. Smith,* 322 Mo., 1129, 19 S. E. (2nd), 1; *State ex rel. Powell v. State Bank,* 80 A. L. R., 1494; *R. R. v. Cherokee County,* 177 N. C., 86. A law is a special law if it imposes particular burdens or confers 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. *Mathews v. City of Chicago,* 342 Ill., 120, 174 N. E., 335.

Under the terms of the contract herein involved an effort is made to "peg" the minimum resale price of all of the manufacturer's identified or trade-marked commodities, but the act itself exempts from this restriction (1) closing out sales, (2) sales where trade-mark, brand, etc., is obliterated, (3) sales where goods are second-hand or damaged, (4) judicial sales, (5) sales to religious, charitable, and educational institutions, and (6) sales to the State of North Carolina or any of its agencies or any of the political subdivisions of the State. The plaintiff by the contract here involved undertakes to add these further exemptions: Sales to (a) physicians, (b) dentists, (c) veterinarians, or (d) hospitals. In other words, even if it is admitted that resales of manufacturers' identified commodities constitutes a class of retail sales which may be made the subject of a general law, certainly when there is exempted from this general class of retail sales ten distinct sub-classifications within the class, the law ceases to be a "general" law and becomes a "special" law which applies to some retail sales within the defined class and not to others. As such a "special" law "regulating trade" it is, in my opinion, declared void by the provisions of Art. II, sec. 29, of the N. C. Constitution.

It was the evident intent of the Legislature to make the contracts authorized by the act, when entered into, apply to all except those expressly excepted by the statute—which exceptions in themselves make the act special in nature. If, however, the act is to be given the interpre-

tation apparently placed thereon by the plaintiff and authorizes the plaintiff and others in like situation to limit those to whom the stipulated price shall apply, then the act becomes even more obnoxious. It delegates to the contracting distributor the right to make any type of classification of ultimate purchasers it may elect. If it is not to be given that interpretation then the contract relied on is not in accord with the statute and is not protected by the terms thereof, and is an unwarranted attempt to regulate prices to the ultimate consumer without statutory authority.

The act under consideration violates the provisions of N. C. Constitution, Art. I, sec. 31, relating to monopolies.

A monopoly denotes a combination, organization or entity so extensive and unified that its tendency is to suppress competition, to acquire a dominance in the market and to secure the power to control prices to the public harm with a respect to any commodities which people are under a practical compulsion to buy. It is "any combination, the *tendency* of which is to prevent competition in its broad and general sense and to control, and thus, at will, enhance prices to the detriment of the public." The common law monopolies were unlawful because of their restriction upon individual freedom of contract and their injury to the public. Contracts having a monopolistic tendency have been held to "expose the public to all the evils of monopolies," to be "to the prejudice of the public," and to be "hostile to the rights and interest of the public."

The legislation under consideration permits the creation of a monopoly as thus defined in that it opens wide the door for the creation of retailer price-fixing combinations which will inevitably destroy price competition and enhance prices to the detriment of the public. But, says the majority opinion, in effect, we are not interested in legislation which merely permits the formation of a monopoly. It is only after the monopoly has been actually formed and is operating to the detriment of the public that there is any violation of the constitutional provision. With this I cannot agree.

It may be that the term "monopoly," as used at the time of the adoption of the Constitution, was not quite so comprehensive in meaning as present-day conditions make it. Yet the term was used and the framers of the Constitution unquestionably intended to prohibit "any combination, the *tendency* of which is to prevent competition in its broad and general sense and to control, and thus, at will, enhance prices to the detriment of the public." When a statute has been enacted, the clear import of which is to authorize monopolistic combinations, the terms of Article I, section 31, of the Constitution have been violated. We are not required to stand by and await the actual formation of a monopolistic combination, and the defendant is not compelled to refrain from

action until after he has been arbitrarily forced into such unlawful enterprise before appealing to the court for relief.

Such monopolies, contracts in restraint of trade and contracts in restraint of competition (such as authorized by this statute) are unlawful at common law and are prohibited by the Constitution. Attempts to sell property for a full price and yet to place restraint upon its further alienation have been hateful to the law from Lord Coke's day to ours because obnoxious to public interest. *Strauss v. Victor Talking Machine Company,* 243 U. S. 490, 61 L. Ed. 866. Laws seeking this end are violative of the familiar rights attaching to ordinary ownership and are contrary to the public interest and to the security of trade. It is this type of law that our Constitution prohibits.

Viewing the legislation under consideration within the narrow confines of this case make it appear that only one distributor and one retailer are involved. Such is not the effect of the statute. Practically all commodities now sold on the market, from commonplace table salt to the most expensive luxury, including drugs, foods, clothing, groceries and practically every other article of merchandise, are sold under trade-mark, brand or name. Small groups of retailers, under authority of this statute, by contracting with their source of supply as to the various articles of merchandise offered to the general public may create, through the operation of the provisions of section 6 of Act, ironclad price-fixing combinations which will enhance the price and operate to the detriment of the general public, as well as to completely destroy price competition. That it has this latter effect—the destruction of price competition—is substantially admitted by the plaintiff in its allegations in the complaint that contracting retailers are threatening to breach their contracts to the end that they may meet the price competition offered by the defendant.

The majority view relies upon the absence of horizontal price maintenance, pointing out that the vertical price maintenance achieved here standing alone without horizontal price maintenance is lawful. See quotation from *Triner Corp. v. McNeil,* 363 Ill., 559, this being one of the cases which the *Old Dearborn Distributing Co. case* affirmed. In the Illinois and California Fair Trade Acts (the two acts which have been upheld by the Supreme Court of the United States—see 299 U. S., 183, and 299 U. S., 198) only *vertical* price maintenance, *i.e.,* through contracts down the line from manufacturer to wholesaler to retailer, was judicially approved as not being in conflict with the due process and the special privilege and immunities provisions of the Federal Constitution. In the instant act not only is this *vertical* price maintenance permitted, but an extensive network of *horizontal* contracts is also permitted, as the vendor may agree with the vendee that he will not sell to any other wholesaler unless that wholesaler first agrees not to resell to any whole-

saler, retailer, or consumer who will not carry out, by further contracts or otherwise, the price maintenance plan embodied in the first contract. This system of contracts, fixing minimum prices both *vertically* and *horizontally,* is a much more elaborate and more dangerous method of price-fixing than that which has heretofore received court approval; approving a network of contracts reaching out vertically and horizontally so as to cover with a lattice-work a well-nigh perfect control of the prices of a given product moves much more definitely in the direction of approval of a monopoly than does the approval of a short chain of minimum resale price contracts. This Court might, with mild misgivings, approve such acts as the California and Illinois Fair Trade Acts, yet (by reason of Art. I, sec. 31, declaring ". . . monopolies are contrary to the genius of a free state and ought not to be allowed") strike down the so-called Fair Trade Act here under consideration. It is interesting to note in passing that, although forty-four states are reported to have adopted Fair Trade Acts (6 U. S. Law Week, 1250—9 May, 1939), apparently only nineteen of them (Norwood, Trade Practice and Price Law, 1938, pp. 145-6) permit horizontal chains of contracts which cross and interlock with the links of the vertical chains, as allowed in the North Carolina act.

Likewise, the majority opinion is bottomed on the conclusion that the statute provides protection for the good will of the manufacturer or distributor. In this I cannot concur.

The title of the act recites that it is to "protect trade-mark owners, producers, distributors and the general public against injurious and uneconomic practices in the distribution of competitive commodities bearing a distinguishing trade-mark, brand or name, through the use of voluntary contracts establishing minimum resale prices and providing for refusal to sell unless such minimum resale prices are observed."

Thus, it indicates that the purpose of the act is to eliminate "injurious and uneconomic practices" by *voluntary* contracts, with the right in the manufacturer or distributor to refuse to sell to those who decline to contract.

The act itself authorizes contracts between manufacturers and distributors and wholesalers and retailers containing provisions cited in the statute, which provisions are violative of and radically change the common law. It then, in effect, in section 6, prohibits any noncontracting retailer from selling such commodities at less than the stipulated minimum price. This is the full scope of the act. There is nothing in respect to good will either in the caption or in the body of the act. That the act was intended to protect good will is a judicial deduction, which in my opinion is not warranted by the facts.

Good will is that intangible asset which an individual, or corporation, dealing with the public, acquires through its reputation for fair dealing and the excellence of service or commodity offered for sale. It is the advantage accruing from the probability that the customer—induced by the quality of the merchandise sold and the courteous service rendered—will go back to trade where he has been well treated. Other and more comprehensive definitions may be found in Story, Partnership, sec. 99, 16 Am. Jur., 87; Callihan Cyc. Dict.; Words and Phrases; *Faust v. Rohr,* 166 N. C., 187; *Hilton v. Hilton,* L. R. A., 1918 F, 1174; *Bloom v. Holms Ins. Agency,* 121 S. W., 293; Bouvier's Law Dict.

While "good will" is a species of property, it evaporates and becomes nonexistent so soon as a business ceases to operate as a going concern. I have never understood that the price at which a commodity is offered for sale aided in the creation of good will, except that an excessive price will discourage and eliminate purchasers and thus decrease the value of good will, and popular prices will attract and retain satisfied customers and thus increase the value of this recognized asset.

If a manufacturer may sell its commodity to a retailer and part with title thereto for a full price and yet retain an interest therein to be protected by legislation, that right still exists after the article finally reaches the ultimate purchaser. If it exists the mere sale by the retailer could not destroy it, and to say that the manufacturer still has a property interest in the hat that I wear because it was sold under, and has printed therein, the name "Dobbs," or to conclude that the tailor possesses a property interest in my suit of clothes because there is a label attached to the inside pocket requires a process of reasoning I am unable to follow.

Even when a commodity is sold under patent or copyright—and the act under consideration does not require that the trade-mark, label or name shall be patented or copyrighted—the patentee or copyright owner parts with its statutory protection under the Federal Law. A patentee cannot by virtue of his statutory monoply impose conditions as to the resale price so as to render one who fails to observe them a contributory infringer of the patent. Cases cited in notes, 7 A. L. R., 477. After the right of the sale has been once exercised and the patentee receives his price, the article passes beyond the limits of the monoply and, in considering the validity of the contractual restraint at a price at which the article is to be resold, either at common law or under an anti-trust act, the case is to be considered as if there were no patent. Cases cited in notes 7 A. L. R., 477. The same rule applies to copyright protection; *Bobbs-Merrill Co. v. Strauss,* 210 U. S., 339, 52 L. Ed., 1086, and to trade-marked goods; *Ingersoll v. McColl,* 204 F., 147, and other cases cited in note, 7 A. L. R., 482; and to goods made by secret process;

Dr. Miles Medical Co. v. Park & Sons Co., 220 U. S., 373, 55 L. Ed., 502. Certainly the manufacturer or distributor has no greater right in merchandise sold under trade-mark, label or name than it would have in merchandise which was patented or copyrighted or sold under registered trade-mark.

It is true that there has been a recent change in the trend of legislation, which, due to the reluctance of the courts to invalidate legislative enactments, has brought about a shift in the line of decisions on subjects such as the one under consideration. However, this new trend tends to, and will, if followed, lead to the inevitable curtailment and eventual destruction of fundamental rights of person and property guaranteed by the Constitution. Statutes such as this give evidence of the ability of organized minorities to procure legislation for their own advantage and enrichment at the expense of the unorganized purchasing masses. They have brought about a new "orientation" from the principle of individual liberty to the idea of regimentation and strict control of commerce and property. Here a manufacturer or distributor and one retailer is granted authority to fix, by contract, the price at which a commodity shall be sold by all other retailers without regard to local conditions, overhead expenses or other circumstance. The many must yield to the will of the few to the end that the few may make a larger profit and be enriched thereby. As I have heretofore stated, such legislation, in my opinion, violates the express terms of our Constitution.

Cases cited and relied on in the majority opinion are distinguishable. The Dearborn and other U. S. Supreme Court cases deal only with Federal questions. In *Max Factor & Co. v. Kunsman* the defendant had surreptitiously acquired the commodities of the plaintiff and was selling them at greatly reduced prices, frequently below cost. In *Mills Co. v. Swanson* language similar to the terms of section 6 of our act was not involved or discussed. Similar differences, if space would permit, could be pointed out as to the other cases cited.

If, however, the constitutionality of the act be conceded in every respect, it, in my opinion, does not apply to or authorize price-fixing contracts concerning the commodities listed in Class II. It is expressly stipulated that: "Products falling within this class are those which are marketed exclusively by the plaintiff under patent owned or controlled by the plaintiff or under which plaintiff has been granted an exclusive license. The statute authorizes contracts in respect to a commodity which is "in free and open competition with commodities of the same general class produced or distributed by others." Products in Class II are not sold in competition with such designated commodities. To hold that they fall within the provisions of the statute is to say that the exclusive manufacturer of a product may fix the retail sale price thereof

upon the theory that when sold by one retailer, it is in competition with the same product sold by another retailer. This does not seem to me to be within the intent or purpose of the statute.

For the reasons stated, I am of the opinion that the judgment below should be affirmed.

REALTY PURCHASE CORPORATION v. W. B. FISHER AND WIFE, LEILA FISHER.

(Filed 27 September, 1939.)

1. Boundaries § 1—

Reference to one deed in another for the purpose of description is equivalent to incorporating and setting out its description in full.

2. Same—

In construing a description in a deed, every part and clause therein should be given effect, if possible, and the entire instrument construed to ascertain the true intention of the parties.

3. Boundaries § 2—Where general and specific descriptions are in harmony and each embraces lands not described in the other, both may be given effect.

The deed in question described by metes and bounds lands which comprised lots 1, 2, and 3 of the *locus in quo*. The specific description was followed by a general description "and being all of those certain lots conveyed" by named grantors to named grantees, giving the page and book at which said deeds were recorded, which general description by reference to the descriptions in the other deeds, embraced lots 3, 4, and 5 of the *locus in quo*. *Held:* There is no variance between the descriptions, but the general description merely described lands in addition to the lands described in the specific description with a lappage over lot No. 3, and by application of the rule that a description will be construed as a whole and each part and clause thereof given effect, if possible, the deed conveys lots 1, 2, 3, 4, and 5.

STACY, C. J., dissenting.

BARNHILL and WINBORNE, JJ., concur in dissent.

APPEAL by defendants from *Nettles, J.*, at January Term, 1939, of CHEROKEE. No error.

W. A. Devin, Jr., for plaintiff, appellee.

C. G. Hyde, J. N. Moody and Ralph Moody for defendants, appellants.

SCHENCK, J. This is an action in ejectment wherein defendants had executed a deed of trust upon certain lands in the town of Andrews,

Cherokee County, which deed of trust was duly foreclosed and the plaintiff became the purchaser at the foreclosure sale.

The description of the land in the deed of trust and in the deed from the substituted trustee in the deed of trust to the plaintiff was as follows: "Second Lot. Beginning at a stake, said stake standing at the point of intersection of the south margin of Chestnut Street with the east margin of First Avenue, and runs thence with said east margin of First Avenue south 20 west 75 feet to a stake in said margin; thence south 70 east 100 feet to a stake in the west margin of a ten-foot private alley; thence with said west margin of said alley north 20 east 75 feet to a stake in the margin of Chestnut Street; thence with the south margin of Chestnut Street north 70 west 100 feet to the point of beginning.

"And being all of those certain lots conveyed to W. B. Fisher and wife, Leila Fisher, by deed from A. B. Andrews *et al.*, dated the 19th day of January, 1899, and recorded in Book 31, page 81, of the Records of Deeds for Cherokee County, North Carolina, and in deed from A. B. Andrews *et al.*, S. Porter and wife, W. C. Wilkes and wife, recorded in Book 56, page 565, Book 37, page 366, Book 58, page 249, of Records of Deeds for Cherokee County."

The jury having answered the issues in favor of the plaintiff, the court entered judgment that the plaintiff was the owner of and was entitled to recover the possession of the land described in the complaint, as follows:

"Situated in Cherokee County, Andrews, N. C. Beginning at a stake, said stake standing at the point of intersection of the south margin of Chestnut Street with the east margin of First Avenue, and runs thence with said east margin of First Avenue south 20 west 125 feet to a stake in said margin; thence south 70 east 100 feet to a stake in the west margin of a ten-foot private alley; thence with said west margin of said alley north 20 east 125 feet to a stake in the margin of Chestnut Street; thence with the south margin of Chestnut Street north 70 west 100 feet to the point of beginning."

The court charged the jury in effect that the description of the land in the deed of trust signed by the defendants and in the deed of the substituted trustee to the plaintiff included the lands described in the complaint (which was the same as set forth in the judgment), to which charge the defendants preserved exceptions, and rely principally upon such exceptions on this appeal.

The particular or specific description contained in the deed of trust given by the defendants and in the deed from the substituted trustee to the plaintiff constitutes a parallelogram 100 by 75 feet on the corner of First Avenue and Chestnut Street in the town of Andrews, and includes Lots 1, 2 and 3 in Block D, each lot fronting 25 feet on First Avenue, and running back 100 feet to a ten-foot alley.

The deed from A. B. Andrews *et al.* to W. B. Fisher and wife, Leila Fisher, dated 19 January, 1899, recorded in Book 31, page 81, of the Records of Deeds for Cherokee County, conveyed to defendants "Lots Nos. 3 and 4 in Block D, in said town of Andrews, Cherokee County, North Carolina."

The deed from S. Porter and wife to W. B. Fisher, recorded in Records of Deeds No. 37, page 366, conveyed to defendant W. B. Fisher "Town Lot 5, in Block D, of the town of Andrews."

Lots 4 and 5, Block D, each have a frontage of 25 feet on First Avenue and run back 100 feet to a ten-foot alley, and Lot 4 is contiguous to Lot 3, and Lot 5 is contiguous to Lot 4. Lots 4 and 5 together with Lots 1, 2 and 3 constitute a parallelogram 100 by 125 feet.

The deed from A. B. Andrews *et al.* to W. B. Fisher, recorded in Book 58, page 249, Records of Deeds for Cherokee County, conveys "Lot No. 17 in Block D"; and the deed from W. C. Wilkes and wife to W. B. Fisher and wife, recorded in Book 56, page 565, said records, conveys "Lot No. 18 in Block D in the plat of said town." The land conveyed by these deeds, Lots 17 and 18, in Block D, are not involved in this appeal.

The question presented for answer is: Does the particular or specific description control, in which event only Lots 1, 2 and 3 of Block D would be included; or does the general description control, in which event only Lots 3, 4 and 5 of Block D would be included, or do both particular or specific description and general description control, in which event all of the lots involved, Lots 1, 2, 3, 4 and 5 of Block D, would be included?

The defendants, appellants, contend that the particular or specific description controls and that they conveyed by their deed of trust and the substituted trustee conveyed to the plaintiff only Lots 1, 2 and 3.

His Honor was of the opinion, and so held and in effect so charged the jury, that the particular or specific description and the general description control, and the defendants conveyed by their deed of trust and the substituted trustee conveyed to the plaintiff Lots 1, 2, 3, 4, and 5 of Block D.

We concur in his Honor's holding.

Reference to one deed in another for the purpose of description is equivalent to incorporating and setting out its description in full. *Euliss v. McAdams,* 108 N. C., 507; *Williams v. Bailey,* 178 N. C., 630.

"The entire description in a deed should be considered in determining the identity of the land conveyed. Clauses inserted in a deed should be regarded as inserted for a purpose, and should be given a meaning that would aid the description. Every part of the deed ought, if possible, to take effect, and every word to operate." *Quelch v. Futch,* 172 N. C., 316.

By giving the construction the court did to the description in the deed of trust and in the trustee's deed to the plaintiff every word therein took effect and was operative, whereas had the construction contended for by the defendants been given the general description would have been ignored and rendered nugatory. There is no variance between the particular or specific description and the general description. The latter is merely the description of land in addition to the land described in the former, with a lappage over Lot No. 3. In this respect the description involved in the instant case differs from the descriptions involved in *Potter v. Bonner,* 174 N. C., 20, and other cases cited by the appellants sustaining the rule that when there is a variance between the particular and general description in a deed, the particular description controls.

"By the modern and prevailing doctrine, we are required to examine the entire instrument and ascertain the true intention of the parties, for that is what the law seeks to effectuate." *Dill v. Lumber Co.,* 183 N. C., 660 (668), and cases there cited; and this is so even though it contravenes the rule that a more particular description controls when at variance with a general description in the same instrument. *Dill v. Lumber Co., supra.*

We have examined the exceptions to the evidence set out in appellants' brief and find no prejudicial error therein.

In the trial in the Superior Court we find

No error.

STACY, C. J., dissenting: The specific description in a deed, when definite and clear, is not to be enlarged by a reference to the source of title, such as "being the same property conveyed in deed," etc., because "when connected with the specific description, it can only be considered as an identification of the land described in the boundary," *Midgett v. Twiford,* 120 N. C., 4, 26 S. E., 626, or "as a further means of locating the property." *Loan Assn. v. Bethel, ibid.,* 344, 27 S. E., 29.

It is only when the specific description is ambiguous, or insufficient, or the reference is to a fuller or more accurate description, that the general clause is allowed to control or is given significance in determining the boundaries. *Crews v. Crews,* 210 N. C., 217, 186 S. E., 156; *Quelch v. Futch,* 172 N. C., 316, 90 S. E., 259; *Ritter v. Barrett,* 20 N. C., 266; *Campbell v. McArthur,* 9 N. C., 33; 18 C. J., 284.

The rule is that where there is a particular and a general description in a deed, the particular description is preferred over the general. *Von Herff v. Richardson,* 192 N. C., 595, 135 S. E., 533; *Potter v. Bonner,* 174 N C., 20, 93 S. E., 370.

"Where there is an 'unambiguous and certain description,' and also one that is indefinite and uncertain, the former is to be regarded as

controlling, and the latter will be rejected"—*Hoke, J.*, in *Williams v. Bailey*, 178 N. C., 630, 101 S. E., 105.

This is in full accord with the doctrine announced in *Triplett v. Williams*, 149 N. C., 394, 63 S. E., 79, that the significance of a deed, like that of a will, is to be gathered from its four corners. *Gudger v. White*, 141 N. C., 507, 54 S. E., 386.

The line of demarcation was pointed out by *Walker, J.*, in *Ferguson v. Fibre Co.*, 182 N. C., 731, 110 S. E., 220, "If the first description by metes and bounds does not embrace the *locus in quo*, the second one should not be allowed to control it, and thereby enlarge its boundaries, unless it was the clear, if not manifest, intention of the grantor to do so and to convey lands not covered by the first description," and again in *Dill v. Lumber Co.*, 183 N. C., 660, 112 S. E., 740, "The general rule is, to be sure, that a particular description will control a general one, because the law prefers the best evidence as to the intention of the parties, and when properly considered, the particular description is more certain and reliable than the other one."

In *Carter v. White*, 101 N. C., 30, 7 S. E., 473, it was held that the general description "known as Walker's Island" should give way to a more specific one by metes and bounds which did not include the whole island.

Likewise, in *Dana v. Bank*, 10 Dana, 250, where under the particular description the land was described by locative calls, the Massachusetts Court held that such a description would prevail over a more general one, the reference there being almost identical with the one here under consideration, *i.e.*, "being the same set off to the representatives of the late Wm. S. Crook, deceased, in the division of the estate of Enoch Crook, deceased, recorded with Middlesex Probate Records, b. 177, p. 97."

This case was cited with approval in *Cox v. McGowan*, 116 N. C., 131, 21 S. E., 108, where *Avery, J.*, with his usual clarity, animadverted as follows: "But in *Dana v. Bank, supra*, the more general description refers to the book and page of the record, as exhibiting the whole deed. The description, which calls for lines of other tracts, we can see fixes the boundaries by what are considered stable and certain monuments, then existing, and is to be preferred to one that is more general, even when the more general designation of the lines can by reference to other deeds be made more specific. It is true that in numerous cases which we need not cite, it has been held that the reference in one deed to another makes it competent to introduce the conveyance referred to in evidence for the purpose of showing that the original instrument offered is not void for vagueness in the descriptive clause, but it does not follow that there is any conflict between that rule and the one invoked in the

decision of this case, that the general designations, such as 'known as the Brown place' or 'known as the Mt. Vernon place,' though susceptible of location by proof *aliunde,* must yield to a more specific description, which marks out the boundaries as lines of adjoining tracts, streets or rivers or designated corners with course and distance either preceding or following that which is less definite in the same instrument. The parties are presumed to have intended to be governed by the description which they make specific where it is in conflict with another."

To similar effect is the decision in *Hale v. Swift,* 23 Ky., 497, 63 S. W., 288, where it was held that "where a deed describes a particular lot of ground by metes and bounds, and fixes its beginning corner by calling for a well known point, like a street corner, and, after thus definitely locating the exact ground, attempts to further describe it by giving a map number, which conflicts with the location, then the lot must be located according to the particular description, and not its map number."

In *Loan Assn. v. Bethel, supra,* there was a particular description of Lot No. 13, with the addition, "and upon this lot the Hotel Bethel is erected." The Hotel Bethel was, in fact, erected on Lot No. 13, but it also extended eight feet over on the adjacent Lot No. 12. It was held that the deed did not convey the eight feet of Lot No. 12 upon which the Hotel Bethel also stood.

The facts in the case of *Prentice v. R. R.,* 154 U. S., 163, make it almost identical with the case at bar, certainly the same in principle. There, it was held, as stated in the syllabus: "When a deed contains a specific description of the land conveyed, by metes and bounds, and a general description referring to the land as the same land set off to B., and by B. afterwards disposed of to A., the second description is intended to describe generally what had been before described by metes and bounds; and if, in an action of ejectment brought by a grantee of A., as plaintiff, the description by metes and bounds does not include the land sued for, it cannot be claimed under the general description."

Speaking to the general reference, the Court said: "It seems entirely clear that the words in the clause beginning *'and being the land,'* etc., were intended to describe, generally, what had been before specifically described by metes and bounds; that *'and being'* is equivalent to 'which is,' in which case this clause of general description—the specific description by metes and bounds being rejected as not embracing the land—cannot, it is conceded, be regarded as an independent description of the subject of the conveyance."

This is in conformity to the general rule, that a reiteration or redescription, such as, "being a lot in the shape of a parallelogram, 100 by 75 feet," etc., adds nothing to the description, but is in affirmation of the locative calls in the deed. *Ferguson v. Fibre Co., supra; Gudger v. White, supra;* 18 C. J., 284.

Speaking to this latter rule in *Ferguson v. Fibre Co., supra,* where the deed in question was more favorable to the plaintiff's position than the one we are now considering, *Walker, J.,* with his usual accuracy of expression, stated the case as follows: "There are two descriptions of the land in this case to be found in the deed in question, one by metes and bounds, and the other by more general words. It is admitted that the land in dispute is not embraced by the metes and bounds set forth in the deed, but it is contended by the plaintiff that it is included in the other description. . . . We are of the opinion that the second or further description gives strength and confirmation to the view that it was not the intention of the grantor to do so (extend the boundaries), but merely to repeat the former description, but in different, and, as he evidently supposed, plainer and more unmistakable language. . . . The second description was inserted not for the purpose of extending the boundaries of the lands, but merely as another way of making his meaning, in the first description, less liable to misunderstanding."

The strongest statement of the instant case is, that the deed conveys certain lots, specifically described by metes and bounds, and then makes reference not only to deeds conveying the lots specifically described, but also to another deed for lots not contained in the specific description. The parties are in disagreement whether the reference is to the source of title or for a further description. But even conceding the latter, to hold, as the majority opinion does, that this ambiguity in the general reference conveys the lots not covered by the specific description is to depart from the general rule of construction. *Williams v. Bailey, supra; Beck v. Love,* 18 N. C., 65.

The case of *Quelch v. Futch, supra,* ought not to be misunderstood. There, an error in the specific description resulted in a misdescription of the land intended to be conveyed, as was clearly revealed by the reference in the deed to the description in another deed where the same property was conveyed to the grantor, but not where some other property was acquired by him. Under these circumstances the choice was made between declaring the deed void for want of sufficient description or giving it significance according to the manifest intention of the parties. It is a far cry from that case to this one. "Every opinion to be correctly understood ought to be considered with a view to the case in which it was delivered." *U. S. v. Burr,* 4 Cranch, 469.

The case of *Von Herff v. Richardson, supra,* is likewise on four points with the case at bar, where a different result was upheld. See, also, *Gaylord v. McCoy,* 158 N. C., 325, 74 S. E., 321; *Peebles v. Graham,* 128 N. C., 222, 39 S. E., 25.

It is not to be doubted that "by a proper reference of one deed to another, the description of the latter may be considered as incorporated into the former, and both be read as one instrument for the purpose of

identifying the thing intended to be conveyed." *Everitt v. Thomas,* 23 N. C., 252. But this is not our case.

The deed in question contains two clear and unmistakable descriptions by metes and bounds, the one under the designation "First Lot" and the other under the title "Second Lot." The specific description under the "First Lot" covers Lots 17 and 18 in Block D, while the particular description under the "Second Lot" covers Lots 1, 2 and 3 in Block D. Then follows the reference, "And being all of those certain lots conveyed," etc. Under the decisions heretofore prevailing, the particular descriptions take precedence over the general reference and are regarded as controlling. *Scull v. Pruden,* 92 N. C., 168; *Proctor v. Pool,* 15 N. C., 370.

BARNHILL and WINBORNE, JJ., concur in dissent.

DALLAS C. BURNETT, EMPLOYEE, v. PALMER-LIPE PAINT COMPANY, EMPLOYER, AND AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, CARRIER.

(Filed 27 September, 1939.)

1. Master and Servant § 45b—

Conversations between insured and insurer's auditor as to the coverage of the policy cannot vary the terms of the compensation insurance policy theretofore executed and delivered to, and accepted by insured.

2. Master and Servant § 39d—Employee held not covered while performing duties at employer's residence unconnected with duties at place of business.

Defendant employer was sole owner of a retail paint store doing business in a definite location and employing more than five employees. Plaintiff employee's duties were to drive the delivery truck and do the janitorial work at the store, and he was also required to do janitorial work at his employer's residence, mow the lawn, and work in her garden, plaintiff being paid for all work through the store. Plaintiff was injured while mowing the lawn at his employer's residence during his regular hours of employment. *Held:* The injury did not arise out of and in the course of his duties connected with the employment covered by the Compensation Act, and the award of the Industrial Commission in his favor should have been reversed by the Superior Court.

3. Same—

The North Carolina Workmen's Compensation Act excludes persons whose employment is casual and not in the course of the trade, business, profession or occupation of the employer, sec. 8081 (a), (b), and specifically excepts from its provisions casual employees, farm laborers and domestic servants.

4. Master and Servant § 45b—

When a compensation insurance policy provides coverage solely in connection with the employer's business having a definite location, the policy does not cover injury to an employee sustained while mowing the lawn at the employer's residence.

APPEAL by defendant Insurance Company from *Pless, J.*, at June Term, 1939, of BUNCOMBE. Reversed.

This was a proceeding under the Workmen's Compensation Act. From an award by the Industrial Commission in favor of plaintiff, defendant insurance carrier appealed to the Superior Court. In the Superior Court, the defendant employer moved to dismiss the appeal. Motion denied. Judgment was then entered affirming the award of the Industrial Commission, and defendant insurance carrier appealed to the Supreme Court. The employer did not appeal.

Carl W. Greene and Jordan & Horner for plaintiff, appellee.
Smathers & Meekins for defendant, appellant.

DEVIN, J. The plaintiff Burnett was employed by Mrs. D. K. Lipe. She was engaged in business under the name and style of Palmer-Lipe Paint Company, of which she was, and is, sole owner. The business carried on was that of retail store at 82 Patton Avenue in the city of Asheville, together with painting, decorating and shop operations in connection with the store. It was admitted that more than five persons were employed in the business at that location.

The plaintiff received an injury while engaged in mowing the lawn at the private residence of Mrs. Lipe, located on Hendersonville Road, several miles from 82 Patton Avenue. He testified relative to his injury as follows: "I was injured August 13th, and I had a job working for Mrs. D. K. Lipe, mowing her front yard, running a lawn mower. The lawn mower picked up a piece of glass or steel one and threw it up and cut me in the eye. When I was employed by the Palmer-Lipe Paint Company my duties were to clean up after all the painters, mow Mrs. Lipe's lawn, fire the furnace and clean up around the house out there when I wasn't busy at the Paint Store. It was part of my duty for the wage of $15.00 per week to look after the lawn out there."

Mrs. Lipe testified as follows: "When Mr. Burnett was employed by the Palmer-Lipe Paint Company his duties were to do the delivery, do the general work at the store, do the janitor work at my home, as far as getting in kindling and making the fire, washing the floors and cutting the lawn, working the garden when I needed him, also take any of the jobs any of my contractors might do, haul in all the rubbish around the house and in the basements, clean that up and bring it in to the incin-

erator when the job was completed. That includes washing the windows at the store, doing the floor work and janitor work at the store."

The North Carolina Industrial Commission found the facts as to the character of plaintiff's employment as follows: "That the plaintiff was employed by the Palmer-Lipe Paint Company, an unincorporated firm, to drive the delivery truck, do the janitorial work at the store, and do the general janitorial work at the home of the sole owner of the Palmer-Lipe Paint Company, Mrs. Lipe, such as mowing the lawn, firing the furnace, cleaning the floors, and so on."

The Industrial Commission considered that, as the contract of employment between Mrs. Lipe and the plaintiff provided for the performance of certain duties at the home of Mrs. Lipe, as well as at the store, for which he was paid through the store, and the injury occurred during regular work hours, the injury arose out of and in course of plaintiff's employment.

Mrs. Lipe obtained a policy of employer's liability insurance from the defendant American Mutual Liability Insurance Company which obtained, among other things, the following provision: "3. Locations of all factories, shops, yards, buildings, premises, or other work places of this Employer—82 Patton Avenue, Asheville, Buncombe County, North Carolina."

The classification of operations is stated in the following words: "Store risks—retail—N. O. C. (No other classification.) Painting, decorating or paper hanging—N. O. C.—including shop operations; drivers, chauffeurs and their helpers . . . 5. This employer is conducting no other business operations at this or any other location not herein disclosed—No exceptions."

Some reference was made in the testimony and in the findings of the Industrial Commission as to a conversation between Mrs. Lipe and an auditor of the defendant Insurance Company, who was checking the employer's pay rolls, relative to coverage, but this may not be held to vary the terms of the policy of insurance executed by the defendant Insurance Company and delivered to and accepted by the employer.

The North Carolina Workmen's Compensation Act defines employment coming within the provisions of the act as including "all private employment in which five or more employees are regularly employed in the same business or establishment, except agriculture and domestic service," and excludes from its provisions "persons whose employment is both casual and not in the course of the trade, business, profession or occupation of his employer." Sec. 8081 (i), (a), (b), Michie's Code. The act further provides that insurance policies issued thereunder shall contain clause that "jurisdiction of the insured for the purpose of this article shall be jurisdiction of the insurer, that the insurer shall in all

things be bound by and subject to the awards, judgments or decrees rendered against insured employer." The act also specifically excepts from its provisions casual employees, farm laborers and domestic servants. Sec. 8081 (u), (b), Michie's Code. In *Johnson v. Hosiery Co.*, 199 N. C., 38, 153 S. E., 591, this Court interpreted the meaning of these phrases as used in the statute.

There was reference in the testimony of the employer in the hearing before the Industrial Commission to the effect that she had also a contracting or construction business, separate and apart from the paint store, for which she did not carry insurance.

The record presents these material facts upon which appellant's liability depends: The plaintiff was employed by the operator of a paint store doing business at a definite location in Asheville, where more than five persons were there employed. The employer owned a private residence in another part of the city which had no connection with the business carried on at the store, except that both were owned by her. The plaintiff, in addition to the services rendered at the store, was also, for the same wage, required by his employer, from time to time, to perform certain other services at her home, such as firing the furnace, washing the floors, working the garden and mowing the lawn. No other person was employed in that work. It was while engaged in mowing the lawn that the injury complained of was received. Upon the record presented we are of opinion, and so hold, that the injury does not come within the provisions of the act, that the Industrial Commission was without power to make the award against appellant, the insurance carrier, and that the Superior Court was in error in affirming the award. It is clear, we think, if the employer had been a corporation or partnership, of which Mrs. Lipe was an executive, an injury to an employee of the company while engaged in private and personal work for her, having no relation in character or location to the business of the company, would not have been compensable by the company or its insurance carrier under the act. And we think the same reasoning would apply when the same person operates a business or industry, and also has personal service rendered in and around a private residence at another location.

The terms of the insurance policy definitely exclude liability for injury received at the location and in the manner in which plaintiff was injured; hence, the employer had no insurance for an injury to an employee engaged in mowing the lawn at her residence on Hendersonville Road, notwithstanding she paid him indiscriminately for all services through her office at the store.

"One of the fundamental tests of the right to compensation is not the title of the injured person, but the nature and quality of the act he is

performing at the time of his injury." *Hodges v. Mortgage Co.,* 201 N. C., 701, 161 S. E., 220; *Nissen v. Winston-Salem,* 206 N. C., 888, 175 S. E., 310.

The precise question here presented has not heretofore arisen in the State. However, the principle involved has been considered by courts in other states in numerous cases. The results obtained in the different cases are not always in harmony, but we think the weight of authority supports the conclusion we have reached.

A case in many respects similar to ours was decided by the Supreme Court of Maine in *Paradis Case,* 127 Me., 252. There the employer's specified business was that of general hardware, tinsmithing and plumbing, in a store. The claimant was employed to operate trucks, haul freight, unpack and deliver goods. His duties varied, however, and were divided between the store and the house of his employer. At the employer's house (during work hours) he made kindling, prepared fuel, tended fires, worked about the grounds. The employee was paid at the store. The wage included work done by the employee at the home as well as at the store. In mid-afternoon, at the home, while breaking up a box for kindling, he was injured when a nail flew from the box into his eye. Holding the claimant not entitled under the act, the Court said: "The manner in which an employee is paid is not necessarily a basis for the measurement of legal responsibility. *Olsen's Case,* 252 Mass., 108. . . . He (the employee) was injured while doing work wholly apart from any that his employer's hardware and connected business called upon the employee to do."

Under the Oklahoma act, limited to hazardous duties, the Court of that state recognizes the principle that when certain duties performed by an employee come within the provisions of the statute and other duties are without, and an injury arises out of the latter, compensation cannot be awarded. *Jones v. McDonnell,* 164 Okla., 226; *Oil Co. v. Wilson,* 165 Okla., 103. To the same effect is the holding in *Denny v. Dept. of Labor & Ind.,* 172 Wash., 631, and in *Ocean Accident & Guarantee Co. v. Ind. Com.,* 69 Utah, 473, where the employer was engaged in the general business of marketing sand and gravel and also farming. An employee injured raking hay was held not within the act.

In *Crockett v. Ind. Accident Com.,* 190 Cal., 538, claimant, employed as carpenter, was injured while sweeping down some walls in employer's residence. The Court said: "Employment may be dual in character. In so far as the employee acts in one capacity, he may be within the provisions of the Compensation Act; and in so far as he works in another capacity, his employment will be exempt from its provisions."

In *Kender v. Reineking,* 228 N. Y., 240, a workman employed in care of a building, after close of working hours, was specially employed to

repair an automobile on the premises and was injured while so engaged. It was held this was not an employment in connection with the care of the building, and compensation under Workmen's Compensation Act was denied.

In *Forester v. Eckerson,* 151 Atlantic, 639 (N. J.), where one employed as a painter in a plant was sent by executives of the company on several occasions to do painting work at the homes of the executives, the work was held casual and not in course of the business of his employer.

In *Pacific Employers Ins. Co. v. Department of Ind. Relations,* 267 Pac., 880 (Cal.), the claimant was employed in the business of trucking and hauling and was injured tearing down a barn by direction of employer. This was held not in course of the business or trade of employer, and compensation denied. So, also, where employer's business was that of a wholesale hat and millinery establishment, and the injury to employee occurred while he was plastering the building, compensation was denied for the reason that he was not engaged in work usual and necessary for the business, and the liability of insurer could not be extended beyond terms of the policy. *New Amsterdam Casualty Co. v. Ind. Com.* (Okla.), 193 Pac., 974. To the same effect is the holding in *Rust Lumber Co. v. General Accident Corp.,* 64 Sou., 122 (La.), and *Ostlie v. Dirks,* 248 N. W. (Minn.), 283.

In *Petit v. Reges,* 242 N. Y., 272, 151 N. E., 450, the policy insured against accident to employees while engaged at work upon certain premises and in connection with a described business. It was held that claim for injury at another place was not covered, the work having no relation to work on the premises described. The provisions in the insurance policy considered by the Court were identical with those of the policy in the case at bar.

In *Astrin v. East New York Woodwork Mfg. Co.,* 206 N. Y. S., 524, the policy covered accidents to employees at a certain place. Employer moved to another place without notice to the Insurance Company, and employee was injured at the latter place. The Court held the accident was not within the terms of the policy and reversed the award against the carrier, on the ground that the provisions of the policy (same as in our case) clearly state the intent of the parties as to the limitations of carrier's liability and constitute basis upon which the rates of insurance were fixed. Risk at another location might be different.

In *Tunnicliff v. Bettendorf,* 214 N. W., 516, the Supreme Court of Iowa considered the case of one employed as chauffeur and to care for automobiles. In a bungalow belonging to his employer and occupied by employer's son, he was injured while repairing a gas generating machine. The Compensation Act of Iowa is similar to ours, and the

policy was in the same form as in the instant case. There the Court, referring to the broad principle underlying these acts, said that the spirit of Workmen's Compensation Acts—the fundamental idea—was that the disability of a workman resulting from an injury arising out of and in course of his employment was a loss that should be borne by the industry itself as an incident of operation. "The clear objective of the compensation act is to protect the employee against the hazard of the employer's trade or business." *Eddington v. Northwestern Bell Tel. Co.,* 201 Iowa, 67. "In other words, the Compensation Act is intended to apply to the trade or business of the employer." *Pfister v. Doon Elec. Co.,* 199 Iowa, 548.

Under the California statute exempting "domestic service" and "horticulture" from the provisions of the Compensation Act, the case of a claimant employed in dual capacity of janitor for a dance hall and as house and garden laborer, was considered in *Kramer v. Ind. Com.,* 161 Pac., 278. Claimant was injured while pruning fruit trees. It was held that his employment as janitor came within the act, but that caring for grass, lawns, trees, shrubbery and flowers was horticultural and excluded, and that his injury was received while at work as gardener, and hence not compensable, not being incident to his work as janitor.

In *In re Sickles,* 156 N. Y. S., 864 (citing *Cleisner v. Cross,* 155 N. Y. S., 946), it was said: "The difficulty is that the employer was engaged in two entirely distinct kinds of business, one of which was not within the protection of the statute, and that claimant was injured in the performance of duties which at the time of injury solely had reference to that kind of business not protected." *Slaughter v. Pastrana,* 217 S. W., 749; *George v. Ind. Com.,* 178 Cal., 733.

The line of distinction appears clearly indicated in the case of *Grieb v. Hammerle,* 222 N. Y., 382 (opinion by *Cardozo, J.*), where an employee in a cigar factory, after hours, at request of employer, and as incident to his work, delivered cigars to purchasers. He was killed on way to deliver some cigars. Compensation was allowed, since the service, though after working hours, was incidental to the business. It may be interesting to note that *Mr. Justice Cardozo,* who wrote the opinion in this case, was also a member of the New York Court which later decided *Petit v. Reges, supra,* and concurred in that opinion.

There are decisions which on analysis seem to support appellee's contention that the injury under the facts of the instant case was within the provisions of the North Carolina Workmen's Compensation Act, was compensable, and that the insurance carrier is bound. Notably among these is *Matis v. Schaeffer,* 270 Pa., 141, where a laborer in a coal yard was sent out to assist on a farm and suffered sunstroke. There it was said that the general character of the contract of hiring and not

the casual or incidental work performed at request of employer governed. In *Heal v. Ind. Com.,* 197 Wis., 95, where claimant employed to drive a tractor for road construction was directed to drive the tractor to a plow for another and was injured, award of compensation was affirmed. In *Austin v. Leonard,* 177 Minn. 503, employer operated potato warehouses and a few farms. Employee was sent out to do work on a farm, and on his return to a warehouse for work there was killed en route. The injury was held within the statute. See, also, *City of Oakland v. Ind. Accident Com.,* 170 Pac., 430; *Carroll v. Necessities Corp.,* 233 Mich., 541; *Byas v. Hotel Bentley,* 157 La., 1030; and *Boteler v. Gardiner,* 164 Md., 478.

After giving careful consideration to all the cases cited by appellee and appellant in their excellent briefs, as well as to numerous other cases, we conclude that the action of the court below in affirming the award of the Industrial Commission against the defendant insurance carrier must be held for error, and that the judgment should be

Reversed.

BEAUFORT COUNTY v. J. P. BISHOP AND WIFE, LUCY BISHOP, R. H. BISHOP, ALBEMARLE DRAINAGE DISTRICT, PANTEGO DRAINAGE DISTRICT.

(Filed 27 September, 1939.)

1. Clerks of Court § 3—

The jurisdiction of the court of the clerk of the Superior Court is limited to that conferred by statute, and unless otherwise expressly provided the clerk may not enter any judgment except on Monday. Ch. 92, sec. 10, Public Laws of 1921, as amended by ch. 68, Public Laws of 1923. Michie's Code, 597 (b).

2. Same: Taxation § 40c—Commissioner's deed to purchaser at foreclosure of tax lien conveys no title when clerk's order of confirmation is void.

In this suit to foreclose the lien for taxes, C. S., 7990, the clerk entered an order confirming the commissioner's sale and directing the commissioner to execute deed, and upon the commissioner's filing a supplementary report later the same month the clerk entered another order of confirmation, both of which orders of confirmation were entered on a day other than Monday. *Held:* The clerk was without jurisdiction to enter the orders of confirmation on a day other than Monday and therefore the orders are void and the deed of the commissioner purporting to be executed thereunder is also void, and confirmation being essential, the tax sale was incomplete and the last and highest bidder remained but a proposed purchaser.

3. Taxation § 41—The owners are entitled to redeem lands from the foreclosure of the tax lien under C. S., 7990, at any time before valid confirmation.

In the foreclosure of the tax liens upon the lands in question under C. S., 7990, the clerk's order confirming the commissioner's sale and decreeing that he execute deed was void because entered on a day other than Monday. *Held:* The owners were entitled to redeem the land from the tax sale upon proper tender, and such tender having been made two days prior to the effective date of ch. 107, Public Laws of 1939, relating to the clerk's power to enter certain judgments in actions instituted under C. S., 7990, and ratifying judgments and orders theretofore entered by clerks of Superior Courts in such actions, the effect of this latter statute need not be considered, and the sale being set aside, the authority of the clerk at that time to enter judgment by default final and ordering sale of the lands need not be determined.

APPEAL by plaintiff and H. S. Ward, B. G. Carrowan, D. T. Carrowan and Ethel M. Carrowan from *Carr, J.*, at May Term, 1939, of BEAUFORT.

Civil action to foreclose tax lien under C. S., 7990.

The case was heard below upon motion of defendants J. P. Bishop and R. H. Bishop, mortgagee, and Southern Cotton Oil Company, assignee of R. H. Bishop, mortgagee, to vacate and set aside order for sale of lands described in the complaint and purported decrees confirming report of sale thereof, and for an opportunity to redeem the land from the lien of certain enumerated taxes. The parties, with consent and approval of the clerk, stipulated and agreed that the motion should be heard by the judge presiding at the May Term, 1939, of Superior Court of Beaufort County, and that such judgment as might be entered by him should be treated as the judgment of said clerk of Superior Court affirmed on appeal by the judge presiding.

Thereupon the court, judge presiding, after hearing the parties, finds *inter alia* pertinent uncontroverted facts, substantially these:

This action was instituted 15 November, 1938, for the purpose of enforcing against certain lands in Beaufort County, North Carolina, owned by and listed in the name of J. P. Bishop and wife, Lucy Bishop, the lien of certain enumerated unpaid taxes, duly levied and assessed by and due to plaintiff. At that time there appeared of record a mortgage on said land in favor of R. H. Bishop. J. P. Bishop and wife, Lucy Bishop, and R. H. Bishop, mortgagee, were named defendants and duly and personally served with summons and copy of complaint. When the suit was instituted R. H. Bishop had endorsed the note given to him by J. P. Bishop and secured by the mortgage, and the mortgage to Southern Cotton Oil Company, but the records failed to disclose this fact, and it was not named as defendant nor served with summons.

On Monday, 26 December, 1938, no pleading having been filed by any of the defendants, the clerk of Superior Court of Beaufort County

entered judgment declaring the enumerated taxes to be a first and paramount lien against the lands described in the complaint, ordered a sale of said lands, and appointed W. A. Blount, Jr., commissioner to make sale after publishing notice of sale as therein prescribed, and to report same to the clerk for confirmation. After such publication of notice, and on Monday, 30 January, 1939, at the courthouse door of said county in Washington, the commissioner offered the land for sale when and where H. S. Ward became the last and highest bidder for the same at the price of $439, subject to drainage assessments due Pantego Run Drainage District, Beaufort County Drainage District No. 14. Commissioner made report thereof to the clerk on the day of sale. On 10 February, 1939, the clerk entered decree confirming the sale, and empowering, authorizing and directing the commissioner "to execute title deed to the purchaser, so reported." Immediately thereafter the commissioner executed a deed to H. S. Ward, who in turn executed a deed to B. G. Carrowan, who executed a deed to his brother and sister-in-law, D. T. Carrowan and wife, Ethel Carrowan, for a part of the land. The only money which has been paid for the property is the sum of $439 paid to Blount, commissioner, by H. S. Ward, to whom same was paid by the Carrowans.

On 21 February, 1939, the commissioner filed a supplemental report of the sale, "and on that day the clerk made another order or decree or judgment of confirmation."

J. P. Bishop, the owner of the land, was in possession. Hence, the purchasers gave notice of a motion for a writ of assistance, returnable 6 March, 1939. The hearing was continued to 13 March, 1939, and on that date, at request of movants, was continued to be heard at the convenience of counsel.

On 13 March, 1939, defendant J. P. Bishop "deposited with the clerk of Superior Court of Beaufort County the sum of $500.00 to be used in repaying the purchasers the amounts expended by them for the purchase of the property and to discharge any liens for taxes against said land and for any other purpose in order that they might redeem the property from the sale. The sum so deposited is more than sufficient for such purposes."

Neither of the decrees of confirmation entered by the clerk in February was on Monday. Nor has there been confirmation of the sale on a Monday.

Upon such findings of fact, the presiding judge being of opinion "that there has been no valid sale of the property of defendants, and that there is only pending before the court an offer of H. S. Ward to purchase the land," "adjudged and decreed that the decrees or purported decree of confirmation are invalid or void; that no title passed from Blount,

commissioner, to Ward, or from Ward to B. G. Carrowan, or from B. G. Carrowan to D. T. Carrowan and wife, Ethel Carrowan; that the effect of the payment by Ward to Blount is but a purchase of the tax lien and the costs incurred, and that the sum deposited by the defendants with the clerk be used to pay said taxes now owing to Ward and the Carrowans, the costs of this action and any proper or legitimate expense paid by Ward or the Carrowans in connection with this proceeding, and if there is a surplus after paying said items that the surplus be paid by the clerk to the defendants."

From this judgment, Beaufort County, H. S. Ward, B. G. Carrowan, D. T. Carrowan and Ethel M. Carrowan appeal to Supreme Court, and assign error.

E. A. Daniel for plaintiff, appellant.
Rodman & Rodman for defendants, appellees.

WINBORNE, J. Decision on this appeal fairly turns on this question: If it be conceded that the clerk of Superior Court had authority in February, 1939, to enter a judgment confirming sale of land ordered in an action instituted under the provisions of C. S., 7990, may such judgment be entered by the clerk on any day other than Monday? The statute answers "No." Public Laws, Extra Session 1921, ch. 92, sec. 10, as amended by Public Laws 1923, ch. 68; Michie's Code, 1935, sec. 597 (b). See *Clegg v. Canady,* 213 N. C., 258, 195 S. E., 770.

In this State the clerk of Superior Court is a court of very limited jurisdiction, having only such jurisdiction as is given by statute. *McCauley v. McCauley,* 122 N. C., 288, 30 S. E., 344; *Dixon v. Osborne,* 201 N. C., 489, 160 S. E., 579. The statute conferring on the clerk authority to enter judgments provides in substance that, except as otherwise provided, no judgment shall be entered by the clerk except on Monday. Public Laws, Extra Session 1921, ch. 92, as amended by Public Laws 1923, ch. 68. The authority otherwise applies only to judgment of voluntary nonsuits and those entered by consent. Public Laws 1921, Extra Session 1921, ch. 92, sec. 12 (a) and (b).

In the present case the clerk, by entering two decrees, one on 10 February, 1939, and the other on 21 February, 1939, has undertaken to confirm the sale and to order title made and executed. The first of these orders was on Friday, and the second on Tuesday. Therefore, the clerk having undertaken to act at a time when he had no jurisdiction to act, the purported orders of confirmation are void and give no force or validity to the deed of the commissioner purporting to be executed thereunder. *McCauley v. McCauley, supra.*

This being an action in the nature of an action to foreclose a mortgage, confirmation is essential to the consummation of the sale of the lands by the commissioner appointed and acting under the order of the court. Speaking to this question in *Mebane v. Mebane,* 80 N. C., 34, *Smith, C. J.,* said: "The commissioner acts as agent of the court and must report to it all his doings in execution of its order. The bid is but a proposition to buy, and until accepted and sanctioned by the court, confers no right whatever upon the purchaser. The sale is consummated when that sanction is given and an order for title made and executed." To like effect are numerous decisions of this Court, notably among which are these: *Dula v. Seagle,* 98 N. C., 458, 4 S. E., 549; *Joyner v. Futrell,* 136 N. C., 301, 48 S. E., 649; *Harrell v. Blythe,* 140 N. C., 415, 53 S. E., 232; *Patillo v. Lytle,* 158 N. C., 92, 73 S. E., 200; *Davis v. Pierce,* 167 N. C., 135, 83 S. E., 182; *Upchurch v. Upchurch,* 173 N. C., 88, 91 S. E., 702; *Perry v. Perry,* 179 N. C., 445, 102 S. E., 772; *In re Sermon's Land,* 182 N. C., 122, 108 S. E., 497; *Cherry v. Gilliam,* 195 N. C., 233, 141 S. E., 594; *Davis v. Ins. Co.,* 197 N. C., 617, 150 S. E., 120; *Dixon v. Osborne,* 201 N. C., 489, 160 S. E., 579; *Richmond County v. Simmons,* 209 N. C., 250, 183 S. E., 282; *Bank v. Stone,* 213 N. C., 598, 197 S. E., 132.

In *Harrell v. Blythe, supra,* it is stated: "When land is sold under a decree of court, the purchaser acquires no independent right. He is regarded as a mere preferred proposer until confirmation, which is the judicial sanction or acceptance of the court, and until it is obtained the bargain is not complete."

In *Perry v. Perry, supra, Hoke, J.,* after quoting from several decisions, said: "And this 'confirmation of sale' referred to and contemplated by these authorities means confirmation that has been fixed and determined according to the course and practice of the Court."

In keeping with these authorities, the status of the purchaser on 13 March, 1939, when the defendant J. P. Bishop deposited with the clerk sufficient money to redeem and for the purpose of redeeming the land from the tax lien, was that of a preferred bidder whose bid had not been accepted by the court and who had acquired no independent right. As the sale had not then been confirmed, J. P. Bishop, and those having an interest in the land, had the right, and should have been permitted to redeem the land. Tender of payment by him was made two days before the act of the Legislature, Public Laws 1939, ch. 107, granting the power to clerks of Superior Court to enter judgments by default and subsequent orders and judgments in actions instituted under the provisions of C. S., 7990, for the enforcement of tax liens, and ratifying judgments and orders theretofore rendered by clerks of Superior Court

in such actions, became effective. Hence, it is unnecessary to consider the effect of this act on decrees previously entered by the clerk.

Also, holding that the purported decrees of the clerk entered in February, 1939, on Friday and Tuesday, respectively, are void, we find it unnecessary to consider the subject of the authority of the clerk to enter at that time judgments in actions of this character.

The judgment below is

Affirmed.

J. F. METCALF AND WIFE, GEORGIA METCALF, v. M. L. RATCLIFF, RUBY WARREN, MURRAY I. RATCLIFF AND D. W. McGEE, TRUSTEE,

and

J. E. METCALF AND WIFE, VERA MAY METCALF, v. M. L. RATCLIFF, RUBY WARREN, MURRAY I. RATCLIFF AND D. W. McGEE, TRUSTEE.

(Filed 27 September, 1939.)

1. Appeal and Error § 29—

An assignment of error not brought forward in appellants' brief is deemed abandoned.

2. Evidence § 37—

Plaintiffs tendered parol evidence of the execution and delivery of a deed to defendants, and upon defendants' objection to the evidence, demanded that defendants produce the deed. Defendants remained silent and did not deny possession nor assert their inability to produce the instrument. *Held:* Defendants' objection to the testimony on the ground that they were given insufficient notice to produce the deed is untenable.

3. Appeal and Error § 39d—

An objection to the admission of testimony is immaterial where the same evidence is later admitted without objection.

4. Execution § 29—

In this action to subject lands to the satisfaction of plaintiffs' judgment, plaintiffs alleged that defendant judgment debtor was the real owner of lands although record title thereto was in another, plaintiffs claiming that the record owner held title as trustee for the benefit of the judgment debtor. *Held:* Evidence that one of defendants was in possession and claimed some interest in the lands is insufficient to overrule his motion for judgment as of nonsuit.

5. Same: Bills and Notes §§ 8, 10f: Judgments § 17b—Evidence of possession of unendorsed notes held insufficient to support issue of possessor's title.

This action was instituted to subject certain lands to the payment of a judgment upon allegations that defendant judgment debtor was the real owner thereof. It appeared that the judgment debtor conveyed the lands subject to a purchase money deed of trust, that the purchasers were

unable to pay and that the judgment debtor took a reconveyance, that thereafter the son of the judgment debtor in an *ex parte* proceeding had a substitute trustee appointed upon his affidavit that he was the owner of the purchase money notes. Pending the action, the trustee foreclosed and the land was conveyed to the son as purchaser at the sale. A witness for defendants testified that she saw the purchase money notes in defendant son's possession. It appeared that the payees had not endorsed the notes. The jury found that defendant son held title as trustee for the benefit of defendant judgment debtor and that she was the owner of the lands. *Held:* Although the pleadings raised the issue of the ownership of the notes by defendant son, the evidence is insufficient to support the submission of such issue, since it merely tends to show possession of the unendorsed notes by the son without evidence as to whether possession was by transfer or for collection or presentment, etc., and the record evidence, while competent to establish the appointment of a substitute trustee, does not support the *ex parte* declaration of ownership, and furthermore the finding of the jury amounted to establishing the discharge of the purchase money notes by the reconveyance with which defendant son was chargeable as a holder without endorsement; and *held further*, while the provision of the judgment that the foreclosure deed should be canceled may be erroneous as not supported by an issue, the verdict in the light of the charge established that the purchase money deed of trust was canceled by the reconveyance and defendant son being a party, had knowledge at the time of his purchase at the foreclosure sale, and therefore the parties are not prejudiced by the cancellation of the foreclosure deed.

APPEAL by defendants from *Pless, Jr., J.*, at May Term, 1939, of BUNCOMBE. No error.

Civil actions to revive and establish balances due on judgments and to subject certain lands to their payment.

During the progress of the trial the parties agreed as to the amounts due on the two judgments, the facts in relation to which are stated in *Metcalf v. Ratcliff,* 215 N. C., 243.

The complaint contains allegations that the judgment debtors conveyed certain property to the defendant Ruby Warren, without consideration and with intent to defeat the rights of the plaintiffs as creditors. At the conclusion of the evidence judgment of nonsuit, as to the defendant Ruby Warren, was entered.

The complaint also alleged that the defendant, M. L. Ratcliff, is the owner of a 71-acre tract of land in Leicester Township, Buncombe County, and that the deed conveying same to her is not of record. The plaintiffs seek to subject this land to the payment of the judgments. The two causes were consolidated for trial to determine the issues of fact arising on these allegations and the counter-allegations in the answer.

On 20 June, 1927, M. L. Ratcliff and husband conveyed 71 acres of land in Leicester Township, Buncombe County, to James Morris Brown and wife, Iowa Rachel Brown, and received in part payment therefor

notes secured by a purchase money deed of trust. The purchasers, being unable to pay the purchase money notes, reconveyed the property to M. L. Ratcliff and husband in February, 1931, in consideration of the cancellation of the purchase money debt.

In October, 1938, the defendant, M. I. Ratcliff, a son of the defendant M. L. Ratcliff, and a party to this suit, while the suit was pending, filed an *ex parte* application with the clerk of the Superior Court of Buncombe County for the appointment of a substitute trustee in the original purchase money trust deed, asserting in his affidavit that he is the owner of the purchase money notes. A substitute trustee was appointed and foreclosure was had. At the foreclosure sale M. I. Ratcliff and wife became the last and highest bidders and have received a deed from the substitute trustee for the *locus in quo*.

Issues were submitted to and answered by the jury as follows:

"1. Does the defendant, Murray I. Ratcliff, hold the title of the 71-acre tract of land described in Deed Book 376 at page 423 and Deed Book 513 at page 499 as registered in the office of the Register of Deeds for Buncombe County, as Trustee for his co-defendant, Mrs. M. L. Ratcliff? Answer: 'Yes.'

"2. Is the defendant, M. L. Ratcliff, the owner of and in possession of the 71 acres of land described in plaintiffs' complaint, as alleged in the complaint? Answer: 'Yes.'

"3. What credits, if any, is the defendant, Mrs. M. L. Ratcliff, entitled to have on the judgment of J. E. Metcalf and upon her counter-claim? Answer: 'Nothing.'"

Upon the coming in of the verdict the court rendered judgment in favor of J. F. Metcalf and wife, Georgia Metcalf, and against M. L. Ratcliff in the amount agreed to be due said plaintiffs on the judgments sued upon, and likewise rendered judgment in favor of J. E. Metcalf and wife against M. L. Ratcliff in the sum agreed to be due upon the judgment held by said plaintiffs. The court further adjudged that the defendant, M. L. Ratcliff, is the owner of the 71-acre tract of land described in the complaint; that the purchase money deed of trust has been fully satisfied and shall be canceled of record; that the trustee's deed to M. I. Ratcliff and wife be set aside and canceled, and that the judgment of the court should operate as a conveyance of the 71-acre tract of land to the defendant M. L. Ratcliff.

The defendants, M. L. Ratcliff and Murray I. Ratcliff, excepted and appealed.

E. L. Loftin for appellants.
Don C. Young for appellees.

BARNHILL, J. Defendants do not bring forward in their brief assignment of error No. 1 and the same is deemed to be abandoned.

Assignments of error numbered 2 and 3 are untenable. When the plaintiffs undertook to offer evidence of the execution and delivery of the alleged deed from the Browns to M. L. Ratcliff and husband and to show that the same conveyed the 71-acre tract of land the defendants objected. The court thereupon asked plaintiffs' counsel whether he had made any demand for the production of the deed. The plaintiffs' counsel then demanded its production. No response was made to the demand. The defendants did not deny the possession thereof or assert their inability to produce it. They now contend, however, that the oral testimony should not have been admitted for the reason that they were given insufficient notice to produce the deed. The record does not disclose that any such contention was made at the time the objection was entered. The ruling of the court in this respect cannot be held for error.

The evidence, which is the subject matter of assignment No. 4, to the effect that Don C. Young was the writer of the letter to which the witness referred was later admitted without objection. Furthermore, the answer of the defendants sets out that Don C. Young was employed to obtain the deed from the Browns. This assignment is without merit.

Assignments numbered 5 and 6 are directed to the refusal of the court to enter judgment of nonsuit as to the defendant Murray I. Ratcliff. There is evidence tending to show that this defendant was in possession of the property and is claiming some interest therein. This evidence presented a question for a jury which defeated the motion of nonsuit.

At the conclusion of all the evidence the defendants tendered an issue as to the ownership by Murray I. Ratcliff of the purchase money notes, and excepted to the refusal of the court to submit the same. This issue was raised by the pleadings. The only evidence tending to support the same was the testimony of Ruby Warren, sister of the defendant, who said: "I saw these notes in the possession of Murray Ratcliff before my father's death on February 15, 1931." She did not undertake to testify under what conditions or circumstances he had possession. Did her father give the notes to the defendant to inspect, or to aid in the collection thereof, or to present to the makers, or to place in a position of safety? She does not undertake to say. The notes were not endorsed and it does not appear that the defendant, Murray I. Ratcliff, is the one who produced the notes at the hearing. Nor is there evidence that any consideration was paid therefor or that he was in possession before or after the execution of the reconveyance by the mortgagors. If it be conceded that her statement constitutes more than a scintilla of evidence, the answers to the first and second issues submitted were, of necessity, predicated upon a finding that these notes were owned by the original

payees and were discharged by the reconveyance. Furthermore, if this defendant held the notes they had not been endorsed by the original payees. He possessed them subject to any equity of the payors as against the payees. Satisfaction of the notes by the reconveyance was as binding upon him as upon the original payees.

While the record of the application and appointment of a substitute trustee may have been properly admitted as evidence as such, it was not evidence as to the *ex parte* statements of M. I. Ratcliff contained therein that he owned the purchase money notes. Even if it be conceded that the evidence of Ruby Warren was competent upon the issue tendered, and it was sufficient to take the case to the jury thereon, under the circumstances of this case, error in the refusal to submit the same is not of sufficient merit to justify a retrial.

The defendants excepted to the judgment for that it decrees the cancellation of the foreclosure deed to M. I. Ratcliff and wife when no issue in respect thereto was raised by the pleadings. Perhaps the judge below overstepped his jurisdiction by inserting this provision in the judgment. However, the defendant, Murray I. Ratcliff, is a party defendant in this action. The jury has found that the defendant, M. L. Ratcliff, is the owner of the property. The answers to the issues submitted, when viewed in the light of the charge, constitute a finding that the deed from the mortgagors to M. L. Ratcliff and husband was executed and delivered in satisfaction of the purchase money notes, and that the said M. L. Ratcliff and husband were, at that time, the owners of the notes. The evidence of the plaintiff in respect thereto includes testimony that from and after the execution of said deed by the mortgagors, M. L. Ratcliff was in possession, claiming the property as her own. She leased it to various tenants; she listed it for taxation and she made affidavit that it was her property. Likewise, she testified in a court proceeding that she owned the same. The defendant, M. I. Ratcliff, offers no evidence of ownership by him except the *ex parte* proceedings for the appointment of a substitute trustee and the deed in foreclosure. From the findings of the jury it appears that at the time of said alleged foreclosure the notes secured by the trust deed had been fully paid and discharged by the reconveyance of the mortgaged property. Under these circumstances the foreclosure was a nullity and this defendant cannot claim to be a purchaser for value without notice. Being a party to this suit he had full knowledge at the time of said foreclosure of the contentions of the plaintiffs that the notes were discharged. Therefore, the findings of the jury establish the fact that the foreclosure deed is ineffective to convey title to the property. It cannot materially affect the rights of the defendants to have the judgment to so declare.

We have carefully examined the assignments of error predicated upon exceptions to portions of the charge of the court. Some of these are directed to designated statements as to the contentions of the parties. None of them are of sufficient merit to justify a new trial.

Simply stated, the defendant, M. I. Ratcliff, is the judgment debtor in the two judgments held by the plaintiffs. She owns 71 acres of land and has been in possession thereof, claiming it as her own, since the execution of the deed of reconveyance from the mortgagors. There is no record evidence of her present ownership. The judgment establishes the fact that this land is hers and is subject to execution for the payment of her just debts.

In the trial below we find

No error.

G. W. TICKLE v. FRANK P. HOBGOOD, ADMINISTRATOR OF THE ESTATE OF J. FRANK HARRISON, DECEASED, TRADING AND DOING BUSINESS UNDER THE NAME AND STYLE OF COCA-COLA BOTTLING COMPANY OF BURLINGTON, NORTH CAROLINA.

(Filed 27 September, 1939.)

1. Food § 15—

While the doctrine of *res ipsa loquitur* does not apply to the finding of a foreign, deleterious substance in a bottled drink, direct evidence of actionable negligence is not required, but such negligence may be inferred from relevant facts and circumstances, such as the finding of like substances in other bottles manufactured by defendant under similar conditions at about the same time.

2. Food § 16—Evidence held insufficient for jury in this action for damages allegedly caused by foreign, deleterious substance in bottled drink.

Plaintiff instituted this action for damages upon allegation and evidence that he was injured as a result of drinking a bottled drink containing a foreign, deleterious substance, which was prepared by defendant. The retailer from whom plaintiff purchased the bottle testified that he saw a greasy substance in the lower corner of another bottle, prepared by defendant at about the same time, which was on the inside because it could not be rubbed off, but that he did not open the bottle. *Held:* The testimony that there was a greasy substance on the inside of the bottle was a mere conclusion of the witness, both as to the nature of the substance and that it was on the inside of the bottle, and plaintiff's evidence is insufficient to overrule defendant's motion for judgment as of nonsuit.

SCHENCK, J., dissenting.

CLARKSON and SEAWELL, JJ., concur in dissent.

APPEAL by defendant from *Spears, J.*, at September Term, 1938, of ALAMANCE. Reversed.

TICKLE *v.* HOBGOOD.

Civil action to recover damages for personal injuries resulting from drinking bottled beverage containing a deleterious substance.

There was evidence that the plaintiff purchased a bottle of Coca-Cola which had been bottled and placed on the market by the defendant; that he became sick when he drank it; and, that he subsequently discovered decomposed animal matter in the bottle. The only evidence offered by the plaintiff to show that the defendant manufactured and sold, under substantially similar conditions and about the same time, other bottles containing foreign or deleterious substances, was the testimony of one B. M. Barker, who testified: "Some days, or within a week of the occurrence of Mr. Tickle (the plaintiff) I examined another bottle of Coca-Cola purchased from the Burlington Coca-Cola people (the defendant). There was a greasy substance in the lower corner of the bottle; it was in the inside because you could taste and rub it on the outside and you would not move it. I didn't open that bottle of Coca-Cola." He further testified that he did not shake or open the bottle.

The court denied the defendant's motion for judgment as of nonsuit at the conclusion of the plaintiff's evidence and at the conclusion of all the evidence, to which the defendant duly excepted. There was a verdict and judgment for plaintiff, and the defendant excepted and appealed.

Dameron & Young and T. C. Carter for plaintiff, appellee.
Long, Long & Barrett and R. M. Robinson for defendant, appellant.

BARNHILL, J. In actions for damages for personal injuries resulting from consumption of bottled beverages the plaintiff may not rely upon the doctrine of *res ipsa loquitur; Enloe v. Bottling Co.,* 208 N. C., 305, 180 S. E., 583, and cases there cited. At the same time the plaintiff is not required to offer direct proof of actionable negligence on the part of the defendant; such negligence may be inferred from relevant facts and circumstances, *Enloe v. Bottling Co., supra; Broadway v. Grimes,* 204 N. C., 623, 169 S. E., 194. The usual, and an approved method, of establishing negligence in such cases is by offering evidence tending to show that like products manufactured under similar conditions and sold by the defendant "at about the same time" contained foreign or deleterious substances. Such similar instances are allowed to be shown as evidence of probable like occurrence at the time of plaintiff's injuries, when accompanied by proof of substantially similar instances and reasonable proximity in time. *Enloe v. Bottling Co., supra,* and cases there cited.

It is not necessary for us to now discuss or decide whether one other instance is sufficient to require the submission of a cause to the jury.

If the evidence offered by the plaintiff, through the witness Barker, is insufficient to show another instance at or about the same time of a sale by the defendant of bottled Coca-Cola containing foreign or deleterious substance, then the motion for judgment as of nonsuit should have been allowed.

The evidence of this witness, when analyzed, amounts to nothing more than the expression of an opinion. He saw what appeared to be a greasy spot on the bottle. By "rubbing and tasting the spot" he satisfied himself that it was not on the outside. Thereupon, he concluded that it was on the inside. It is just the same as if he had testified: "I saw what appeared to be a greasy spot on the inside of the bottle. Judging from its appearance, I am of the opinion that it was a greasy spot." This does not rise to the dignity of substantive evidence and is not sufficient. In fact, the spot might have been an air bubble or other defect in the bottle; or the settlement of the syrup in the Coca-Cola; or it might have been caused by any one of a number of other conditions. Those who viewed it might well have formed varying opinions as to its nature and substance. The so-called evidence is merely a surmise, speculative in nature, and does not constitute evidence of another instance in which the defendant sold a bottled Coca-Cola containing deleterious matter.

As the plaintiff offered no competent evidence of other instances in which the defendant had sold bottled Coca-Cola "at or about the same time" containing deleterious matter, there was no sufficient evidence offered to require the submission of the cause to the jury. The motion for judgment as of nonsuit should have been allowed.

Reversed.

SCHENCK, J., dissenting: This is an action by a consumer to recover of a bottler damages resulting from drinking bottled beverage containing noxious substance. The only exceptions set out in the appellant's brief are those to the denial by the court of the defendant's motion for judgment as in case of nonsuit, made when plaintiff had introduced his evidence and rested his case, and renewed after the evidence on both sides was in. C. S., 567.

There was plenary evidence that the plaintiff purchased a bottle of Coca-Cola which had been bottled and placed on the market by the defendant, and was made sick when he drank it, and subsequently discovered decomposed animal matter in the bottle.

To establish the actionable negligence of the defendant by showing "that like products manufactured under substantially similar conditions and sold by the defendant 'at about the same time' contained foreign

or deleterious substances" (*Enloe v. Bottling Co.*, 208 N. C., 305), the plaintiff relied upon the testimony of one B. M. Barker.

The witness Barker testified: "Some few days or within a week after the occurrence of Mr. Tickle (the plaintiff) I examined another bottle of Coca-Cola purchased from the Burlington Coca-Cola people (the defendant). . . . It was a greasy substance in the lower corner of the bottle. It was in the inside because you could taste and rub on the outside and you would not move it. I didn't open that bottle of Coca-Cola . . . and had it set up. . . . The Coca-Cola wagon of the Burlington Coca-Cola Company gave me another in place of it." On cross-examination the witness testified further: "I said yesterday it looked like a greasy substance. There was no other color about it except the greasy proposition. I did not shake the bottle. I turned it back to the driver of the wagon."

I am of the opinion that this testimony is more than a scintilla of evidence of another instance of foreign matter in a beverage bottled by the defendant "at about the same time," and under similar circumstances, as the beverage purchased and drank by the plaintiff was bottled. Such being the state of the evidence, I think the case was properly submitted to the jury. *Broadway v. Grimes*, 204 N. C., 623; *Corum v. Tobacco Co.*, 205 N. C., 213; *Enloe v. Bottling Co., supra*, and cases there cited; *Blackwell v. Bottling Co.*, 211 N. C., 729.

CLARKSON and SEAWELL, JJ., concur in dissent.

COUNTY OF BUNCOMBE AND ROBERT C. COLLINS ET AL., CONSTITUTING THE BOARD OF COMMISSIONERS OF BUNCOMBE COUNTY, v. J. HUNTER WOOD.

(Filed 27 September, 1939.)

Wills § 33f—Will held to devise lands to widow with full power of disposition.

By the second item of his will testator devised to his wife all his property in fee with the exception of land devised to him by his father, and as to this land he devised her a life estate with remainder over to the children of his brothers and sisters; by the third item of the will he gave his wife full power to dispose of any part of his estate. *Held:* As to the property devised in fee, testator's wife already had full power of disposition and therefore to give any significance to the third item of the will the power of disposition must relate to the lands devised to testator by

his father, and therefore the widow's deed to such land defeated the limitation over and vested all interest which testator had in the land at the time of his death in her grantee, who is not bound to see to the application of the purchase money.

APPEAL by defendant from *Pless, J.*, at June Term, 1939, of BUNCOMBE. Affirmed.

Brandon P. Hodges for plaintiffs, appellees.
Williams & Cocke for defendant, appellant.

SCHENCK, J. This is an action for the specific performance of a contract to purchase a tract of land, heard by consent without a jury upon agreed facts.

The facts agreed upon are as follows: (1) That the plaintiffs contracted to sell and convey to the defendant a good and indefeasible fee title to the land hereinafter described, and the defendant contracted to purchase and pay for such title the sum of $4,725; (2) that the land involved in said contract of sale and purchase was "all that certain piece of land known as the Old Scale Factory, situated in the city of Asheville, at the southwest corner of Choctaw and McDowell Streets and being more particularly described in a certain deed from the heirs of William Jones to S. G. Bernard, which deed is recorded in the office of the register of deeds for Buncombe County, North Carolina, in Deed Book 467, at page 469, to which reference is made for a more particular description"; (3) that the plaintiffs have tendered to the defendant a deed, with full covenants of warranty, sufficient in form to convey a fee simple title to the lands involved, and defendant has declined to accept said deed and to pay the contract price, contending that the plaintiffs do not have a valid title to a one-fourth undivided interest in said land; (4) that the land involved was owned by the late William M. Jones at the time of his death on 6 December, 1926, and was devised by his will to his four children, including Lawrence H. Jones, share and share alike; (5) that Lawrence H. Jones died on 11 April, 1927, without issue but survived by his wife, Edith C. Jones, leaving a last will and testament, the pertinent portions of which read: "Second: I devise and bequeath unto my devoted wife, Edith C. Jones, all the property and estate of which I may die seized and possessed, or to which I may be entitled, of whatever nature, and wheresoever situated, absolutely and in fee, save and except the property devised to me by my father, William M. Jones, and as to the property so devised to me, I give and devise unto my said wife a life estate therein, with remainder to the children of my brothers and sisters to be divided between such children as representatives of my brothers and sisters, and not per capita. Third: It is my will,

and I so direct, that my said wife shall have full power and authority to sell and dispose of any part of the property of my estate at any time, upon such terms and conditions as she shall deem fair, shall have power to borrow money, execute mortgages or deeds of trust for the security thereof, and shall have full power and authority to carry on and conduct any business in which I may be engaged at the time of my death for such length of time as she may see fit, with all the powers, rights and privileges incident to the continuance of such business"; (6) that on 26 March, 1934, the three living children of the late William M. Jones, and the widow of his deceased child, Lawrence H. Jones, namely, Edith C. Jones, by deed duly executed and recorded conveyed to S. G. Bernard in fee simple all right, title, interest and estate which they owned and held in the land involved; (7) that thereafter, on 11 July, 1934, S. G. Bernard and his wife executed and delivered a deed to the Board of Financial Control of Buncombe County, which deed is duly recorded, and purports to convey a title in fee to the land involved; (8) that thereafter, through deeds of conveyance and statute the county of Buncombe became the owner in fee simple of all the right, title and interest of the Board of Financial Control of Buncombe County in the land involved; (9) that on 24 June, 1937, Edith C. Jones executed and delivered to the county of Buncombe a quitclaim deed to the land involved, which deed is duly recorded.

His Honor held that the deed tendered by the plaintiffs to the defendant conveyed a good, indefeasible, fee simple title to the land involved and adjudged that the defendant accept the deed and pay the purchase price agreed upon. To this judgment the defendant excepted and appealed to the Supreme Court.

The question presented for answer is: Does the provision in the third item of the will of Lawrence H. Jones that his "wife shall have full power and authority to sell and dispose of any part of the property of my estate at any time, upon such terms and conditions as she shall deem fair," give to his wife, Edith C. Jones, the right and power to convey a valid fee simple title to the land described in the second item of his will as "the property devised to me by my father, William M. Jones," in which property he devised to his wife a life estate, "with remainder to the children of my brothers and sisters"? The answer is in the affirmative.

By the second item of the will of Lawrence H. Jones, his wife, Edith C. Jones, was devised a fee simple title to all of his property and estate, "save and except the property devised to me by my father, William M. Jones," and as to all of his property outside of that excepted his wife had full power and authority to sell and dispose of by virtue of said second item, and, therefore, to give any significance to the direction of

the testator in the third item of the will "that my wife shall have full power and authority to sell and dispose of any part of the property of my estate at any time, upon such terms and conditions as she shall deem fair" it must be construed as giving authority to sell and dispose of that portion of his estate excepted from the absolute devise in fee in the second item of the will, namely, the land devised to him by his father.

A gift to A. for life, remainder to B. in fee, with a power to A. to sell all or so much of the property as in her judgment may be necessary vests in A. an estate for life, with power of sale *appurtenant* to her life estate, and the exercise of the power will vest in the purchaser an estate in fee, and he will not be bound to see to the application of the purchase money. *Troy v. Troy,* 60 N. C., 624.

"The case of *Troy v. Troy* was cited with approval in *Parks v. Robinson,* 138 N. C., 269, and *Herring v. Williams,* 158 N. C., 1. In the latter case, this Court, by *Justice Brown,* said that where 'there is a devise for life, with language which expressly gives the devisee a general power to dispose of both real and personal property, or where the devise is not limited to a life estate, but the property is devised absolutely, with a provision that what remains at the death of the devisees shall go to certain designated persons,' the exercise of the power, express or implied, will defeat the remainder and vest the fee in the appointee under the power of purchaser, citing *Troy v. Troy, supra.* The cases of *Wright v. Westbrook,* 121 N. C., 155; *Stroud v. Morrow,* 52 N. C., 463; *Little v. Bennett,* 58 N. C., 156; *Gifford v. Choate,* 100 Mass., 343; and *Barford v. Street,* 16 Vesey, 134, are strong authorities for the position that the exercise by Mrs. Brown of the power conferred upon her by the will defeats the limitation over to the children and passes the fee to the purchaser." *Mabry v. Brown,* 162 N. C., 217 (221).

The second item of the will of Lawrence H. Jones devised to his wife, Edith C. Jones, a life estate with certain limitations over in the land which was devised to the testator by his father, and the third item of said will conferred upon her full power and authority to sell and dispose of said land, and when she exercised the power and sold the land she conveyed to her grantee a valid fee simple title thereto. *Darden v. Matthews,* 173 N. C., 186.

The judgment of the Superior Court is

Affirmed.

PEYTON COLYER, PLAINTIFF, v. VANDERBILT HOTEL COMPANY, DEFENDANT.

(Filed 27 September, 1939.)

1. Principal and Agent § 8—

A principal is bound by the acts of his agent within the apparent scope of the agent's authority, which includes authority to do all those things usual and necessary to accomplish the main act authorized, and a third person having no knowledge of limitations on the agent's authority is not bound thereby.

2. Principal and Agent § 7—

The course of dealing between the parties in similar transactions is competent upon the question of agency.

3. Same—Evidence held for jury on question of agent's implied authority to employ plaintiff for definite period of time.

Plaintiff's evidence was to the effect that on prior occasions he had been employed temporarily by defendant through the agent whom he alleged made the contract of employment in suit, and defendant's general manager admitted that on the occasion in question he told the agent to employ plaintiff, but defendant denied that the agent had authority to employ plaintiff for any definite period of time, however short. *Held:* Defendant's denial of its agent's authority to employ plaintiff for any definite period relates solely to the agent's actual authority, and the difference between authority to employ temporarily and for a definite period of time is not such as to take the latter out of the agent's apparent authority as a matter of law, and the issue should have been submitted to the jury under appropriate instructions.

APPEAL by plaintiff from *Pless, J.*, at April Term, 1939, of BUNCOMBE. Reversed.

The plaintiff brought this action in the county court of Buncombe County to recover damages for a breach of contract of employment, and suffered judgment of involuntary nonsuit on motion of defendant under C. S., 567, at the conclusion of his evidence, and renewed at the conclusion of all the evidence. Upon his appeal to the Superior Court the judgment of nonsuit was affirmed.

Consistently with the pleading, plaintiff's evidence tends to show that he was employed about 3 September, 1938, by a Mr. MacAllister to work in painting and decorating rooms in the Vanderbilt Hotel, leased and operated by the defendant, at a salary of $22.00 per week, with which he was to receive his meals as part of his compensation, for a period lasting all the fall and part of the winter, the employment to begin 4 September. Plaintiff began work as agreed and continued to work until 9 October, when he was "laid off," or discharged, on the ground that there was no further work for him. Plaintiff testified that he then tried to secure

other employment, without success. He was corroborated in his testimony as to the duration of his term of employment by Ralph Ingle, assistant manager of the Nu-Enamel Company, who testified that he had offered the plaintiff work at sixty cents an hour and plaintiff told him he could not accept because he was at work at the Vanderbilt Hotel, which work would last through the fall and half the winter.

The plaintiff testified that he had been employed by MacAllister twice before in a similar capacity, and had been paid by the hotel without question.

Jack Enright testified for the defendant that he was, during the period mentioned, general manager for the hotel, and that no one else had any authority to hire. That no one was authorized to employ plaintiff for any definite period of time. That he did not so employ or authorize anyone else to do so.

On the specific question of Colyer's employment, he testified: "In July, 1937, when we started to get rooms in condition for the 1938 season, MacAllister told me he needed an extra helper for the painter, and that Colyer's work was satisfactory and asked me if it would be all right to put him on. I said 'Yes.' MacAllister did not put him on himself, but only upon my instructions and with my permission. I do not know what MacAllister said to Colyer. Colyer was a good painter. His work was satisfactory. When we laid him off, I told him if he would come back around November 1st we would use him again."

MacAllister testified that he was employed by the Hotel Company as Chief Engineer. He denied telling plaintiff he would have work during the fall and winter. "What I probably told him was that if we had work he could work all fall and part of the winter."

There was further evidence on the part of the defendant that no one had authority to make a contract for permanent employment, and that there was no employment of any person on such a basis.

Ford & Lee for plaintiff, appellant.
J. Frazier Glenn, Jr., for defendant, appellee.

SEAWELL, J. This case hinges mainly around the question whether there is any evidence tending to show that MacAllister had authority to make the contract sued upon in behalf of the Hotel Company. We conclude that there is.

The plaintiff had the right to deal with MacAllister according to the apparent scope of his authority. *Powell v. Lumber Co.*, 168 N. C., 632, 485 S. E., 1032; *Oliver v. Fidelity Co.*, 176 N. C., 598, 97 S. E., 490; *Daniel v. R. R.*, 136 N. C., 517, 48 S. E., 816; *Stewart v. Realty Co.*, 159 N. C., 230, 74 S. E., 736. Limitations on authority within that scope unknown to plaintiff would not relieve MacAllister's principal if

the agent improvidently exceeds the actual authority. *Oliver v. Fidelity Co., supra; Hooper v. Trust Co.,* 190 N. C., 423, 130 S. E., 49. Even in the case of special or limited agency, as relates to third persons, the agent's authority is presumed to include all necessary means of effectuating its exercise. *New York Life Insurance Co. v. Smith,* 39 Ga. Appeals, 160, 147 S. E., 126. Apparent authority, in case of special agency, and as it relates to third persons, includes authority to do all those things usual and necessary in accomplishing the main act authorized. *McDonald v. Pearre Bros. & Co.,* 5 Ga. Appeals, 130, 62 S. E., 830.

The course of business dealing between the parties in similar transactions is competent evidence upon the question of agency.

The general manager of the defendant admits that he told MacAllister to "put him on"—this in reference to the employment of the plaintiff—and MacAllister did "put him on" twice, on a temporary basis, and thereafter, as alleged by plaintiff, for a definite period of employment. The question arises as to whether or not the difference between employing temporarily and employing for a definite period, however short, is such a distinction as would necessarily, as a matter of law, take the transaction out of MacAllister's apparent scope of authority when he had been given the power of employment.

There is vigorous denial on the part of the defense that MacAllister had the right to employ for any definite period. This only bears on MacAllister's actual authority.

The evidence represented by the plaintiff was sufficient to bar a nonsuit and must be considered on its merits.

Looking at the evidence in the light most favorable to the plaintiff, the judgment of nonsuit should not have been entered, and it is

Reversed.

ROSEMARY MANUFACTURING COMPANY v. ELLISON JEFFERSON AND WIFE, LIZZIE W. JEFFERSON, AND CHARLIE JEFFERSON.

(Filed 27 September, 1939.)

1. Mortgages § 32e: Limitation of Actions § 2a—

When the mortgagors admit the execution of the notes secured by the instrument, and it appears that the due date of some of the notes was within ten years prior to the date of foreclosure and the execution of the foreclosure deed, the mortgagors' contention that at the time of foreclosure the power of sale was barred is untenable, and a peremptory instruction on the issue is proper.

2. Payment §§ 9, 11—

Defendant mortgagors contended that at the time of the foreclosure sale the mortgage notes had been paid. *Held:* The burden was on defendants upon the issue of payment, and upon failure of proof of payment to the holders of the notes alleged to have been in default at the time of foreclosure or to their duly authorized agent, a peremptory instruction in favor of the purchaser at the foreclosure sale is without error.

3. Mortgages §§ 32a, 39g—

The trustee's deed establishes *prima facie* right in the purchaser at the foreclosure sale, and therefore in the absence of evidence of notice to the purchaser of any irregularity in the foreclosure or any invalidity in the power of sale or evidence of absence of good faith in acquiring the title, the purchaser is an innocent purchaser for value without notice.

APPEAL by defendants from *Thompson, J.*, at May Term, 1939, of NASH. No error.

Action to recover possession of land. From judgment on verdict in favor of plaintiff, defendants appealed.

Allsbrook & Benton and Battle & Winslow for plaintiff, appellee.
Leon T. Vaughan for defendants, appellants.

DEVIN, J. The plaintiff derived its title to the land under a deed from the Roanoke Bank & Trust Company, dated 29 December, 1936. The Roanoke Bank & Trust Company purchased at the foreclosure sale under the power contained in a deed of trust executed by defendants to W. L. Long, trustee, dated 19 December, 1923. The trustee's deed, dated 1 July, 1936, recited that the foreclosure sale was occasioned by default having been made in the payment of the debt secured.

The defendants set up two defenses, first, that the power of sale was barred by the statute of limitations, and, second, that the debt had been paid.

It was admitted that defendants had executed the deed of trust to secure their four notes of $417.50 each, under seal, due and payable on 19 December, 1924, to 1927, inclusive, the due dates of the last two notes being within the period of ten years prior to the date of foreclosure and deed. It was also admitted that payments were made on these last notes as late as 1932. Hence, the court properly instructed the jury, if they found the facts to be as shown by the evidence, to answer the issue as to the statute of limitations in favor of the plaintiff.

The four notes were originally given to the Schlicter Lumber Company and were endorsed by the payee to the Rosemary Banking Company. Two of the notes were paid, and the last two were transferred to and held by the Roanoke Bank & Trust Company for several years prior to and at the time of the foreclosure. These notes were produced

at the trial by the cashier of the Roanoke Bank & Trust Company and showed a balance due thereon at date of foreclosure of more than $900.00.

The defendants' testimony in support of their allegation of payment was vague and uncertain, and nearly all of the payments alleged were testified to have been made to R. P. Todd. Todd was not shown to have had any connection with the bank except as borrower, and no proper authority to receive payments for the bank was shown. The plaintiff contended his relation to the transaction was that of holder of the first two notes. In any event, the burden was on the defendants to show payment in full to the holder of the last two notes. This they failed to do.

The plaintiff Rosemary Manufacturing Company was a purchaser for value from the Roanoke Bank & Trust Company, and there was no evidence of notice of any irregularity in the foreclosure, or of alleged invalidity in the power of sale. There was no evidence of connection between plaintiff and either bank or the trustee such as would impugn the *bona fides* of the transaction or show absence of good faith in the acquirement of the title to the land by the plaintiff. The recitals in the recorded deed from the trustee to the Roanoke Bank & Trust Company established *prima facie* right in the purchaser at the foreclosure sale, and the plaintiff as grantee of the purchaser occupied the status of an innocent purchaser for value without notice.

We think the court below properly charged the jury if they found the facts to be as testified and as shown by all the evidence to answer the issue of title in favor of the plaintiff.

The appellants' assignments of error, based on exceptions to the rulings of the court in the admission and exclusion of testimony are without substantial merit and do not warrant the overthrow of the verdict and judgment.

In the trial we find

No error.

STELLA BARBER v. B. GEORGE BARBER.

(Filed 27 September, 1939.)

Judgments § 23: Divorce § 14—Where defendant makes general appearance in action for subsistence without divorce, service of notice of subsequent petition for recovery of past due installments gives court jurisdiction.

An action is not ended by the rendition of a judgment, but is still pending until the judgment is satisfied for the purpose of motions affecting the judgment but not the merits of the original controversy, especially

judgments allowing alimony with or without divorce, and where the defendant makes a general appearance in the original action for subsistence without divorce in which judgment is duly rendered for plaintiff, the court acquires jurisdiction over defendant by the proper service of notice of plaintiff's subsequent petition to recover past due installments, and defendant may not challenge the court's jurisdiction to hear plaintiff's motion and petition for such recovery by special appearance.

APPEAL by defendant from *Pless, Jr., J.*, at June Term, 1939, of BUNCOMBE. Affirmed.

Petition and motion in the cause by the plaintiff. In 1920 the plaintiff instituted an action against the defendant for subsistence without divorce. After answer was filed the cause was duly heard before a jury and the issues submitted were answered in favor of the plaintiff. There was judgment thereon allowing the plaintiff subsistence under the statute. The judgment allowing subsistence was modified in October, 1929, by a judgment of Johnson, J. This order reduced the amount of the monthly payments of defendant. At the March Term, 1939, Pless, Jr., J., on affidavit of the plaintiff, entered an order directing that notice be served on the defendant, who is now a nonresident of the State, by the sheriff of Hamilton County, Tennessee, "to appear at Asheville, North Carolina, on 17 April, 1939, and then and there show cause, if any he may have, why the relief prayed for by the plaintiff in her petition filed should not be granted." The order further directed that a copy of the verified petition likewise be served on the defendant. At the same time the plaintiff filed a petition setting forth the former judgments and orders and alleging that the defendant was then in arrears in the payment of monthly installments required of him for the subsistence of the plaintiff in the sum of $16,428.50.

In her petition the plaintiff prays that she have and recover of the defendant herein judgment in the amount of the past-due installments, with interest, etc.; that the purported divorce decree obtained by the defendant in the State of Georgia be declared null and void; that the defendant, by appropriate order, be commanded to appear and answer the petition and show cause, if any he may have, why the relief prayed for should not be granted; and for counsel fees and costs.

The notice directed by the judge, together with a copy of the petition, was served on the defendant in the State of Tennessee, 29 March, 1939, by the sheriff of Hamilton County, Tennessee.

The defendant, through his counsel, on 14 April, 1939, entered a special appearance in the cause for the sole purpose of moving to dismiss said petition for want of jurisdiction. The motion set forth the several grounds relied upon by the respondent. The cause came on for hearing on the special appearance and motion to dismiss entered by the

defendant before Pless, Jr., J., at the June Term, 1939, Buncombe County Superior Court. The judge below, having taken the cause under consideration by consent, entered a judgment *nunc pro tunc* 7 August, 1939, adjudging "that the special appearance and motion of the defendant B. George Barber be, and the same hereby is overruled and denied and the defendant B. George Barber is allowed thirty days from this date within which to file demurrer, answer or other pleadings to said petition." Defendant excepted and appealed.

Jordan & Horner for plaintiff, appellee.
Weaver & Weaver for defendant, appellant.

BARNHILL, J. It is stipulated in the record that summons in the original cause was personally served on the defendant and it appears from the record that he made a general appearance and answered the plaintiff's complaint. Can he now, on special appearance, challenge the jurisdiction of the court to hear plaintiff's petition and motion in the cause? This is the only question presented and it must be answered in the negative.

An action in court is not ended by the rendition of a judgment, but in certain respects it is still pending until the judgment is satisfied. *Finance Co. v. Trust Co.,* 213 N. C., 369, 196 S. E., 340. Motion affecting the judgment but not the merits of the original controversy may be made in the cause. *Land Bank v. Davis,* 215 N. C., 100. This is particularly true of judgments allowing alimony in divorce actions and in actions for alimony without divorce, in which it may not be said that the judgment is in all respects final. C. S., 1667. Such actions are always open for motions in the cause to determine the amount of arrearage and to obtain the remedies permitted by statute for the enforcement of the order for alimony. It was not required that a new summons be served upon the defendant. Notice of motion under the statute was sufficient. This notice was duly served.

It appears from this record, as stated, that the defendant is in court and is subject to its jurisdiction, on notice, to hear and determine motions in the cause. Want of jurisdiction of the court in such matters may not be challenged by special appearance. The right of the plaintiff to make the motion may not be thus questioned.

Perhaps defendant's appeal was premature. In any event, only a question of procedure is presented. We do not decide the right of the plaintiff to the relief sought in her petition and motion. Nor do we determine the merits of the controversy arising thereon. We merely hold that, as the defendant has received due notice of a motion in the cause in which he had theretofore made a general appearance, he may

now defend only by general appearance, by answer or demurrer or appropriate motion. The court below properly protected his right in this respect by granting time in which to plead in such manner as he may be advised.

The judgment below is

Affirmed.

ELEANOR G. HILDEBRAND v. SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY.

(Filed 27 September, 1939.)

1. Trespass § 3: Pleadings § 29—Upon motion to strike, the court will not attempt to plot the course of the trial.

Plaintiff instituted this action for trespass against defendant telephone company upon the ground that an additional burden had been imposed on plaintiff's land abutting a highway by the erection of defendant's poles and wires. *Held:* The allegations of defendant's answer setting up as defenses the provision of C. S., 1695, and regulations of the State Highway Commission were improperly stricken upon plaintiff's motion, since the defenses may or may not become material at the trial, and since the court will not attempt to plot the course of the trial upon a motion to strike, but will ordinarily leave the matter for determination by rulings upon the evidence.

2. Pleadings §§ 12, 29—

A reply should be limited to a denial of any new matter set up in the answer, and defendant's motion to strike out matter beyond the scope of such denial should be allowed.

APPEAL by defendant from *Pless, Jr., J.*, at January Term, 1939, of BUNCOMBE. Modified and affirmed.

Sanford W. Brown and J. W. Haynes for plaintiff, appellee.
J. G. Merrimon for defendant, appellant.

DEVIN, J. The only questions presented by the appeal relate to the rulings of the court below on motions to strike certain allegations from the pleadings. Motions were made originally in the general county court of Buncombe County, where the cause was instituted, to strike certain allegations from the defendant's further answer and defense, and to strike certain allegations from plaintiff's reply. By appeal these motions were heard by the judge of the Superior Court, and the defendant appellant now assigns as error the ruling of the Superior Court in sustaining the county court's order striking out the third and fourth

sections of the defendant's further answer and defense, and in refusing to strike out certain portions of the plaintiff's reply.

Without undertaking here to quote the offending allegations, it may be said briefly that the plaintiff's action is to recover damages for trespass, upon the ground that an additional burden has been imposed upon plaintiff's land abutting on a highway by the erection of defendant's poles and wires along the highway in front of plaintiff's land. The defendant, among other defenses, quotes C. S., 1695, and sets out at length allegations raising the defense that it is relieved of any liability by the statute as well as by regulations of the State Highway Commission.

This Court has said that it would not undertake to chart the course of the trial in deciding motions to strike allegations from pleadings (*Pemberton v. Greensboro,* 205 N. C., 599, 172 S. E., 196), and that ordinarily the test of relevancy of a pleading was the right of the pleader to offer evidence of facts to which the allegations relate. *Trust Co. v. Dunlop,* 214 N. C., 196. However, without intimating an opinion upon the sufficiency as a defense of the matters set up in the paragraphs of the further answer which were ordered stricken out, or deciding their legal effect, we think the allegations should be permitted to remain in defendant's pleading, and that the court should not cut off at the outset an alleged defense which may or may not become material at the trial. The matter can be more properly presented for judicial determination when the evidence is offered at the hearing. We do not decide the ultimate questions raised by plaintiff's motion to strike, nor express any opinion on the merits. While the allegations of defendant's further answer and defense are set out at some length, we cannot say that the prodigality of the pleadings should constitute ground for their elimination. *Revis v. Asheville,* 207 N. C., 237, 176 S. E., 738.

The defendant's motion to strike certain portions of plaintiff's reply was properly allowed, and we also think the ruling applied to paragraphs 8, 9 and 10 should have been extended to the other paragraphs of the reply. The reply should be limited to a denial of any new matter set up in the answer. *Revis v. Asheville, supra; Wadesboro v. Coxe,* 215 N. C., 708.

We conclude that portions of the defendant's further answer and defense were improperly stricken out, and that the allegations of the reply containing matters beyond the scope of a denial of the allegations of the answer should have been eliminated.

Except as herein modified, the judgment of the Superior Court is affirmed.

Modified and affirmed.

REALTY PURCHASE CORPORATION v. MRS. W. G. HALL, WIDOW.

(Filed 27 September, 1939.)

1. Dower § 2b: Mortgages § 10—

Where a wife joins in the execution of a mortgage or deed of trust she conveys her dower interest as security for the debt, and upon foreclosure after her husband's death she may not assert her dower in the land as against the purchaser at the foreclosure sale, although, her position being analogous to that of a surety, she is entitled to assert a claim against her husband's estate to the amount of the value of her dower.

2. Mortgages § 39g—

A widow may not assert her dower rights as against the purchaser at the foreclosure sale under a mortgage executed by her husband and herself prior to his death, and evidence tending to show transactions between herself and her late husband and those through whom the original loan was obtained, is properly excluded as against the purchaser at the sale.

APPEAL by defendant from *Sinclair, Emergency Judge,* at January Term, 1939, of SWAIN. No error.

Black & Whitaker for plaintiff.
C. E. Hyde and J. N. Moody for defendant.

DEVIN, J. This was an action to recover the possession of land alleged to be wrongfully withheld by defendant. Plaintiff derived its title from a deed executed by V. S. Bryant, trustee, pursuant to the foreclosure of a deed of trust conveying the land, which had been executed by W. G. Hall and the defendant in 1928. The facts relating to plaintiff's title are not controverted, but the defendant, now the widow of W. G. Hall, who died in 1933, subsequent to the execution of the deed of trust, claims she is entitled to dower in the land.

Can a married woman who joins with her husband in the conveyance of land by way of mortgage or deed of trust, assert, after the husband's death, a dower right in the land against the purchaser at the foreclosure sale? The answer is "No."

It has been said that the law favors dower (*Ruffin v. Cox,* 71 N. C., 256), and the principle is well established that when a married woman signs a mortgage or deed of trust conveying her inchoate right of dower in her husband's land, for the purpose of securing his debt, her position is analogous to that of surety. But after the death of her husband and the sale of the land under foreclosure to a *bona fide* purchaser, the courts can only afford protection to her rights as creditor of her hus-

band's estate to the amount of the value of her dower right in the land, and may not deprive the purchaser at the foreclosure sale of the title derived from the conveyance executed in due form by herself and her husband. C. S., 4102; *Gore v. Townsend,* 105 N. C., 228, 11 S. E., 160; *Chemical Co. v. Walston,* 187 N. C., 817, 123 S. E., 196; *Griffin v. Griffin,* 191 N. C., 227, 131 S. E., 585; *Holt v. Lynch,* 201 N. C., 404, 160 S. E., 484; *Parsons v. Leak,* 204 N. C., 86, 167 S. E., 563; 17 Am. Jur., 685-86.

In *Chemical Co. v. Walston, supra,* involving rights of creditors, it was said: "When a wife executes a mortgage with her husband she thereby conveys her dower in the property described therein as security for the payment of the debt mentioned in the mortgage. . . . Where the whole land including the widow's dower, as in the instant case, has been sold under the mortgage or deed of trust to pay the debt secured thereby, the widow becomes *ipso facto* a creditor of her husband's estate to the amount of the value of her dower in the land so sold."

The evidence offered for the purpose of showing transactions between defendant and her late husband and those through whom the original loan was obtained, was properly excluded as incompetent to affect the title of the plaintiff, the purchaser at the foreclosure sale. The other exceptions noted at the trial and brought forward in defendant's assignments of error are without merit. In the trial we find

No error.

EVELYN CLARKE ET AL. v. JOSEPH F. WINEKE ET AL.

(Filed 27 September, 1939.)

1. Executors and Administrators § 12b—

The provision of a will that testatrix' executor should pay off mortgage indebtednesses on a particular tract of land out of the "further assets constituting my estate" does not empower the executor to sell other lands of testatrix, even though the personalty is insufficient to pay off the encumbrances, and the executor may not sell such other lands except by court order upon his petition to make assets in compliance with the statute.

2. Pleadings § 23—

Where it is held on appeal that petitioner's demurrer to the interplea was properly sustained, the interpleader may be permitted to recast his petition.

APPEAL by interpleader from *Carr, J.,* at June Term, 1939, of PASQUOTANK.

Petition for partition.

The plaintiffs and defendants are residuary legatees, or their representatives, under the will of Adelaide A. Wineke, late of Baltimore County, Maryland. The lands sought to be partitioned are situate in Pasquotank County, North Carolina.

It is provided in the will of the deceased that if at the time of her death there should be a mortgage on her Camden and Light Street properties, situate in the city of Baltimore, "my executor shall pay off said mortgage out of the further assets constituting my estate." There were four mortgages on these properties aggregating $40,000 at the time of the death of the testatrix, no part of the principal of which has since been paid. The further assets of the estate consist of personal property amounting to approximately $15,000, a home place and other properties in Baltimore valued at $11,000, and the lots situate in Pasquotank County here sought to be partitioned.

The executor, Jacob France, intervened and demanded the right to sell the lots in question under the will and apply the proceeds to the mortgages on the Camden and Light Street properties.

The petitioners interposed a demurrer to the interplea of the executor on the ground that "the provisions of the will are not sufficient to permit an order authorizing such sale by the executor unless the allegations in his petition are in compliance with the statute relating to the sale of property by an executor to make assets." Demurrer sustained, and the interpleader appeals, assigning error.

McMullan & McMullan for interpleader, appellant.
M. B. Simpson and R. M. Cann for petitioners, appellees.

STACY, C. J. The will in question confers no power of sale on the executor as was the case in *Seagle v. Harris,* 214 N. C., 339, 199 S. E., 271, cited and relied upon by appellant. It would seem, therefore, that the executor should proceed in the usual way to sell the "further assets" of the estate in order to pay the debts in accordance with the directions of the testatrix. *Neighbors v. Evans,* 210 N. C., 550, 187 S. E., 796.

The demurrer was properly sustained, though the interpleader will doubtless be permitted to recast his petition. *Harris v. Board of Education, ante,* 147.

Affirmed.

J. T. BALLARD AND WIFE, M. A. BALLARD, v. JOHN METCALF, BERRY ENGLISH, JOHN McELROY, TRUSTEE, AND R. W. WILSON.

(Filed 27 September, 1939.)

Venue § 2a—

An action by creditors to enjoin foreclosure of a deed of trust on the debtor's land and for the appointment of a receiver is properly removed to the county in which the land is situate upon defendants' motion.

APPEAL by plaintiffs from *Ervin, Jr., J.*, at January Special Term, 1939, of YANCEY. Affirmed.

Charles Hutchins for plaintiffs, appellants.
Roberts & Baley and John H. McElroy for defendants, appellees.

PER CURIAM. Plaintiffs brought this action to restrain the sale of lands in Madison County under judgment of the Superior Court of that county, and under the power of sale contained in the mortgage deed, upon the grounds that such sale would sacrifice the value of the property and leave nothing to which other creditors might resort for the payment of their debts. They asked for the appointment of a receiver, to the end that the property might be more orderly administered, which they claim might accomplish the full satisfaction of their debts.

The defendants, in apt time, entered a motion for the removal of the cause to Madison County, where the lands lie, as the proper venue for trial. The plaintiffs appealed from the order of removal.

The order of removal was proper, and the judgment is

Affirmed.

LOUISE M. CLEMENT v. MORTIMER T. CLEMENT.

(Filed 27 September, 1939.)

1. Appearance § 2b—

The general appearance of a defendant renders immaterial the writ of attachment as a basis for the service of summons by publication.

2. Venue § 1d—When both parties are nonresidents and no other rule governing venue is germane, plaintiff may maintain action in any county of the State.

In this action on a judgment of another state, plaintiff's attachment of lands of defendant situate in a county in this State was rendered imma-

terial by defendant's general appearance. The court found that both parties are nonresidents. *Held:* Plaintiff was entitled to maintain the action in any court of this State she might designate, and defendant's motion to remove to the county in which the real estate attached is situate and of which he asserted he is a resident, was properly denied.

APPEAL by defendant from *Rousseau, J.*, in Chambers, 3 February, 1939. From POLK. Affirmed.

Civil action on a judgment rendered by the Superior Court of Kitsap County, State of Washington, in favor of plaintiff and against defendant, in which the defendant appeared and moved to remove the cause for trial to Mecklenburg County.

Plaintiff sues to recover on a judgment rendered in the State of Washington in the sum of $10,000 and the sum of $250, attorney fees, and costs. Service of summons was had by publication and was based on an ancillary writ of attachment against real property of the defendant, located in Mecklenburg County. The defendant bases his motion upon the contention that he is a resident of Mecklenburg County and that the action involves real estate located in said county.

The court below, having found from the evidence that the defendant is a nonresident of the State, denied the defendant's motion. Defendant excepted and appealed.

Massenburg, McCown & Alledge for plaintiff, appellee.
Kirkpatrick & Kirkpatrick for defendant, appellant.

PER CURIAM. The general appearance of the defendant renders the writ of attachment immaterial as a basis for the service of summons by publication. The court found, on competent evidence, that both the plaintiff and defendant are nonresidents of North Carolina. Thus, the plaintiff was entitled to maintain her action in any county in this State she might designate. C. S., 469.

Affirmed.

R. L. HINTON v. ADA V. WHITEHURST ET AL.

(Filed 27 September, 1939.)

Judgments § 22g—

A defendant is not entitled to attack a judgment on the ground that the various orders of the clerk extending the time for filing complaint were irregular and not in continuous and unbroken sequence when it appears that defendant filed answer after the orders complained of were entered and the cause was tried upon its merits.

POWELL *v.* SMITH.

APPEAL by plaintiff from *Carr, J.*, at June Term, 1939, of PASQUOTANK. Affirmed.

Civil action instituted by plaintiff to remove cloud from title to real property caused by the existence of a duly docketed judgment, and to have said judgment canceled of record. In connection therewith plaintiff seeks injunctive relief against sale under execution.

Defendants obtained the judgment in controversy against plaintiff after pleadings filed and upon a hearing upon the merits. The plaintiff now contends that various orders entered by the clerk extending the time to file complaint were not made in continuous and unbroken sequence from the time of issuance of the summons until the time of the filing of the complaint, but were, in fact, fraudulently made and entered at one and the same time, 7 May, 1928. The original summons was served 16 February, 1922.

The defendants duly demurred to the complaint. The demurrer was sustained and plaintiff excepted and appealed.

Q. C. Davis, Jr., and George J. Spence for plaintiff, appellant.
P. W. McMullan and John H. Hall for defendants, appellees.

PER CURIAM. After the entry of the various orders extending the time to file complaint, the defendants filed answer thereto and the cause was heard and determined upon its merits, resulting in the judgment cited in the complaint. We concur in the opinion of the court below that the complaint does not state a cause of action. The demurrer was properly sustained.

Affirmed.

EDWIN LEE POWELL v. V. J. AND C. H. SMITH, TRADING AND DOING BUSINESS AS SMITH'S TRANSFER COMPANY; VANCE CHURCH, S. E. CAMPBELL, AND CHRISTINE WALLACE.

(Filed 27 September, 1939.)

Pleadings § 16—Demurrer for misjoinder of parties and causes held properly denied when all causes of action arose out of same automobile accident.

Defendant in a negligent injury action had other parties joined as defendants upon allegation that such other parties were joint tort-feasors in any negligence which might be found against it, and asked contribution. Such other defendants answered and set up a cross-action against the original defendant, alleging damage to their property in the same accident resulting from the original defendant's negligence. *Held:* The orig-

inal defendant's demurrer to the cross actions on the ground of misjoinder of parties and causes was properly overruled, since the causes of action grew out of the same transaction. C. S., 455, 456.

APPEAL by defendants V. J. and C. H. Smith, trading and doing business as Smith's Transfer Company, and Vance Church, from *Pless, J.*, at June Term, 1939, of BUNCOMBE. Affirmed.

The plaintiff Edwin Lee Powell brought this action against V. J. and C. H. Smith, trading and doing business as Smith's Transfer Company, and Vance Church, to recover for a personal injury received through the alleged negligence of the defendants in the operation of a truck, and filed his complaint setting up the cause of action against them. The defendant Smith's Transfer Company thereupon applied to have S. E. Campbell and Miss Christine Wallace joined as parties defendant, filing contemporaneously with the motion a complaint alleging that said Campbell and Miss Wallace were joint tort-feasors with this defendant in any negligence which might be found against it, and asking for contribution. Both S. E. Campbell and Christine Wallace answered, setting up cross actions against the Transfer Company and demanding damages because of its negligence in injuring their properties. The defendant Transfer Company thereupon moved to strike out from the answers of Christine Wallace and S. E. Campbell, respectively, the cross actions or causes of action demanding affirmative relief, and demurred to each of them for misjoinder of causes of action and of parties. The motions to strike were denied and the demurrers overruled, and defendants appealed.

Alvin Kartus for Christine Wallace, appellee.
Heazel, Shuford & Hartshorn for S. E. Campbell, appellee.
Williams & Cocke for defendants, appellants.

PER CURIAM. The defendant Transfer Company had S. E. Campbell and Christine Wallace brought in as parties for its own convenience and relief and asserted a cause of action against them for contribution as joint tort-feasors in case a recovery should be had against the Transfer Company because of its negligence. Each of the defendants countered with an affirmative demand for compensation against the Transfer Company for negligent injury to property. The causes of action grew out of the same transaction and are properly litigated in the same action. There is no misjoinder of parties or causes of action. C. S., 455-456; *Wilson v. Motor Lines*, 207 N. C., 263, 176 S. E., 750; *Hudson v. Transportation Co.*, 214 N. C., 489.

The judgment is

Affirmed.

THE CHAMPION PAPER & FIBRE COMPANY v. H. D. LEE, R. G. JENNINGS, INDIVIDUALLY, AND R. G. JENNINGS, EVAN G. JENNINGS, AND J. G. VOLMER, EXECUTORS AND TRUSTEES OF THE ESTATE OF E. H. JENNINGS, DECEASED.

(Filed 27 September, 1939.)

Reference § 3—

The plea of title by adverse possession is not such a plea in bar as will prevent a compulsory reference until after the determination of the plea when it appears that the very plea of adverse possession of lappage is based upon a complicated question of boundary within the meaning of C. S., 573 (3).

APPEAL by defendants from *Rousseau, J.*, at April Term, 1939, of TRANSYLVANIA.

Civil action in ejectment, for recovery of damages for alleged trespass and for removal of cloud upon title.

Plaintiff alleges that it is the owner in fee and entitled to the possession of certain specifically described tract of land containing 228 acres and lying on the headwaters of the west fork of French Broad River in Transylvania County; that defendants have entered into unlawful possession of same, and committed acts of trespass thereon to its damage; that it acquired title under Grant No. 230 issued by the State of North Carolina to George Latimer in 1796, through *mesne* conveyance, and under grants junior thereto through *mesne* conveyances; and that defendants claim title adverse to it under certain specified grants through *mesne* conveyances, all of which are clouds upon the title of the plaintiff.

Defendants deny the title of plaintiff and aver, by way of defense, that Grant No. 230 is void, for that at the time of its issuance the lands covered by it were withdrawn from entry and grant by reason of certain Indian treaties, but which later became the subject of entry and grant; that if located according to the courses and distances called for and without regard to the objects and lines of other tracts called for in the grant, it will probably lap on *about* 248 acres of land claimed by the defendants which are parts of three tracts of land described in certain deeds to E. H. Jennings; that if plaintiff ever had title to the land within the lappage, if any, of the 248 acres, which they deny, plaintiff has been divested of that title, and title thereto has been vested in the defendants by reason of seven years adverse possession by them under color of title, which possession as a statute of limitation is a plea in bar of plaintiff's right to maintain this action.

Defendants further aver that it will be necessary to have a complete survey for the purpose of locating that part of Grant No. 230 claimed by the plaintiff to determine whether the same can be located, and if it can be located, according to the courses and distances called for in the grant without regard to the objects and lines called for, a survey should be made of the lands of the defendants that are lapped upon by said grant in order to determine the exact extent of the lappage, and to do such surveying as may be necessary to locate the old Indian Treaty line, known as the Meiggs and Freeman line, lands west of which it is claimed were not subject to entry in 1796, and to determine its position with respect to the lands described in the complaint.

The court below, finding from the pleadings, and especially the answer of the defendants and statements of counsel on both sides as to the contention of the parties, that the pleadings raise a complicated question, not only as to boundary but also as to title, ordered compulsory reference. From this order defendants appeal to the Supreme Court, and assign error.

Geo. H. Smathers and D. L. English for plaintiff, appellee.

Lewis P. Hamlin and Ralph H. Ramsey, Jr., for defendants, appellants.

PER CURIAM. Defendants contend that a compulsory reference cannot be ordered until their alleged plea in bar has been determined. If it be conceded that the statute relating to the ripening of title by seven years adverse possession under color of title may be invoked as a plea in bar, there is still a complicated question of boundary within the meaning of the statute, C. S., 573 (3), presented on the pleadings in this case. The plea presents it.

The defendants rely upon *Duckworth v. Duckworth,* 144 N. C., 620, 57 S. E., 396. The decision there is clearly distinguishable by reason of different factual situation. Here, in any event, there is a complicated boundary dispute.

The judgment below is

Affirmed.

EDGECOMBE BONDED WAREHOUSE COMPANY v. SECURITY NATIONAL BANK.

(Filed 11 October, 1939.)

1. Appeal and Error § 40e—

Upon defendant's exception to a peremptory instruction for plaintiff, the Supreme Court will consider the evidence in the light most favorable to defendant, giving him the benefit of every reasonable intendment thereon and every reasonable inference therefrom, in determining the sufficiency of defendant's evidence to put at issue plaintiff's right of recovery.

2. Bills and Notes § 7a—

A note payable to bearer is negotiated by delivery, a note payable to order is negotiated by endorsement of the holder and completed by delivery, C. S., 3010, and a note with special endorsement requires the endorsement of the person specified therein to further negotiation of the instrument, C. S., 3015, and endorsements may be either in blank or special, which may also be either restricted or qualified or conditional, C. S., 3014, and for convenience endorsements may be divided into endorsements in blank, which are unqualified, and endorsements not in blank, which are qualified.

3. Bills and Notes § 7b—

The designation of a particular class is sufficient to render an endorsement special, and therefore an endorsement to "any bank, banker or trust company" is a special endorsement precluding the further negotiation of the instrument without the endorsement of one of the class specified.

4. Same—

Where the original endorsement is authorized, subsequent diversion of the funds will not make it a forgery.

5. Corporations § 20—

The secretary-treasurer of a corporation has the authority to present to the corporation's local depository, either for deposit or for payment in cash, checks received by the corporation and drawn on out-of-town banks.

6. Principal and Agent § 8a—

A principal is bound by the acts of his agent which are within the agent's express or implied authority, and a person who, in the exercise of reasonable prudence and good faith, relies upon the agent's apparent authority is not chargeable with secret limitations upon that authority.

7. Banks and Banking § 8a: Bills and Notes § 7b—

Where a check payable to a corporation is endorsed by its duly authorized agent "pay to any bank, banker or trust company," the corporation's local bank may accept the check and pay the amount thereof to the corporate officer or employee who has the authority, either express or implied, to present it.

8. Principal and Agent § 10a—

Where one of two innocent parties must suffer by the wrongful act of an agent, he who selects the agent and places it in the agent's power to do the wrong must suffer the loss.

9. Banks and Banking § 8a: Bills and Notes § 7b—Evidence held to raise issue as to whether agent had implied authority to cash check having special endorsement.

The checks in question had been endorsed by the corporate payee "pay to any bank, banker or trust company," and had been accepted by the corporation's local bank and the amount thereof paid in cash to agents and employees of the corporation. The bank of deposit introduced evidence of a course of dealing between the bank and the corporation over a period of time, to the knowledge of the corporation's secretary-treasurer, under which the corporation's checks so endorsed had been paid to the same agents and employees of the corporation, and that checks so endorsed had been left where they were accessible to such agents and employees. *Held:* A peremptory instruction that the corporation was entitled to recover of the bank funds diverted by its agents and employees out of funds received by them from the bank upon checks having such special endorsement is error, since the evidence of implied authority of the agents and employees to present the checks, and evidence that the corporation placed it in their power to commit the wrong, requires the submission of appropriate issues to the jury.

10. Banks and Banking § 8a—

Notice to a bank by its corporate depositor to honor all checks, drafts, etc., for the withdrawal of the funds of the corporation only when made, drawn, accepted or endorsed by at least two of its officers, by its terms embraces only the withdrawal of funds deposited in the bank and does not apply to the advancement of money by the bank on checks payable to the corporation and drawn on another bank, pending presentment to and payment by the payee bank.

APPEAL by defendant from *Thompson, J.*, at June Term, 1939, of EDGECOMBE. New trial.

Civil action to recover $4,862.77 and interest, representing the total of forty-nine checks, payable to the order of plaintiff, which were received by the defendant and collected from the payee banks, the plaintiff alleging that it has never received the money or credit therefor.

The plaintiff is a corporation engaged in the business of operating a bonded storage warehouse in Tarboro, where it accepts for storage commodities of all kinds, particularly cotton and other farm products and whiskey on account of distillery companies. In the case of whiskey, the distillery companies would pay, at the first of each month, storage charges for all whiskey withdrawn during the preceding month. In the case of cotton and other commodities, the storage was ordinarily paid upon bill rendered, after the commodity was withdrawn from storage.

During the period from November, 1936, to May, 1938, the plaintiff received, among others, the particular forty-nine checks which are the subject matter of this action. The first of the forty-nine checks was dated 14 November, 1936, and the last one was dated 12 May, 1938. These checks were drawn by customers of the plaintiff on numerous banks located in points other than Tarboro, with the exception of five which were drawn on the defendant's branch bank in Tarboro. All of these checks were endorsed by plaintiff with the following endorsement: "Pay to the order of any bank, banker or trust company. All prior endorsements guaranteed. Edgecombe Bonded Warehouse Company, by A. B. Bass, Sec-Treas." The endorsement was made by A. B. Bass, secretary-treasurer, by the use of a rubber stamp, except the signature "A. B. Bass," which was inserted in Bass' handwriting. This endorsement was the one used by the plaintiff throughout the course of its dealings with the defendant. Some of the checks received by the plaintiff represented funds which belonged in part to the plaintiff and in part to Bass Bonded Trucks, Inc., of which Bass was likewise an officer.

The forty-nine checks were, from time to time, presented to the defendant's bank at Tarboro, N. C., and it advanced the money thereon and placed the same in the course of collection. Thereafter, in due course, the defendant collected the checks from the drawee bank. The plaintiff alleged and offered evidence tending to prove that these checks were cashed by parties to the plaintiff unknown and who were unauthorized to receive the cash thereon. The defendant alleged and offered evidence tending to prove that all of these checks were cashed by and the money paid to the officers or employees of the plaintiff company, pursuant to one of the customary methods adopted by the plaintiff in handling checks received by it. It further offered evidence tending to show that employees of the plaintiff who presented such checks to the defendant were vested with express or implied authority so to do. It likewise offered evidence tending to show the negligent manner in which the plaintiff handled checks in its possession after the same had been endorsed, and the manner in which checks were handled when deposited to the credit of the plaintiff.

The court submitted the following issue:

"Is the defendant indebted to the plaintiff and, if so, in what amount?"

It charged the jury in respect thereto: "Gentlemen of the jury, as I view this matter, it resolves itself into a question of law largely. I am submitting one issue to you with the peremptory instruction as to how to answer that issue. I instruct you, gentlemen, if you believe the evidence and find the facts to be as it tends to show, you will answer that issue $4,862.77, with interest thereon from the date of payment of each check involved in the lawsuit."

The jury answered the issue as instructed. Judgment was rendered thereon and the defendant excepted and appealed.

Battle & Winslow and H. H. Philips for plaintiff, appellee.
Gilliam & Bond for defendant, appellant.

BARNHILL, J. The court below, as evidenced by its charge, held, as a matter of law, that the defendant had offered no evidence of any probative force which challenged or put at issue plaintiff's right of recovery. In ascertaining the correctness of this conclusion the evidence must be considered in the light most favorable to defendant and it is entitled to every reasonable intendment thereon and every reasonable inference therefrom, for it is the province of the jury to determine the weight and credibility of the testimony.

On this question the plaintiff contends that the form of the endorsement on the checks was of such nature as to prevent the further negotiation of the checks by anyone other than a bank, banker or trust company, and that the payment by the defendant to a third party not coming within that class renders the bank liable to the plaintiff. On the other hand, the defendant contends that it has offered evidence sufficient to be submitted to the jury tending to show that those who presented the checks were employees of the plaintiff, impliedly authorized to present them to and obtain cash therefor from the defendant bank; and that the negligent conduct of the plaintiff in the manner in which it handled the checks after the endorsement was such as to place any resulting loss upon it and not upon the defendant.

If there were but one check involved, or if the uncontradicted evidence tended to show that all of the checks were paid to third parties not connected with the plaintiff, nothing else appearing, we would readily concur in the view of the plaintiff.

Our statute provides that an endorsement may be either in blank or special, and it may also be either restricted, or qualified or conditional. C. S., 3014. A special endorsement specifies the person to whom, or to whose order, the instrument is to be payable; and the endorsement of such endorsee is necessary to the further negotiation of the instrument. C. S., 3015. If payable to the bearer, it is negotiated by delivery; if payable to order, it is negotiated by the endorsement of the holder and completed by delivery. C. S., 3010. For convenience, endorsements might well be put into two general classes: unqualified—in blank; and qualified—all endorsements not in blank.

The requirement that an endorsement shall specify the person to whom, or to whose order, the instrument is payable is necessary to make it a special endorsement is fully met when a particular class is desig-

nated. Thus, an endorsement to "any bank, banker or trust company" is a sufficient designation of a person to make the endorsement special and to require the endorsement of one within that class as a prerequisite to the further negotiation of the instrument. *State Planters & Trust Co. v. Fifth Third Union Trust Co.,* 56 Ohio App., 309, 10 N. E. (2nd Ed.), 935; *First Nat'l Bank v. Brunke,* 289 S. W., 372; *Cario Nat'l Bank v. Blanton,* 287 S. W., 839; *Sands v. Clark,* 284 S. W., 902; *Behringer v. City Nat'l Bank,* 296 S. W., 674. Nothing else appearing, a check endorsed in the manner adopted by the plaintiff in the hands of someone who had found it upon the street or by a person other than the plaintiff or its agent would not be negotiable in the hands of such person and he could not pass title thereto. Anyone accepting the same would do so at his own risk unprotected by the Negotiable Instrument Law. Under these circumstances, by reason of the limitations of the endorsement, neither the person cashing the check nor the bank receiving it could have or acquire any title to the same.

The case here presented is not so simple. The transactions involved extended over a period of eighteen months. That the original endorsement was authorized is admitted. There is evidence that checks so endorsed were presented, to the knowledge of the plaintiff, by employees of the plaintiff to the defendant for discount or payment over the counter. The chief clerk, who acted as assistant to the secretary-treasurer, during the time these checks were received by the plaintiff and long prior thereto, testified that she took checks endorsed as here to the defendant bank and procured the cash therefor to the end that she might divide the proceeds thereof between the plaintiff and the Bass Bonded Trucks, Inc., which had a part interest therein, and there is evidence that she presented and obtained cash for many of the checks in controversy. She testified: "I did not cash any of the checks and put the money in my pocket. When I cashed these checks at the bank I would see Mr. Martin, Mr. Carstarphen or Mr. Haven (tellers of the defendant bank) and I would tell them why I was cashing the checks. To the best of my recollection we have also sent the colored man (plaintiff's janitor) there to cash checks. I think Mr. Bass went down and cashed them; I couldn't say positively. I don't recall seeing Mr. Bass use but one endorsement stamp when the check was owned by both corporations." J. M. Carstarphen testified: "The reason I did not require the endorsement of the person who got the money was that it had been the custom of the warehouse company to bring pay roll checks to the bank and they have also brought these checks along about the same time, these checks that were cashed." He identified three of the checks in controversy as having been cashed over the counter by him. R. B. Havens, Jr., testified that he had cashed thirty-two of the checks in controversy. He

further stated: "I can't recall each individual check but I do recall on several occasions waiting on Mrs. Fullwood (chief clerk and assistant to Bass) and one check I remember the amount because it was rather odd. One check for $50.00 I cashed for Jaf Gray (the janitor). This was the same colored man spoken of by other witnesses. On several occasions I waited on Miss Whitley (Mrs. Fullwood) and as well as I can remember these checks were drawn on Peoria. I divided these checks so a division could be made between the truck and warehouse, gave her the cash in a form so the division could be made. Miss Whitley asked for it in that manner. She put it up there and asked me to cash it so as to make a division between the two. I can't recall each item but I recall handling it several times in that way. I can pick out the $50.00 check. I can also pick out, when I waited on Miss Whitley, a check some over $300. After this matter arose I had several conversations with Mr. Bass and he said that he knew that some of the checks had been cashed for a division and that cashiers' checks had been issued prior to this in payment of the two accounts for a split check. I have never seen any checks payable to the warehouse company endorsed in any other way than with the endorsement which appears on these checks. The funds of the bank were paid out for each of the thirty-two checks bearing my teller's number. I remember issuing a cashier's check to Mr. Walston (secretary of the plaintiff who usually made the deposit) on one occasion in order to divide up a check payable to the plaintiff." Randolph Martin testified: "I cashed eight of the checks in this action. I remember the circumstances under which one of these checks was cashed, the $268.55 check of Old Mr. Boston drawn on Boston, by Ben Burk, it is a liquor check, it is payable to the warehouse company. I cashed this check for Miss Whitley and remember very distinctly counting out fifties and giving it to her and she put it back and asked for twenties, said so she could divide it between the two firms, the warehouse company and the truck company. I cashed the majority of the eight checks for Miss Whitley. I remember cashing one for Mr. Bass. On one or two occasions they would send the old darkey, and part of the money would be sent back in a book and he would take it back, part of the cash was deposited. I paid the money on all eight of these checks to these three people. I had several conversations with Mr. Bass after this matter came up and he said he hoped Mr. Bridgers had had them cashed in order to teach him a lesson, said he had been cashing these and Mr. Bridgers wanted him to stop, that it was a bad practice, and he said he hoped Mr. Bridgers had the money put away to teach him a lesson. He said Mr. Bridgers had warned him a year before the controversy, but he had continued to do it." In addition, Mr. Bass testified that checks were sent to the bank through Mr. Walston, Miss Whitley

and the janitor. Likewise, there is testimony that when checks were received by the plaintiff they were endorsed by Bass in the authorized manner and then were left in the cash journal, in the drawer to his desk, or in an unlocked safe, from one or two days to several weeks. There is also testimony that these checks were, some time after endorsement, sent to Mr. Walston who made out the deposit slip listing the checks received by him. He made entries of the checks deposited, but made no effort to check his records with those kept by Bass or to determine whether he had received all of the checks. Nor was there an audit of the unpaid bills to ascertain which had been paid, and the plaintiff did not discover the alleged misuse of its checks until more than eighteen months after the first check was cashed.

There is no definite statement in the record as to whether the checks in which the plaintiff and the Bass Bonded Trucks, Inc., had a joint interest, were payable to the plaintiff or to the plaintiff and the Bass Bonded Trucks, Inc., other than the statement of Miss Whitley, that some of the checks were payable jointly to the two corporations. However, the clear implication to be drawn from the statement of witnesses is that many of these checks were payable to the plaintiff and that the plaintiff accounted to the Bass Bonded Trucks, Inc., for so much thereof as belonged to it.

There is no controversy about the original endorsements. They were made by Bass, who was secretary-treasurer. His official position gave him implied authority to endorse and the evidence discloses that he had actual authority as well. The original endorsement being authorized, the diversion of the funds after endorsement will not make it a forgery. *Standard Steamship Specialty Co. v. Bank,* 220 N. Y., 478, 116 N. E., 386, L. R. A., 1919 B, 575; *Rivers v. Bank,* 133 S. E. (S. C.), 210. The secretary-treasurer is the officer of a corporation expressly charged with the duty to handle its funds. His authority, as such, includes the power to present checks received from customers and drawn on out-of-town banks to the local depository of the corporation either for deposit or for payment in cash. There is nothing in this record which limits this implied authority—certainly none of which the defendant had notice. The resolution adopted by the plaintiff, as we hereafter point out, does not have this effect.

Does this testimony constitute more than a scintilla of evidence tending to show that Miss Whitley and the janitor had implied authority to present checks to the defendant for payment over the counter?

"While as between the principal and the agent the scope of the latter's authority is that authority which is actually conferred upon him by the principal, which may be limited by secret instructions and restrictions, such instructions and restrictions do not affect third persons ignorant

thereof, and as between the principal and third persons the mutual rights and liabilities are governed by the apparent scope of the agent's authority, which is that authority which the principal has held the agent out as possessing, or which he has permitted the agent to represent that he possesses, and which the principal is estopped to deny. The apparent authority, so far as third persons are concerned, is the real authority, and when a third person has ascertained the apparent authority with which the principal has clothed the agent, he is under no further obligation to inquire into the agent's actual authority. The authority must, however, have been actually apparent to the third person, who, in order to avail himself of the rights thereunder, must have dealt with the agent in reliance thereon, in good faith, and in the exercise of reasonable prudence, in which case the principal will be bound by the acts of the agent performed in the usual and customary mode of doing such business, although he may have acted in violation of private instructions, for such acts are within the apparent scope of his authority." *R. R. v. Smitherman,* 178 N. C., 595; *Trollinger v. Fleer,* 157 N. C., 81; *Powell v. Lumber Co.,* 168 N. C., 632; *Furniture Co. v. Bussell,* 171 N. C., 474; *Cardwell v. Garrison,* 179 N. C., 476; *Bobbitt Co. v. Land Co.,* 191 N. C., 323; *Sears Roebuck & Co. v. Banking Co.,* 191 N. C., 500; *Bank v. Sklut,* 198 N. C., 589; *R. R. v. Lassiter & Co.,* 207 N. C., 408. "Accordingly, persons who do not know what the agent's authority really is are justified in dealing with him upon the assumption that he has the authority which the principal indicates by his conduct that the agent possesses." *R. R. v. Lassiter & Co., supra.*

If a third party—not a bank, banker or trust company—presented a check to the defendant, endorsed as here agreed, the endorsement was ample notice to the bank that such check was not negotiable in the hands of the individual presenting it; if the check, so endorsed was presented by the plaintiff through one of its officers or employees who had authority, either express or implied, so to do, the bank, being within the class designated in the endorsement, incurred no liability by the acceptance of the same. The payment of the face amount of the check to such agent was payment to the plaintiff. When the checks were endorsed in the authorized manner by an authorized officer in the manner agreed, the effect was the same as if they had been endorsed "pay to the order of Security National Bank." If an employee, as an authorized conduit through which the check passed from the plaintiff to the defendant, presented a check so endorsed, it was presentment by the plaintiff to one who came within the class designated in the endorsement.

There is evidence that over a considerable period of time, employees of the plaintiff, from time to time, presented checks payable to the plaintiff and drawn on banks in various sections of the country, to the defend-

ant for payment over the counter. The acceptance of such checks and the payment of the amount thereof is a service customarily rendered by banks to their customers. It is immaterial whether any of the checks in controversy were among those so presented. If the jury finds these to be the facts then the conduct on the part of the plaintiff was such as to vest such employees with the implied authority to act as a conduit through which the checks passed from the plaintiff to the defendant for payment in cash. If the plaintiff, in fact, so handled the checks and the jury finds that its conduct in so doing was such as to reasonably lead the defendant to believe that the employees acted under the direction of the plaintiff, the implied authority thereby vested in the officers and employees who so presented the checks will protect the defendant. Any loss resulting from the misuse of funds thus obtained by any agent or employee of the plaintiff must be sustained by the plaintiff rather than by the defendant.

"Where the transactions of an agent or employee of a corporation, acting within the scope of his duty, causes a loss which must fall either on the corporation or a third party, both being innocent, the corporation who selected its own agent must suffer the loss." *Shuford v. Brown,* 201 N. C., 17. The loss must be borne by those who put it in the power of the agent to do the wrong rather than by a stranger. *County of Macon v. Shores,* 97 U. S., 272; *Bank v. Liles,* 197 N. C., 413; *O'Connor v. Clark,* 170 Pa., 318, 29 A. L. R., 607. He who first made it possible for the loss to occur must bear the loss. *Lightner v. Knights of King Solomon,* 199 N. C., 525; *R. R. v. Kitchin,* 91 N. C., 44; *Bank v. Liles, supra; White v. Johnson & Sons,* 205 N. C., 773; *R. R. v. Lassiter, supra; Bank v. Clark,* 198 N. C., 169.

Is there evidence that the plaintiff, by its negligent conduct, put it in the power of its employees to commit the wrong complained of so as to permit the defendant to invoke the principal laid down in the foregoing cases?

There is not only some evidence that certain employees of the plaintiff were used as messengers to carry checks to and obtain cash from the defendant bank, but there is likewise evidence that the checks in controversy and others were endorsed when received and were left lying around in the cash journal, in a desk drawer and in an unlocked safe, easily accessible to such employees so that they could, at will, abstract a check, already endorsed, and present it to the bank. The bookkeeping methods adopted by the plaintiff were such as to make this possible with a minimum degree of risk of discovery. In fact, the plaintiff did not discover the misuse of checks until after the last one had been presented to and paid by the bank, more than eighteen months after the first one was cashed.

We are of the opinion, therefore, that this evidence coupled with the testimony tending to show an implied agency, is such as to require the submission of appropriate issues to the jury.

The plaintiff calls our attention to and relies on the case of *Rivers v. Liberty Bank,* 135 S. C., 107, 133 S. E., 210. The facts in that case make it distinguishable. It is not controlling on the facts here presented.

The plaintiff insists that a resolution adopted by it, copy of which was furnished to the defendant, put the defendant on notice that no one of its officers or employees was authorized to withdraw funds upon any check payable to the plaintiff unless signed or endorsed by at least two of its officers, and that its loss is directly attributable to the total disregard by the defendant of the limited nature of the endorsement and the express terms of the resolution. We do not so interpret the resolution. It appointed the defendant a depository of the plaintiff and authorized it "to honor and pay all checks, drafts, acceptances, promissory notes, bills of exchange, orders for the payment of money or other instruments for the withdrawal of funds (including instruments payable to the order of the officer or officers signing the same) only when made, drawn, accepted or endorsed by at least two of its officers" designated in the resolution. The specified particular instruments followed by the general term *orders for the payment of money or other instruments for the withdrawal of funds* make it clearly appear that the resolution refers to the withdrawal from the bank of funds belonging to the plaintiff. A check drawn on another bank payable to the plaintiff, upon which the defendant advanced money, pending presentment to and payment by the payee bank, is not an order or instrument for the withdrawal of plaintiff's funds from defendant bank. The resolution and the letters relating thereto, addressed to the defendant, give notice that no funds deposited in the defendant bank, a designated depository of plaintiff, can be withdrawn except upon the signature of at least two officers. It is not sufficiently broad to embrace the transactions which are the subject matter of this suit. There is evidence tending to show that the plaintiff did not so regard it.

Defendant's exception to the charge of the court below must be sustained.

New trial.

L. B. CALHOUN, ADMINISTRATOR OF THE ESTATE OF J. E. CALHOUN, DECEASED, v. NANTAHALA POWER & LIGHT COMPANY.

(Filed 11 October, 1939.)

1. Trial § 22b—

Upon a motion to nonsuit, the evidence is to be considered in the light most favorable for plaintiff.

2. Trial § 24—

If there is any substantial evidence supporting plaintiff's cause of action, defendant's motion for nonsuit is properly overruled.

3. Appeal and Error § 21—

Where the charge of the court is not in the record, it will be presumed that the court correctly instructed the jury on every phase of the case, both with respect to the law and evidence.

4. Electricity § 7—Evidence held for jury on issue of negligence of power company in maintaining high voltage wires too near ground and in employing inexperienced workman to clear underbrush from beneath the wires.

Plaintiff's evidence tended to show that defendant power company entered into a contract with her intestate under which he was to cut small trees and undergrowth beneath defendant's transmission lines, that the transmission lines carried an extremely high voltage, that they were strung fifteen feet from the ground, with expert testimony that lines carrying such voltage should have been maintained at a height not less than thirty feet from the ground according to the industry's customary and approved method, that intestate was a woodman without experience with electricity, that in performance of his contract he cut a tree which stood higher than the wires and that its top came into contact with the wires and caused intestate's death. *Held:* Even in the absence of affirmative testimony by plaintiff of defendant's failure to warn intestate, the evidence is sufficient to be submitted to the jury on the issue of whether defendant was negligent in maintaining the high voltage wires only fifteen feet from the ground and in employing an inexperienced person to perform the inherently dangerous work.

5. Electricity § 6—

In constructing and maintaining high voltage transmission lines a power company is required to exercise the utmost care and prudence consistent with the practical operation of its business, such care being only commensurate with the highly and inherently dangerous character of the instrumentality.

6. Electricity § 10—

Intestate contracted to clear small trees and underbrush from underneath defendant's transmission lines and was killed when he felled a tree which came into contact with high voltage wires. *Held:* The question of intestate's contributory negligence was a matter for the jury under appropriate instructions.

SEAWELL, J., concurring.

BARNHILL, J., dissenting.

APPEAL by defendant from *Nettles, J.*, at March Term, 1939, of SWAIN. No error.

Action for wrongful death of plaintiff's intestate alleged to have been caused by the negligence of the defendant in the maintenance of its electric power line. There was verdict for plaintiff on issues submitted, and from judgment on the verdict defendant appealed.

Lee & Lee and Edwards & Leatherwood for plaintiff, appellee.
Black & Whitaker for defendant, appellant.

DEVIN, J. The only assignment of error brought forward by defendant appellant is the denial of its motion for judgment of nonsuit entered at the close of plaintiff's evidence and renewed at the close of all the evidence.

It is well settled that upon this motion the evidence is to be considered in the most favorable light for the plaintiff, and that if there be any substantial evidence—more than a scintilla—to support the plaintiff's allegations the case must be submitted to the jury. Applying this rule to the evidence as shown by the record before us, we reach the conclusion that there was no error in submitting the case to the jury. There was no exception to the conduct of the trial. The judge's charge was not sent up; hence it must be presumed that the jury was properly instructed by the trial judge as to all phases of the case, both with respect to the law and the evidence.

The pertinent facts were these: Plaintiff's intestate, pursuant to contract with defendant, undertook to clear the right of way of defendant's power line of undergrowth, bushes and trees for a distance of six miles from the power house to Fontana mine. The written specifications for the work plaintiff's intestate was engaged to perform were as follows: "A trail 10 feet wide shall be cut continuously along and under the wires, along the center line of the transmission line. All perennial growth shall be cut within 6 inches of the ground. All brush shall be piled clear of the trail. In addition, any tree or bush that extends to within 10 feet of any wire of the transmission line shall be cut, and any tree or bush that extends within 10 feet of either wire of the telephone line shall be either trimmed or cut to provide at least 10 feet clearance to the telephone line. The brush shall be cleared from around all poles for a radius of at least four feet."

Defendant's power line over and along this right of way carried an electric current of 66,000 volts, and was suspended 12 to 15 feet above the ground—15 feet at the place of injury. The territory was mountainous and sloping. On the right of way had grown up a mass of bushes and small trees, some of the latter higher than the power lines.

A witness testified: "Trees or sprouts right where he (the deceased) was cutting were hanging over these high powered lines."

Plaintiff's intestate began work on the morning of 12 August, 1938, alone, and shortly thereafter was killed by an electric current transmitted through a small tree which when cut fell against the wires. The tree had stood four or five feet from the line of the wires, and was taller. The body of deceased was found in contact with the tree and badly burned by the powerful current. The deceased had had no experience with electric power lines or electric current.

Plaintiff alleged, among other things, that defendant was negligent in constructing and maintaining an electric power line carrying so powerful a current as 66,000 volts only 15 feet from the ground, and authorizing an inexperienced man to cut bushes and trees in close proximity thereto, and it was further alleged that no warning was given plaintiff's intestate. While the absence of warning does not affirmatively appear from plaintiff's evidence, however, considering the surrounding circumstances, the character of the growth on the right of way, the instruction to cut any tree that extended within 10 feet of any wire of the transmission line, the enormous voltage on uninsulated wires only 15 feet from the ground, we think a situation inherently dangerous for an inexperienced person was thereby created, and we are led to the conclusion that this afforded some evidence of failure on the part of defendant to measure up to its duty to exercise the degree of care required of those who undertake to handle and control a force so powerful and subtle as electricity. It was testified by two witnesses, found by the trial court to be experts in electrical construction, maintenance and repair, that according to the customary and approved method for the installation and maintenance of transmission lines, carrying a voltage as high as 66,000 volts, a height of not less than 30 feet from the ground should be maintained.

From the evidence adduced the inference is permissible that defendant in the exercise of due care should have foreseen that some of the trees to be cut, close to and higher than the wires, would come in contact with the wires, with dangerous consequences.

In *Helms v. Power Co.*, 192 N. C., 784, 136 S. E., 9, a recovery was upheld where electricity escaped from a power line to a telephone line over which it crossed, and caused the death of a lineman at work on the telephone line. In that case *Stacy, C. J.*, speaking for the Court, uses this language in stating the duty incumbent upon electric companies: "Electric companies are required to use reasonable care in the construction and maintenance of their lines and apparatus. The degree of care which will satisfy this requirement varies, of course, with the circumstances, but it must always be commensurate with the dangers

involved, and where the wires maintained by a company are designed to carry a strong and powerful current of electricity, the law imposes upon the company the duty of exercising the utmost care and prudence consistent with the practical operation of its business, to avoid injury to those likely to come in contact with its wires. 9 R. C., 1200."

Various phrases descriptive of the degree of care required of those furnishing electric current or power are collected in the opinion in *Small v. Utilities Co.,* 200 N. C., 719, 158 S. E., 385; *Murphy v. Power Co.,* 196 N. C., 484, 146 S. E., 204; and *McAllister v. Pryor,* 187 N. C., 832, 123 S. E., 92. 18 Am. Jur., 445.

While the defendant's evidence tended to throw a different light on the circumstances and to exculpate it from the implication of negligence, this was a matter for the jury, and must be held to have been determined by the verdict. Defendant further contends that its motion for nonsuit should have been sustained on the ground that plaintiff's evidence affirmatively established contributory negligence on the part of her intestate, but we cannot so hold. This also was a matter for the jury under appropriate instructions by the trial judge. *Cole v. Koonce,* 214 N. C., 188.

We find no error in the ruling of the court below in denying defendant's motion for judgment of nonsuit.

No error.

SEAWELL, J., concurring: The duty resting upon the master to warn a servant of danger under circumstances demanding it of a prudent man has a very prominent place in the law of master and servant, but it is by no means confined to that relation. For illustration, it also arises under the relation of bailor and bailee, and it will not be questioned that the bailee is often an independent contractor. No sound reason has ever been advanced why this duty should be confined to either of these relationships, or why it should be controlled by any other principle than that the one party, for his own or their mutual advantage, has, by some transaction, brought another into the zone of a danger, of which the first party has knowledge, either actual or imputed, and of which the other is ignorant. Decisions of this Court and others affirm this broader statement of the principle. *Stroud v. Transportation Co.,* 215 N. C., 726, and cases cited; *Cashwell v. Bottling Works,* 174 N. C., 324, 93 S. E., 901; *Heaven v. Pender,* 11 L. R., p. 503.

But I am writing in concurrence with the main opinion chiefly because it is challenged with respect to the manner in which the evidence is treated upon the motion to nonsuit, and its effect considered. It is suggested that the case should have been nonsuited because an employee of the defendant and defendant's witness testified that he had given to

the plaintiff's intestate specific warning as to the danger out of which his injury and death came about. Thus, this Court is asked to pass upon defendant's evidence both as to the fact that the warning was given at all and as to its credibility and sufficiency. This is of importance because a strong inference arises under the circumstances that he met his death not from an act of negligence on his part—that would involve imprudent exposure to a known danger or a danger which he ought to know—but through ignorance to the danger itself. He was a woodsman, not an electrician. The jury may have inferred from the evidence that he was unaware of the vast electrical tension in the 66,000 volt current of electricity that traversed the wire in fifteen feet of the ground, its vast eagerness to escape through any convenient channel, and the quantity and destructiveness of the current which might be diverted through his body to the ground when the wire came in contact with a leaf or twig.

The sequence and interrelation of the rules governing this Court upon such a review are as interesting and instructive as the rules themselves.

Where there is any evidence, its weight is for the consideration of the jury, and the judge is without power to take it away from them. *Lassiter v. R. R.*, 171 N. C., 283, 88 S. E., 335; *Hill v. R. R.*, 195 N. C., 605, 143 S. E., 129; *Dickerson v. Reynolds*, 205 N. C., 770, 172 S. E., 402. Upon a motion to nonsuit, the evidence must be taken in the light most favorable to the plaintiff. *Smith v. Coach Line*, 191 N. C., 589, 132 S. E., 567; *Leonard v. Insurance Co.*, 212 N. C., 151, 157, 193 S. E., 166; *Neal v. R. R.*, 126 N. C., 634, 36 S. E., 117; *Gower v. Davidian*, 212 N. C., 172, 193 S. E., 28. Where there are discrepancies and contradictions in the evidence of plaintiff, if there is *any* favorable evidence, it is still a matter for the jury. *Gunn v. Taxi Co.*, 212 N. C., 540, 193 S. E., 747; *Matthews v. Cheatham*, 210 N. C., 592, 188 S. E., 87; *Mulford v. Hotel Co.*, 213 N. C., 603, 197 S. E., 169. Where there are such contradictions and discrepancies in the *testimony* of the plaintiff himself, a like rule prevails, leaving to the jury both its weight and credibility, where a part of the evidence is favorable. *Dozier v. Wood*, 208 N. C., 414, 181 S. E., 336; *Gunn v. Taxi Co., supra; Matthews v. Cheatham, supra; Mulford v. Hotel Co., supra.* The plaintiff is entitled to have the *whole* evidence marshaled—both that of the defendant and that of the plaintiff—and considered in its most favorable light to him, and is entitled to all its inferences and intendments which are favorable to him. *Lynn v. Silk Mills*, 208 N. C., 7, 179 S. E., 11; *Brunswick County v. Trust Co.*, 206 N. C., 127, 173 S. E., 327; *Gower v. Davidian, supra.*

Upon a motion to nonsuit, *only that evidence which is favorable to the plaintiff may be considered,* since the jury only has the prerogative of analyzing, accepting, or rejecting such parts of the evidence as it may

see fit. *Ford v. R. R.*, 209 N. C., 108, 182 S. E., 717; *Gower v. Davidian, supra; Hancock v. Wilson,* 211 N. C., 129, 189 S. E., 631. Only favorable aspects of defendant's evidence can be considered on a motion to nonsuit, and that which tends to defeat or contradict his claim cannot be considered. *Davidson v. Telegraph Co.,* 207 N. C., 790, 178 S. E., 603.

For my part, I have, at times, derived satisfaction and relief in reflecting on the important and exclusive part that is given the jury in our system of judicature, and the fact that I am not permitted to assume their powers nor required to share their responsibilities, and need not suffer vicariously for their default.

Under the Constitution, I do not think that observance of these rules is optional with a court sitting to hear appeals on matters of law or legal inference.

BARNHILL, J., dissenting: Plaintiff's intestate entered into a written agreement to clear a certain portion of the right of way of the defendant's power line for a stipulated amount. The terms of this agreement constituted the deceased an independent contractor. The defendant was not under the same duty to warn him as it would have been under a contract of employment.

Conceding, however, that it was an act of negligence for the defendant to maintain its line with wires carrying voltage of 66,000 so near the ground, as this evidence indicates, and conceding further that it was the duty of the defendant to warn the plaintiff, who had represented himself as an experienced woodsman, it appears from the record that he was warned in detail of the dangers incident to the work. The defendant's electrical engineer testified that he advised deceased that "should he be given the contract, there were perhaps a few bushes that would probably hit the line if they were not cut properly, and we advised him to have at least one man with him at all times and we also advised him that should any bushes be larger than he thought he could handle, his helper ought to have a rope and rope it so it could not, under any condition, reach the line; and we told him we did not expect him to cut anything that would be at all dangerous, but we would prefer our linemen to do that and we would not deduct anything for that. Anything that appeared dangerous he would leave it. We told Mr. Calhoun at this time that the line was energized, that is, it had current on it; we told him there might be a few bushes that could hit the line and under no condition should he allow anything, even small growth, to hit the line, that it might interfere with the operation of the line and might not be safe for him to allow it to do so. I told him we would not want to send him the contract unless he would promise to have at least one man to help

him, and at the same time I repeated what we told him previously—by all means he should have a helper with him at such time as he cut bushes that might touch the line and that all trees like that should be roped, and if he did find anything that wasn't safe to cut, that our linemen will take care of that and he should leave that alone. He agreed to that instruction." Henry Turpin testified that he heard the conversation and that Mr. Tompkins explained to the deceased that those lines would always be hot with 55,000 volts. This witness repeated in substance the instructions heretofore outlined. This witness further says Mr. Tompkins asked the deceased if he thoroughly understood the situation in regard to the danger to the line and property and to himself, and to do the work safely, and he just replied that he thoroughly understood what he was up against. "I talked with him and told him about the same thing Mr. Tompkins told him and warned him to make sure that he didn't let anything come in contact with the conductors regardless of how small it was and if there was any doubt to leave it alone; and if there was any doubt it might fall and touch the line if he did cut it to always tie it and let a man hold it while another one cut it." There was other evidence of warning.

The deceased disregarded these instructions and undertook to do the work alone without the assistance of a helper or rope. The tree which fell against the wire and killed the deceased was standing about 15 feet from the outside wire and the limbs extended to within 5 or 6 feet of the wire. If the deceased was an experienced woodsman, as he represented himself to be, then he knew how to fell a tree so as to make it fall in the desired direction. However, he undertook to fell this tree without taking the necessary precaution, without having a helper and without using a rope, in total disregard of the instructions he had received. Furthermore, it appears that the deceased signed the contract and then began work without returning it to the defendant and without giving it any notice that he had begun the work. Therefore, the defendant had no opportunity, after the contract was executed, to give deceased any further warning, or to ascertain whether he was taking the necessary precautions or to furnish any required supervision.

Under the circumstances, I am of the opinion that the negligent conduct of the deceased materially contributed to and was, as a matter of law, one of the proximate causes of his injury and death.

For the reasons stated, I am unable to concur in the majority opinion.

NATHANIEL COLTRAIN, BY HIS NEXT FRIEND, J. H. COLTRAIN, v. ATLANTIC COAST LINE RAILROAD COMPANY AND L. N. STEPHENSON.

(Filed 11 October, 1939.)

1. Trial § 22b—

Upon a motion to nonsuit all the evidence sustaining plaintiff's cause of action, whether offered by plaintiff or elicited from defendant's witnesses, must be considered in the light most favorable to plaintiff, and he is entitled to every reasonable intendment thereon and every reasonable inference therefrom, C. S., 567.

2. Trial § 24—

If there is more than a scintilla of evidence supporting plaintiff's cause of action, defendant's motion to nonsuit should be overruled and the cause submitted to the jury.

3. Railroads § 9—Evidence held not to disclose contributory negligence as matter of law on part of plaintiff in entering upon tracks at crossing.

The evidence favorable to plaintiff tended to show that defendant's railroad train approached the public crossing at which the accident occurred without giving any warning signal, that the train approached through a cut, and that plaintiff's view was obstructed by the cut and by the tops of felled trees lying along the right-of-way and partly thereon, that plaintiff stopped 15 feet from the track, looked both ways and listened without seeing or hearing a train, that he then put his truck in low gear and entered upon the crossing at about five miles an hour and was struck by defendant's train. *Held:* The evidence does not disclose contributory negligence as a matter of law, and defendant's motion to nonsuit on that ground was properly denied.

APPEAL by defendants from *Thompson, J.,* and a jury, at April Term, 1939, of WASHINGTON. No error.

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

The evidence on the part of plaintiff tended to show that defendant railroad operated trains over its tracks from Plymouth to Rocky Mount, N. C. On the day of the alleged injury, 6 March, 1937, between 1:00 and 2:00 o'clock on Saturday afternoon, in the daytime, an engine of defendant pulling 14 cars struck plaintiff at a highway crossing on a dirt road and permanently injured him—his back was broken in three places, a fracture of the tenth thoracic vertebrae and fractures of the first and third lumbar vertebrae with paralysis of his bladder and rectum. Before the injury he had been in perfect health and a good worker.

Nathaniel Coltrain, the plaintiff, a young man 17 years of age, lived near where the injury occurred, with his father. He was driving a one and a half ton truck, 1934 model Chevrolet, loaded with boards. He

testified, in part: "I was driving carefully about twenty-five to thirty miles per hour along the State Highway. No one was in the truck but me. To get to the Sykes place you have to turn off of the highway on a dirt road. The dirt road is about half a mile from Gardner's Creek bridge. At this point the highway turns sharply to the left leaving the railroad track. Before reaching that point the highway and railroad track are practically parallel for some distance. . . . About thirty days before I was injured some timber had been cut in those woods. The pine tops were laying over to the right towards the railroad. They were lying right close to the track. Q. How close did they extend to the rail of the track, the iron rail? A. They hung over the right of way about four feet or a little further. There were four, five, six or eight of the pine tops. They were large tops. At the time I was injured the pine needles were still on those tops. Q. What effect did that have upon your ability to see a train coming down that track from the direction of Plymouth? A. You couldn't see it at all. The railroad track in going from Plymouth towards Williamston crosses Gardner's Creek. Coming from Plymouth the railroad goes down grade until it gets to Gardner's Creek and then it comes up grade to where this crossing is. It is graded down below the surface of the land. It is graded down about six feet. Q. What effect does that have on the ability or did it have on your ability to see a train coupled with that obstruction you have just described? A. I couldn't see it. The railroad comes up a rather steep hill for this part of the country. When I got to the dirt road I turned off to go to the Sykes place. When I turned off I had to come to a stop to make my turn. That was because of the acuteness of the angle of the road and the road being leveled up that way. I came to a stop to make the turn. There was much traffic on the highway that day. It was Saturday. From the edge of the highway it is about 30 feet down the dirt road to the railroad track, that is, from the edge of the highway to the rail of the track. As I made the stop and started again I put it in low gear. I did not change gears before I got to the railroad track. My truck was moving about five miles per hour. I remember after I got to the railroad track but after the train hit me I don't remember anything else. Just as my truck got to the railroad track the train hit me. It was a freight train. Q. Did that train blow? A. No, sir. Q. Did it ring any bell? A. No, sir. Q. Did it give any warning of any kind? A. No, sir. As I turned off the highway to go down that dirt road I looked and listened both for the train. As I went towards the railroad track I was driving carefully and looking and listening. One of the windows of my truck cab was broken out and the other was cranked down. Both of them were down. Q. Could you have heard that train if it had blown or rung a bell? A. Yes, sir."

On cross-examination, he testified: "The brakes on the truck were in good condition. There was no trouble about my stopping. When I made the turn I stopped there long enough to put it in low gear. Been operating a car all my life. You have to go slower on a truck to change gears than on a car. After I turned I stopped and looked and listened. Q. Where did you stop? A. About half way from the highway to the track. Q. You say you made the turn in low gear, drove half way from the concrete to the railroad and there came to a complete stop? A. Yes, sir, and looked. Q. You came to a complete stop half way between the concrete and the railroad? A. Yes, sir. Q. And there you looked? A. Yes, sir. Q. Which way did you look? A. Towards Plymouth and Williamston both. Q. Then you started up? A. Yes, sir. Q. Did you ever look again? A. Looked about the time the train hit me. I saw that. Q. And you never looked until just as the train was hitting you? A. There wasn't but a mighty short time to look or do anything. Q. You didn't look again until you looked up and ran right into the train? A. I didn't run into the train. Q. Well, the train ran into you? A. Yes, sir. Q. How far were you from the track when you stopped? A. I was about half way. Q. How far is that? A. I said around thirty feet. That would leave fifteen feet from the track. Q. Did you tell the jury you stopped fifteen feet from the track? A. I said around fifteen. Q. Was it fourteen or fifteen? A. I didn't measure it. Q. Your best estimate is you stopped fifteen feet from the track? A. Yes, sir. Q. Came to a complete stop? A. Yes, sir. Q. How long did you stay stopped there? A. I don't know. I didn't look at my watch. Q. Half a second? A. Long enough to look and listen. Q. How long did you look and how long did you listen? A. I looked both ways. Q. How long did you stop at a complete stop? A. Around half a minute. Q. And then drove on and didn't look again until you saw the train right on top of you? A. I looked both ways and didn't see it and I just pulled right on off and about that time—— Q. You told the jury you were fifteen feet or thereabouts from the track when you came to a complete stop and looked and listened? A. Yes, sir. Q. You started off in low gear going about five miles an hour? A. Yes, sir."

J. H. Coltrain testified, in part: "There were no warning signs of any kind on that dirt road between the highway and the crossing. Prior to the time the boy was hurt there had been eight pine trees cut in there. There was also some small stuff but I don't know what it was. There were eight pines measuring from twenty-two inches to twenty-eight inches on the stump. Some of those tops were laying on the shoulder of the railroad and some up and down the shoulder. The needles were on those tops then. The tops had been there about thirty days from the looks of the straw. It had just started dying. I don't hardly know

but I should think those tops were piled some six or eight feet close to the bank of the ditch beside the crossties of the railroad. Q. What effect did those tops have on the ability of a man driving along that dirt road from the highway towards the railroad track to see a train on the track? A. You practically couldn't see anything until you got right on the track. Leaving Gardner's Creek the railroad goes through a field first and then strikes the woods and goes up a hill through the cut and goes out of the cut just as it gets to this road crossing. I don't know how deep the cut is but in some places it is deeper than others. Some places eight feet and some a foot and a half to two feet at the road. It is different depths. The deepest point is down near the creek. It is deeper where it first starts in the hill and comes out of the hill right at the road crossing about six feet before you get to the road crossing. . . . I was at the scene of the accident last week. The tree tops are not now like they were at the time of the injury. They are burned up."

Wendell Griffin testified, in part: "Part of the tops hung over the right of way and part were still in the woods. Those tops had been there thirty or forty days before the accident. The straw was turning brown. The tops extended about half way from the bank to the cut down ground. Q. What effect did those tops have on a man driving down the highway and turning in the dirt road seeing a train approaching from the direction of Plymouth? A. Cut the complete view off of that dirt road. Court: Cut the complete view of the railroad off? A. Yes, sir, till you got pretty close to the track. When you got to the track you could see down the railroad. You would have to get around eighteen or twenty feet, sixteen or eighteen feet of the rail before you could see. Those tops were dense enough that you could not see a train through them and high enough that you couldn't see over them. In addition to the tops the train came through a cut around four or four and a half feet, I should imagine, coming up grade through a cut. Naturally, the lower the train was the less view a man would have above the ground to see. With the pine tops it would make it harder to detect that a train was coming. I know that the point of woods has been burned over since this accident. The tops were there then and they are gone now."

Clarence Wallace testified, in part: "The train and myself both left Jamesville about the same time, not much difference. I could see the smoke all along in open places. I didn't see the train after it crossed Gardner's Creek. I saw the smoke. Q. Have you an opinion satisfactory to yourself about how fast that train was running? A. It was bound to have been running around fifty miles an hour or better. I was running around forty and he had gained on me from Jamesville and was ahead of me. I did not hear it blow. In some places I would be two

or three hundred yards from the train and other places nearer at the bend of the road. I did not hear the train give any signal."

The testimony above set forth was corroborated by many witnesses. The testimony of defendants contradicted that of plaintiff.

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

"1. Was plaintiff injured by the negligence of defendant, as alleged? A. 'Yes.'

"2. Did plaintiff, by his own negligence, contribute to his injuries? A. 'No.'

"3. What damage, if any, is plaintiff entitled to recover? A. '$8,000.'"

The court below rendered judgment on the verdict. The defendants 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.

W. L. Whitley for plaintiff.

Thos. W. Davis, Rodman & Rodman, and Z. V. Norman for defendants.

CLARKSON, J. The Atlantic Coast Line Railroad Company, defendant, states the questions involved as follows: "(1) Is the plaintiff as a matter of law guilty of contributory negligence barring recovery? (2) Is there error in the charge?" We think both questions must be answered against the defendants.

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 below overruled these motions and in this we can see no error.

It is the settled rule of practice and the accepted position in this jurisdiction that, on a motion to nonsuit, the evidence which makes for the plaintiff's claim, and which tends to support his cause of action, whether offered by the plaintiff or elicited from the defendant's witnesses, will be taken and considered in its most favorable light for the plaintiff, and he is entitled to the benefit of every reasonable intendment upon the evidence, and every reasonable inference to be drawn therefrom.

In *Moseley v. R. R.*, 197 N. C., 628 (635-6), it is said: "A serious and troublesome question is continually arising as to how far a court will declare certain conduct of a defendant negligent and certain conduct of a plaintiff contributory negligence and take away the question of negligence and contributory negligence from the jury. The right of

trial by jury should be carefully preserved, and if there is any evidence, more than a scintilla, it is a matter for the jury and not the court."

Plaintiff's evidence was to the effect that defendant railroad neither blew a whistle nor rang a bell on approaching the public crossing where the injury to plaintiff occurred. That the plaintiff Nathaniel Coltrain, before going on the track, stopped fifteen feet from the track, looked both ways and did not see or hear the train. After stopping he started off in low gear, going about five miles an hour. The view of the train was obstructed by pine tops partly lying on the right of way of the railroad, which affected the ability of plaintiff to see the train approaching through a cut. Plaintiff testified: "As I went towards the railroad track I was driving carefully and looking and listening. . . . Q. Could you have heard that train if it had blown or rung a bell? A. Yes, sir." J. H. Coltrain testified: "You practically couldn't see anything until you got right on the track."

In *Pokora v. Wabash Ry. Co.,* 292 U. S., 98, 54 Sup. Court Reporter, 580 (581), *Mr. Justice Cardozo,* delivering the unanimous opinion of the Court, said: "The burden of proof was on the defendant to make out the defense of contributory negligence. *Miller v. Union Pac. R. R.,* 290 U. S., 227, 232, 54 S. Ct., 172, 78 L. Ed., 285. The record does not show in any conclusive way that the train was visible to Pokora while there was still time to stop. . . . In such circumstances the question, we think, was for the jury whether reasonable caution forbade his going forward in reliance on the sense of hearing, unaided by that of sight. No doubt it was his duty to look along the track from his seat, if looking would avail to warn him of the danger. This does not mean, however, that if vision was cut off by obstacles, there was negligence in going on, any more than there would have been in trusting to his ears if vision had been cut off by the darkness of the night. *Cf. Norfolk & W. Ry. v. Holbrook* (C. C. A.), 27 F. (2d), 326. Pokora made his crossing in the daytime, but like the traveler by night he used the faculties available to one in his position. *Johnson v. Seaboard Air Line R. Co.,* 163 N. C., 431, 79 S. E., 690, Ann. Cas., 1915 B, 598; *Parsons v. Syracuse, B. & N. Y. R. Co.,* 205 N. Y., 226, 228, 98 N. E., 331. A jury, but not the court, might say that with faculties thus limited he should have found some other means of assuring himself of safety before venturing to cross."

The *Johnson case, supra,* quoted by *Justice Cardozo,* was written by *Walker, J.,* of this Court, a unanimous opinion. *Mr. Justice Walker* was one of the most careful Justices that ever sat on this Court and had an infinite capacity for painstaking. At pp. 442, 443 and 444, it is said: "As generally pertinent to the case in hand, we may formulate the following rules: (1) Where a railroad track crosses a public highway, both

a traveler and the railroad have equal rights to cross; but the traveler must yield the right of way to the railroad company in the ordinary course of the latter's business. *Duffy v. R. R.*, 144 N. C., 26. (2) While a train has the right of way at a crossing, it is the duty of the engineer to give signals and exercise vigilance in approaching such crossings. *Coleman v. R. R.*, 153 N. C., 322. (3) A railroad company and a traveler on a highway crossing are charged with a mutual duty of keeping a careful lookout for danger; the greater the danger, the greater the care required of both. *R. R. v. Hansbrough's Admx.*, 107 Va., 733. (4) On reaching a railroad crossing, and before attempting to go upon the track, a traveler must use his sense of sight and of hearing to the best of his ability under the existing and surrounding circumstances—he must look and listen in both directions for approaching trains, if not prevented from doing so by the fault of the railroad company, and if he has time to do so; and this should be done before he has taken a position exposing him to peril or has come within the zone of danger, this being required so that his precaution may be effective. *Cooper v. R. R.*, 140 N. C., 209; *Coleman v. R. R.*, 153 N. C., 322; *Wolfe v. R. R.*, 154 N. C., 569, in the last of which cases the rule was applied to an employee charged with the duty of watching a crossing and warning travelers of the approach of trains, and he was required to exercise due care, under the rule of the prudent man, for his own safety by looking and listening for coming trains. (5) The duty of the traveler arising under this rule is not always an absolute one, but may be so qualified by attendant circumstances as to require the issue as to his contributory negligence, by not taking proper measures for his safety, to be submitted to the jury. *Sherrill v. R. R.*, 140 N. C., 255; *Wolfe v. R. R., supra.* (6) If he fails to exercise proper care within the rule stated, it is such negligence as will bar his recovery. *Provided, always,* it is the proximate cause of his injury. *Cooper v. R. R., supra; Strickland v. R. R.*, 150 N. C., 7; *Wolfe v. R. R., supra.* (7) If his view is obstructed or his hearing an approaching train is prevented, and especially if this is done by the fault of the defendant, and the company's servants fail to warn him of its approach, and induced by this failure of duty, which has lulled him into security, he attempts to cross the track and is injured, having used his faculties as best he could, under the circumstances, to ascertain if there is any danger ahead, negligence will not be imputed to him, but to the company, its failure to warn him being regarded as the proximate cause of any injury he received. *Mesic v. R. R.*, 120 N. C., 489; *Osborne v. R. R., supra* (160 N. C., 309). (8) If a traveler is without fault, or if his fault is either excused by some act of the company or is not the proximate cause of his injury, the company having the last clear chance, and if in attempting to cross track on a highway

he is suddenly confronted by a peril, he may without the imputation of negligence adopt such means of extrication as are apparently necessary, and is only held to such measure of care as a man of ordinary prudence would exercise in the same circumstances. *Vallo v. Express Co.,* 14 L. R. A., 745; *Lincoln v. Nichols,* 20 L. R. A., 855; *Crampton v. Ivie Bros.,* 124 N. C., 591, and especially *Douglas v. Railway,* 82 S. C., 71; 3 Elliott on Railroads (2 Ed.), sec. 1173."

The principles set forth in the *Johnson case, supra,* have been consistently followed by this Court. We think the facts in this case are on "all fours" with the case of *Moseley, supra.* Similar cases are: *Lincoln v. R. R.,* 207 N. C., 787; *Preddy v. Britt,* 212 N. C., 719; *White v. R. R., ante,* 79.

The law in all the cases above cited has been so thoroughly gone into recently that we can see no reason for repetition in this cause. We have read the record and learned briefs of the litigants with care; none of the exceptions and assignments of error made by defendants can be sustained.

On the record there is no prejudicial or reversible error.

No error.

STATE OF NORTH CAROLINA EX REL. HUGH P. PRICE, v. WILLIAM G. HONEYCUTT AND AMERICAN INDEMNITY COMPANY.

(Filed 11 October, 1939.)

1. Pleadings § 20—

A demurrer tests the sufficiency of the complaint to state a cause of action, admitting for the purpose the truth of the facts alleged and relevant inferences of fact arising thereon.

2. Sheriffs § 6a: Principal and Surety § 5a—A sheriff, in his official capacity, and his surety are liable for wrongful arrest or for excessive force used in making arrest under color of office.

The complaint in this action against a sheriff in his official capacity and against his surety alleged that plaintiff was permanently injured by the sheriff's use of excessive force in arresting him, and that the arrest was wrongful and unlawful. *Held:* Defendants' demurrer to the complaint should have been overruled, since, even if the terms of the bond "and in all other things well and truly and faithfully execute the said office of sheriff," C. S., 3930, refers solely to the specific duties enumerated and does not impose liability for the wrong alleged, the provision of C. S., 354, extends the liability on the sheriff's general official bond and imposes liability for the wrong alleged committed under color of his office.

3. Principal and Surety § 4—

The provisions of public laws in effect at the time of the execution of an official bond become a part of the contract, since the surety will be presumed to have executed the agreement with knowledge thereof.

PRICE *v.* HONEYCUTT.

APPEAL by plaintiff from *Warlick, J.*, at March-April Term, 1939, of MITCHELL. Reversed.

J. W. Ragland, J. C. B. Ehringhaus, and Charles Aycock Poe for plaintiff, appellant.

McBee & McBee and W. C. Berry for William G. Honeycutt, appellee.

Harkins, Van Winkle & Walton for American Indemnity Company, appellee.

SEAWELL, J. The relator caused this action to be brought for recovery against the sheriff and the American Indemnity Company, surety on his bond, for damages resulting from excessive force used in an attempt to arrest the plaintiff by the said sheriff under color of his office.

The complaint, amongst other more formal matters, sets up that the sheriff, while acting under color of his office, "viciously assaulted, severely wounded and permanently and seriously injured, and arrested the relator herein and imprisoned him in the common jail of said county and there confined him forcibly and against his will, from seven o'clock p.m. until twelve o'clock midnight, or thereabouts, restraining him of his liberty and subjecting him to hardships, privation, humiliation and disgrace." "That said assault was made upon the relator by the said Honeycutt, as aforesaid, with a deadly weapon, to wit, a blackjack, with which the relator was stricken three or four vicious and powerful blows upon his head, one of which was just above his right eye, causing the permanent loss of sight in said right eye, and greatly injuring and damaging him for life; and that said assault upon, and arrest and imprisonment of, the relator as aforesaid was without legal process or color thereof and not in due course of law." It is further alleged that the conduct of Honeycutt was in wanton and reckless disregard of the rights of the relator and wholly without cause or justification in law.

As the allegations of fact in the complaint are admitted by the demurrer, we may assume that the sheriff had given his official bond with his codefendant as surety, and that the said bond was conditioned as required by law, approved, accepted, and filed.

The bond referred to is that required by C. S., 3930, commonly known as the process bond. "The third bond, for the due execution and return of process, payment of fees and moneys collected, and the faithful execution of his office as sheriff, shall be not more than five thousand dollars, in the discretion of the board of county commissioners, and shall be conditioned as follows:" (here follows a statement of specific requirements) "and in all other things well and truly and faithfully execute the said office of sheriff during his continuance therein . . ."

The defendants demurred to the complaint, the defendant Honeycutt upon the ground that he was sued with respect to his official conduct and no cause of action was stated against him in his official character, the defendant American Surety Company upon the ground that the official bond given by it as surety did not cover the facts alleged or the misconduct of the sheriff, if any, and no liability on its part arose upon said bond. The demurrer was sustained and plaintiff appealed.

The court is called upon to answer the single question: Did the facts alleged in the complaint, assuming them to be true, raise a liability upon the sheriff's bond? There are other questions that may help to its answer.

When are the duties of that office well and truly and faithfully performed? Does the public policy to which we have referred go no further than to satisfy some aggrieved person interested in the service of process or defrauded of his moneys? Does it paramount the rights of society merely and not reciprocally the rights of its members? To what extent may the language required by the law to be put into the sheriff's bond be interpreted as reflecting a broader public policy—a more equitable exercise of public power? In the exercise of this power, does the sheriff owe no official duty under his bond except to those who have instigated his action—none to those who are on the receiving end and who are dealt with under color of his office?

The factual situation in a number of cases cited by defendant, where official bonds have not been considered under the given circumstances sufficient to cover wrongful acts of the sheriff, may be distinguished from that in the case at bar.

While it is true that the opinion in *Davis v. Moore,* 215 N. C., 449, brings forward many of the old cases, pertinent of course to the subject, it will be found that these cases did not cover the exact question presented here, and the inferences of law should not now be taken out of their setting. In *Davis v. Moore, supra,* which is concerned with the negligent act of a deputy in closing the door upon a prisoner in jail and injuring his hand, the court properly declined to hold the incident to be covered by the sheriff's bond.

Crumpler v. Governor, 12 N. C., 52, was concerned with a proceeding on the sheriff's bond for the collection of certain taxes. The gist of that opinion was that the particular taxes sued for could not be recovered under the bond on which summary judgment was entered, without resort to the general condition, which was not required by law to be inserted, that the sheriff shall "in all things well and truly and faithfully execute the said office," which was held to refer only to the duties listed. Since the specific provisions of the various bonds at that time required to be given provided for the security of different taxes, the court held the bond not liable under this general provision.

Governor v. Matlock, 12 N. C., 214, deals with a similar situation, holding that the county tax for which a bond had been required by law could not be recovered under this general clause in the sheriff's general official bond required by the Act of 1777.

In *Jones v. Montfort,* 20 N. C., 69, the opinion written by *Gaston, J.,* it is held that the concluding general clause in the sheriff's bond, relating to his duties, could not be held to "extend to the fiscal duties of the office."

Boger v. Bradshaw, 32 N. C., 229, also held that the clause in the sheriff's official bond relating to his general duties did not extend to the public and county taxes.

In *Sutton v. Williams,* 199 N. C., 546, the sheriff had been sued upon his bond for the negligent acts of a prisoner which he had suffered to escape. The opinion does consider the cases above mentioned and construed them as covering the facts in that case; but approval of those cases was not necessary to a decision in the case then under consideration, since the injury complained of could not in any event be considered as a natural and probable consequence of the dereliction of duty attributed to the sheriff, and the opinion adds nothing to the strength of the position by the defendant.

In *Midgett v. Nelson,* 214 N. C., 396, the bond sued upon simply stipulated that the surety company "does hereby agree to indemnify the State of North Carolina . . . against the loss of money or other personal property through the failure of any of the persons . . . named in the schedule forming a part of this bond . . . *faithfully to discharge the duties of their respective offices or employments as described in such schedule,* and honestly to account for all money or other personal property that may come into their respective hands by virtue of said offices or employments," etc. It is noted in the opinion that the bond was not "conditioned," as required by C. S., 1870, "for the faithful performance" of the duties of Assistant Fisheries Commissioner. The suit was by a person claiming liability for his false arrest. The bond was construed as a bond of indemnity to the State, and not available to the plaintiff. It has no bearing upon the case at bar.

We are not inadvertent to the construction put upon similar clauses in the sheriff's general bond in the earlier cases cited, to the effect that the general statement "and shall in all other things well and truly and faithfully" perform the duties of his office, must be restrained to the duties specially listed.

In *Jones v. Montfort,* 20 N. C., 69, *per Gaston, J.,* the Court rather generously varies the statement of this holding in referring to *Governor v. Matlock, supra.* "The decision then made was in conformity to the principle before established in the cases of *Crumpler v. The Governor,*

1 Dev., 52, and *The Governor v. Barr,* 1 Dev., 65, that the general words in the conclusion of the condition shall be restricted by the preceding particular words, *to duties of a like kind with those specified.*" In fact, *Crumpler v. Governor, supra,* and *Governor v. Matlock, supra,* and cases following closely this principle, regard the general statement as referring *only* to the previously listed duties, and as adding nothing whatever to the obligation of the bond. It is singular that in most of these decisions the significant word "other" is not mentioned at all, nor is any weight given to its obvious effect in recognizing that the sheriff has duties "other" than those specifically listed.

It is easy to see why such a general statement would not be expected to cover fiscal duties of the sheriff, as to some of which, as noted in the *Matlock case, supra,* and the *Crumpler case, supra,* he was required to give other security, but we fail to understand why the clause can be regarded as a mere cadence to a period or, to use a homely illustration, a varnish to the job.

Further discussion along this line, however, may not be important, since we are satisfied that the Legislature has extended the liability on the sheriff's general official bond beyond this narrow restriction, by a statute which parallels the general clause we are considering. C. S., 354, on official bonds, provides: "Every person injured by the neglect, misconduct, or misbehavior in office of any . . . sheriff . . . or other officer, may institute a suit or suits against said officer or any of them and their sureties upon their respective bonds for the due performance of their duties in office in the name of the State, without any assignment thereof . . . and every such officer and the sureties on his official bonds shall be liable to the person injured for all acts done by said officer by virtue or under color of his office." The defendant surety presumably made its contract with a knowledge of this public law, and it entered into the contract. *Hood, Comr. of Banks, v. Simpson,* 206 N. C., 748, 175 S. E., 193; *Bateman v. Sterrett,* 201 N. C., 59, 159 S. E., 201; *Steele v. Insurance Co.,* 196 N. C., 408, 145 S. E., 787, 61 A. L. R., 821.

In *Warren v. Boyd,* 120 N. C., 56, 26 S. E., 700, this statute was held to create or declare a liability on the sheriff's official bond for a false arrest.

In *Kivett v. Young,* 106 N. C., 567, 569, construing a similar condition in the bond of the register of deeds, the Court said the security of the bond was not confined to the specially listed duties, but that this statute enlarges the scope and purpose of official bonds in accord with sound policy to cover other duties. The contention here advanced by the defendant was made there, and the Court said: "The learned counsel for the appellant contends in his cogent brief that the condition of the

bond of the defendants sued upon is such as that so prescribed, and that this Court has repeatedly decided that the duty of the register embraced by it is confined to 'the safekeeping of the books and records' of his office, and that the general words, 'and for the faithful discharge of the duties of his office,' have reference to, and only to, such duty, and not to other general duties. *This Court did, in the past, so interpret the statute and like conditions in other classes of official bonds.* . . . It is singular that the clause last recited, notwithstanding a known evil to be remedied, was not enacted until 1883. It first appeared as part of The Code. So that now official bonds and the conditions of them embrace and extend to all acts done by virtue or under color of office of the officer giving the bond." The Court observes pertinently: "There were no adequate reasons why the conditions of official bonds should not extend to and embrace all the official duties of the office, and there were serious ones of justice and policy why they should." See 57 C. J., 1014, footnote 61 (a).

Upon review of these authorities we do not think that the doctrine *stare decisis,* if it applies at all, is involved to such an extent as to prevent the Court in applying to the case sound and equitable principles of law. We feel that if a departure has been made from these principles it grew out of the unnecessary application of a doubtful rule of interpretation in the earlier cases, an impropriety evidently perceived by *Gaston, J.,* in writing *Jones v. Montfort, supra,* since even thus early *stare decisis* is suggested as a reason for following the precedent. No doubt C. S., 354, was enacted to put into effect a broader public policy.

The general rule in other jurisdictions is that the sureties on the official bond of a sheriff are liable for a wrongful arrest and imprisonment under color of his office (57 C. J., 1042), for an assault and battery, while in the prosecution of an arrest, or for excessive force used therein. *Cambridge v. Foster,* 195 Mass., 411, 81 N. E., 278; *Branch v. Guinn* (Texas Civ. A.), 242 S. W., 482; *Deason v. Gray,* 192 Ala., 611, 69 S. E., 15; *Copeland v. Dunehoo,* 36 Ga. A., 817, 138 S. E., 267; *Greenberg v. People,* 225 Ill., 174, 80 N. E., 100; *Cash v. Peo.,* 32 Ill. A., 250; *State v. Walford,* 11 Ind. Appeals, 392, 39 N. E., 162. In some of these cases different phraseology is employed in the bonds, but the principles drawn from the cases are applicable.

The theory that when the sheriff acts viciously, immoderately and with excessive force in making an arrest he becomes *ipso facto* accountable to an injured person in his private capacity only, is not a reasonable one, and imports an official immunity that is not ordinarily extended to a ministerial officer. It would be a poor law that would permit the sheriff, *in medias res,* to throw away his badge and ply his billy with deadly effect.

The law is never more definitely on trial than it is when it comes in contact with the public in its execution. To preserve the respect the people have for it as an instrument of justice, and to appease the spirit of just resentment against oppression, which often flares into rebellion, the execution of law, while not a matter of debate between the sheriff and an offender, should not be attended with unnecessary harshness. It is true that officers of the law must be protected in their attempts to execute it, and great consideration is given them by the courts in matters of arrest. Questions of excessive force must be delicately handled and the conduct of officers cannot, at times, be weighed in golden scales. Evidently the line must be drawn somewhere; but it cannot, with justice, be staked out by a sudden shift in the legal relation of the parties, a discontinuance of official character at the moment the arresting officer begins to violate his duty and inflict injury under color of his office. The injured party was not on equal terms from the beginning. He was approached under color of an authority which he was bound to respect, and by an officer equipped with physical means sufficient to accomplish his purposes, under the assumption that they are, and will remain, lawful. He must rely on the restraint which the law throws around the arresting officer at the same time it clothes him with power, and upon the guaranty provided by law that official duty shall not be disregarded or the delegated power abused.

If not the wording of the bond, then most certainly the force of the statute, brings him within this protection. The sheriff will not be permitted to act under color of his office down to the point where he is remiss in his duties, then shed his official character and escape into the first person singular, to the relief of his surety.

The judgment sustaining the demurrer is

Reversed.

EUGENE BAXTER, EMPLOYEE, v. W. H. ARTHUR COMPANY, EMPLOYER; AND HARTFORD ACCIDENT & INDEMNITY COMPANY, CARRIER.

(Filed 11 October, 1939.)

1. Master and Servant § 41a—Injured employee may be awarded compensation for bodily disfigurement and for partial loss of use of member.

Under the provision of the Workmen's Compensation Act, Michie's Code, sec. 8081 (mm) (t), the Industrial Commission has authority to award compensation for facial and bodily disfigurement, in this case resulting from scar tissue from burns, and to award compensation for partial loss of the use of the arm resulting from such scar tissue, when such awards

are supported by competent evidence, provided the award for the disfigurement does not exceed the $2,500 maximum provided by the act, and provided further that the aggregate of all awards does not exceed the $6,000 maximum prescribed by the act, and *held further*, in this case, the expert testimony and the view of the body of the injured employee by the Commission was sufficient to support the awards.

2. Master and Servant § 55d—

The findings of fact by the Industrial Commission are conclusive on the courts when supported by any competent evidence.

3. Master and Servant §§ 36, 41a; Constitutional Law § 4c—Provision of Compensation Act authorizing award for bodily disfigurement held constitutional.

The provision of the North Carolina Workmen's Compensation Act authorizing the Industrial Commission to award compensation for bodily disfigurement, Michie's Code, sec. 8081 (mm) (t), is sufficiently certain and prescribes the standard for the computation of an award thereunder with sufficient definiteness, and the provision is valid and constitutional and not void as a delegation of legislative power in contravention of Art. I, sec. 8, of the Constitution of North Carolina.

APPEAL by defendants from *Pless, Jr., J.*, at April Term, 1939, of BUNCOMBE. Affirmed.

This was an appeal from an award of the North Carolina Industrial Commission, dated 15 February, 1939, in which the plaintiff was awarded twenty per cent loss of use of right arm and the sum of $1,000 for disfigurement on account of an accident occurring 1 June, 1938. The case was originally accepted by the defendants as compensable, and plaintiff was paid for temporary total disability pursuant to agreement appearing in the record until 23 November, 1938. On 14 November, 1938, plaintiff requested a hearing and the North Carolina Industrial Commission set the same to be heard on 14 December, 1938, to determine what additional compensation, if any, was due claimant. The hearing was held by the Hearing Commissioner, Hon. J. Dewey Dorsett, and the claimant was present in person and his body, extremities and head were exhibited to the Trial Commissioner. Commissioner Dorsett thereafter filed opinion on 21 December, 1938, and entered notice of formal award on 22 December, 1938. Thereafter the defendants appealed for review to the Full Commission, and the claimant was exhibited to the Full Commission, and the Full Commission rendered its opinion, dated 10 February, 1939, and thereafter entered notice of formal award, dated 15 February, 1939, all of which appears in the record. Thereafter the defendants duly appealed to the Superior Court.

The case was heard before his Honor, J. Will Pless, Jr., Judge presiding at the regular April, 1939, Term of the Superior Court of Buncombe County, and the award of the Full Commission affirming the

award of the Hearing Commissioner, J. Dewey Dorsett, awarding 20% loss of use of right arm and $1,000 for serious bodily disfigurement, was affirmed as appears in the record. 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.

R. M. Wells and C. E. Blackstock for plaintiff.
Williams & Cocke for defendants.

CLARKSON, J. The opinion of the Full Commission, which the court below affirmed, is as follows: "This was an appeal by the defendants in apt time, to the Full Commission from an award of Commissioner Dorsett in which the Hearing Commissioner awarded the claimant 20 per cent partial permanent loss of use of the right arm, and also allowed him the sum of $1,000 for serious facial and bodily disfigurement. The Full Commission viewed the scars on the body of the claimant, who was a young colored man, and finds that he was seriously burned while carrying a bucket of hot tar; the tar splashing over his face, forehead, ears, hands, arms, left side of his chest and abdomen, and as the result of the burn he has been seriously disfigured; the scarring being white in color in contrast to his black skin, and the Commission feels that the findings of fact, conclusions of law of the Hearing Commissioner was amply justified by the facts in the case. Therefore, the Full Commission finds no reason to disturb the findings of fact, conclusions of law and award of the Hearing Commissioner, but ratifies and affirms the same. With respect to the award of disfigurement to the right arm in which a 20 per cent partial permanent functional loss of use of the right arm was awarded, the Full Commission and the Hearing Commissioner took into consideration the fact that the scarring of this arm was very extensive and entirely out of proportion to the 20 per cent functional loss, and for this reason the Commission considered the scarring of the right arm in addition to the functional loss of use along with the scarring on the rest of the body as heretofore indicated in arriving at the sum of $1,000 for disfigurement."

N. C. Code, 1935 (Michie), sec. 8081 (mm), in part is as follows: "(t) Total loss of use of a member or loss of vision of an eye shall be considered as equivalent to the loss of such member or eye. The compensation for partial loss of or for partial loss of use of a member or for partial loss of vision of an eye shall be such proportion of the payments above provided for total loss as such partial loss bears to total loss. Loss of both arms, hands, legs, or vision in both eyes shall be deemed permanent total disability, and shall be compensated under sec. 8081 (k).

In case of serious facial or head disfigurement, the Industrial Commission shall award proper and equitable compensation not to exceed $2,500. The weekly compensation payments referred to in this section shall all be subject to the same limitations as to maximum and minimum as set out in sec. 8081 (kk); provided, however, that the foregoing schedule of compensation shall not be deemed to apply and compensate for serious disfigurement resulting from any injury to any employee received while in and about the duties of his employment. And provided, further, that the Industrial Commission created by this article shall have power and authority to make and award a reasonable compensation for any serious bodily disfigurement received by any employee within the meaning of this article, not to exceed twenty-five hundred ($2,500) dollars. And provided, further, that disfigurement shall also include the loss or serious or permanent injury of any member or organ of the body for which no compensation is payable under the schedule of specific injuries set forth in this section."

Dr. George A. Mears testified, in part: "I examined Eugene Baxter immediately after this accident on June 1, 1938. The plaintiff is going to have some permanent disfigurement in both upper extremities, I believe it is the left. He has no permanent disability in his right arm at all and *in his left arm* he is going to have some permanent disability. . . . I would say to sum the thing up, he has approximately 20% permanent partial disability of the arm at this time."

Dr. Mears was corroborated by Dr. A. T. Hipps, who testified: "On the *left arm* as the result he has got scar tissue in and around these tendons here which constricts the muscle power. There is no nerve injury but he has got scar tissue there which prevents those fingers from closing. He has got scar tissue, prevents that. Scar tissue in a burn gets worse as time goes on. This man has not reached his maximum disability yet and he may not reach it for a year yet."

It will be noted that the Commission awarded compensation "20% loss of use of *right arm.*" From all the evidence it should have been *left arm.* The learned attorney for defendant frankly and rightly admitted this error of the Commission and agreed it should be corrected to be the *left arm,* but contended there was no sufficient evidence to support this finding of fact by the Commission. From the testimony of the physicians, the defendants' contention cannot be sustained.

It was held in the case of *Arp v. Wood & Co.,* 207 N. C., 41, that in the case of facial head disfigurement, award could be made in the amount of $2,500 for such disfigurement and, at the same time, additional awards could be made for temporary total disability, 40% loss of visibility in right eye, and total loss of left eye. In the instant case the

Commission included "serious facial and bodily disfigurement." The statute provides that in the case of serious facial or head disfigurement that the Commission "shall award proper and adequate compensation not to exceed $2,500"; and the statute further provides that in the case of "serious bodily disfigurement" the Commission "shall have power and authority to make and award a reasonable compensation . . . not to exceed $2,500." It seems, therefore, that the Commission has full power and authority, based on any competent evidence, to grant an award for facial, head or bodily disfigurement in the amount not to exceed $2,500, provided the aggregate of all awards shall not exceed $6,000. In the instant case there was found to be "bodily disfigurement."

The defendants further contend that there is no sufficient evidence and findings of fact in the case to sustain an award for disfigurement, and that the provision under which an award for bodily disfigurement is made is unconstitutional, as no rule of action is prescribed in the statute. Neither one of these contentions can be sustained.

In *Lassiter v. Telephone Co.,* 215 N. C., 227 (230), we find: "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."

We think the evidence ample to support the findings of fact by the Commission. In the opinion is the following: "The Full Commission viewed the scars on the body of the claimant, who was a young colored man, and finds that he was seriously burned while carrying a bucket of hot tar, the tar splashing over his face, forehead, ears, hands, arms, left side and his chest and abdomen, and as the result of the burn he has been seriously disfigured; the scarring being white in color in contrast to his black skin."

The evidence was the best to be had—a view of the body of plaintiff by the Full Commission. Doubting Thomas would not believe until he saw for himself.

"Then said He to Thomas, Reach hither thy finger, and behold my hands; and reach hither thy hand, and thrust it into my side; and be not faithless, but believing. And Thomas answered and said unto him, My Lord and my God."—(St. John 20:27, 28.)

In *Heavner v. Lincolnton,* 202 N. C., 400 (402), it is said: "This Court, in many decisions, has recognized the applicability of the act, and the power of the Commission to administer it, within the boundaries of the act. While it is technically true that this Court has not heretofore considered the constitutional questions involved in this appeal, it

has approved expressly and unequivocally the liberal and beneficent provisions thereof. Indeed, all the major objections to the constitutionality of compensation acts have been considered by the Supreme Court of the United States and many other courts throughout the country (citing a wealth of authorities). . . . The courts and text writers have declared that compensation legislation falls within the exercise of the police power of sovereignty, and for this reason constitutional objections have not ordinarily prevailed. This Court has never held that the Industrial Commission is a court in the strict sense of that term. Indeed, it has been expressly declared that the Industrial Commission is primarily an administrative agency of the State, charged with the duty of administering the Compensation Act, and, as an incident to such administration, it performs duties 'which are judicial in their nature.' *In re Hayes,* 200 N. C., 133, 156 S. E., 791. In disposing of the questions presented, it is deemed unnecessary to pyramid quotations from the authorities. All legitimate arguments, together with the authorities supporting the various aspects of constitutional inhibition, are contained and set forth at length in the cases determined by the Supreme Court of the United States, *supra.*"

1 Schneider, Workmen's Compensation Law, 2nd Ed., pp. 11, 13, is as follows: "The Supreme Court of the United States has declared constitutional both the compulsory and elective form of act. There are only three states in which the first law enacted was held unconstitutional. Since these decisions both state and federal courts have uniformly sustained the general constitutional questions involved in the Workmen's Compensation Acts, though in some states minor provisions of the acts have been held unconstitutional."

We cannot hold, as contended by defendants, that the "Compensation for bodily disfigurement is void for being unconstitutional as it is a void delegation of legislative power and in controvention further of N. C. Constitution, Art. I, sec. 8, and is incomplete legislation. *Connally v. General Construction Co.,* 269 U. S., 385, 70 L. Ed., 322; *Vallat v. Radium Dial Co.,* 196 N. E., 485 (Illinois Supreme Court, 1935); 99 A. L. R., 607."

The above cases cited we think inapplicable to the facts in this cause. We think the statute is not so vague, or sets up an unintelligible standard of conduct, as to render it void.

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

Affirmed.

ROBERT HOWARD BARRON v. MARSHALL CLAY CAIN.

(Filed 11 October, 1939.)

1. Pleadings § 3a—

A complaint should state in a plain and concise manner the material and essential facts constituting plaintiff's cause of action, C. S., 506 (2), so as to disclose the issuable facts determinative of plaintiff's right to relief, and should not contain collateral, irrelevant, redundant or evidential matter.

2. Same: Damages § 10—

In an action for damages plaintiff should allege, when necessary, matter in aggravation of damages.

3. Same—

Where there are conditions precedent to plaintiff's right to recovery, he should allege performance or facts excusing nonperformance.

4. Same: Quasi-Contracts § 2—

Where plaintiff relies upon an implied contract, he should state the circumstances giving rise to the implied agreement.

5. Wills § 6—

While care of a person during his lifetime is a prerequisite to a recovery on an alleged agreement to pay plaintiff for such care, when the person for whom the services are rendered breaches the contract by making performance impossible, plaintiff is discharged from further performance and may sue for breach of the agreement and recover the reasonable value of the services rendered prior to defendant's breach.

6. Pleadings § 29: Wills § 5—Allegations held proper as excusing want of complete performance by plaintiff and as being matter in aggravation of damages.

In this action to recover for breach of an agreement under which plaintiff was to care for defendant during his lifetime, plaintiff alleged that defendant rendered complete performance on the part of plaintiff impossible by running plaintiff away from the premises with a deadly weapon, and that during the time plaintiff did care for defendant, defendant was drunken and abusive. *Held:* Allegations of the facts rendering complete performance on the part of plaintiff impossible were competent to excuse want of complete performance by plaintiff, and the allegations as to defendant's drunkenness and abuse of plaintiff were competent in aggravation of damages upon the question of the reasonable value of services rendered.

7. Pleadings § 29—

The fact that allegations might be put in more orderly sequence and might be more concisely stated is insufficient to support defendant's motion to strike such allegations from the complaint.

8. Appeal and Error § 50—

When appellee's brief contains a great deal of matter wholly irrelevant to the question presented by the appeal, the Supreme Court, in affirming the judgment of the lower court, will direct the clerk, in taxing the cost, to include in the cost taxed against appellant only an equitable part of the cost of printing appellee's brief, in this case one-half.

APPEAL by defendant from *Ervin, Special Judge,* at April Special Term, 1939, of YADKIN. Affirmed.

Motion in the cause to strike portions of the complaint, as a matter of right, made before the time for answering expired.

The defendant moved to strike paragraphs 2, 5, 6 and 7 of the plaintiff's complaint. When the motion came on for hearing the court allowed the motion as to portions of paragraphs 2 and 5, but declined to strike the remainder of said paragraphs or to strike any part of paragraphs 6 and 7. Defendant excepted and appealed.

Fred M. Parrish and Walter E. Johnston for plaintiff, appellee.
Grant & Grant for defendant, appellant.

BARNHILL, J. The purpose of the complaint is to state, in a plain and concise manner, plaintiff's cause of action so as to disclose the issuable facts and to give the defendant notice of the relief to which the plaintiff supposes himself entitled, and should contain all the facts which the defendant should know to make his defense and which the court should know in order to grant the desired relief. McIntosh, p. 87. It must contain a plain and concise statement of the facts constituting a cause of action without unnecessary repetition. C. S., 506 (2). The material, essential or ultimate facts upon which the right of action is based, and not collateral or evidential facts which are only to be used to establish the ultimate facts, should be stated. The plaintiff is to obtain relief only according to the allegations in his complaint and, therefore, he should allege all of the material facts, but not the evidence upon which he relies to prove them. Irrelevant, redundant and evidential matter should be omitted and unnecessary repetition should be avoided. In actions for damages, when necessary, the plaintiff should allege facts by way of aggravation to increase the damages. McIntosh, p. 389. If there are conditions precedent to plaintiff's right of recovery to be performed by him, such performance should be alleged or sufficient reasons given for failure to perform. If the plaintiff relies upon an implied contract or agreement, the circumstances giving rise to such implied agreement should be stated.

Does plaintiff's complaint, as now constituted, offend against these requirements? To decide this question we must examine the cause of

action the plaintiff undertakes to state and determine whether the allegations in paragraphs 5, 6 and 7 of the complaint are a material part thereof.

The plaintiff sets forth that the defendant, a man 85 years of age, grand-uncle of the plaintiff, in 1932 induced the plaintiff to go and live with and care for him during his life, upon an understanding that plaintiff, at the death of the defendant, would be well paid for his services; that the plaintiff, pursuant thereto, did move to the home of the defendant and live with him until September, 1938, rendering services for the comfort, welfare and best interest of the defendant; that his failure to continue to live with the defendant during his life was due to no fault of the plaintiff but was caused by the wrongful conduct of the defendant in assaulting the plaintiff with a deadly weapon, running him off of the premises and threatening to do him great bodily harm if he returned; and that he has been substantially damaged thereby.

As the plaintiff alleges a contractual agreement to live with and render service to the defendant for and during the natural life of the defendant, before he can recover it is necessary for him to allege in his complaint, and prove at the hearing, that his failure to do so was caused by the wrongful acts of the defendant. Although the performance by the plaintiff of the whole of his promise may be a condition precedent to the liability of the defendant to perform on his part, still the plaintiff's failure to perform will not discharge the defendant if the latter prevented the performance. In such case, the plaintiff is discharged from further performance and may recover damages for the breach, or recover on the *quantum meruit* for his part performance. Clark on Contracts (Ed. 1904), p. 468. The law implies a promise by the party to pay for what has been thus received and allows him to recover any damage he has sustained by reason of the breach, for this is exact justice. *McCurry v. Purgason,* 170 N. C., 463; *Hayman v. Davis,* 182 N. C., 563.

In paragraph No. 6, the plaintiff alleges that during the seven years he lived with the defendant the defendant was constantly under the influence of liquor and that notwithstanding the indignities, lonesomeness and inconvenience to which the plaintiff was subjected by reason thereof, he remained with and was at all times ready, able and willing to serve the defendant until his death in compliance with the understanding between him and the defendant. In paragraph No. 5 the plaintiff alleges that while the defendant was under the influence of liquor he was disagreeable and subjected the plaintiff to abuse and every manner of indignity, notwithstanding which, the plaintiff, in compliance with his agreement, continued to live with and serve the defendant. These allegations constitute allegations in aggravation of damages. The

plaintiff has a right to allege, and to attempt to prove, that by reason of the condition, temperament and attitude of the defendant, services rendered to him were of much greater value than similar services rendered to a sober and well-disposed person.

In paragraph No. 7, plaintiff alleges that the defendant assaulted him with a deadly weapon and ordered him to leave, and sets out the essential facts in relation thereto. He further alleges that he was forced to leave the home of the defendant for fear of bodily harm. These allegations are essential to the plaintiff's cause of action for the purpose of disclosing the alleged reason why the plaintiff has not complied, on his part, with the alleged agreement. Having alleged an agreement to serve defendant during his lifetime and having admitted in his complaint his noncompliance, it is essential to his alleged cause of action that he set forth the wrongful conduct of defendant which caused the breach through no fault of the plaintiff.

The allegations contained in these paragraphs of the complaint might be put in a more orderly sequence and could be more concisely stated, yet this is not sufficient cause for striking them from the complaint.

The plaintiff in his brief states: "The only record before this Court is the complaint and this Court has no knowledge of the evidence in the possession of the plaintiff and which he thinks pertinent to establish a cause of action alleged in the complaint." This is followed by long and detailed recital of "facts" upon which the plaintiff relies to establish his cause of action. The competency of many of the so-called facts is not conceded. In any event, they are wholly irrelevant to the question here presented. We are of the opinion, therefore, that the defendant should not be required to pay for that portion of the brief containing such irrelevant matter. In taxing the costs against the defendant, the clerk will include only one-half of the cost of printing plaintiff's brief.

The judgment below is

Affirmed.

IN THE MATTER OF THE WILL OF GUS COFFIELD.

(Filed 11 October, 1939.)

1. Wills § 14—

A will is revoked by marriage, Michie's Code, 4134.

2. Wills § 15—

A will which has been revoked by the marriage of the testator is revived and republished by a codicil properly executed subsequent to the marriage which refers to the prior will and expresses the intention of the testator that the will should be effective except as altered by the codicil.

3. Wills § 24—

The holding of the trial court that there was no sufficient evidence of undue influence to be submitted to the jury, *held* correct.

4. Wills § 27—

The verdict of the jury on conflicting evidence on the question of the mental capacity of testator to execute the instrument *held* conclusive.

5. Wills § 28—

The allowance of attorney fees to counsel for the propounders is in the sound discretion of the trial court. Michie's Code, 1244, as amended by chapter 143, Public Laws of 1937.

APPEAL from *Grady, Emergency Judge,* and a jury, at April Special Term, 1939, of MARTIN. No error.

This is a controversy over a caveat to the will of Gus Coffield. On 17 May, 1938, Gus Coffield executed a will. On 18 May, 1938, he married Fannie Coffield. On 20 February, 1939, Gus Coffield executed a codicil to his prior will ratifying and confirming his will dated 17 May, 1938, except as changed in the codicil. In the codicil Gus Coffield devised certain realty to his wife, Fannie Coffield. At the trial of the action it was not contended that the first will was not properly executed. However, it was contended by the caveators that the codicil was not a proper republication of the first will, that Gus Coffield was not mentally competent to execute a will at the time of the execution of the codicil, and that the execution of said codicil was procured by fraud and undue influence.

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

"1. Was the paper writing propounded for probate executed by Gus Coffield in the manner and under the formality required by statute? Ans.: 'Yes.'

"2. At the time of the execution of said paper writing on 20 February, 1939, did Gus Coffield have sufficient mental capacity to make a valid and binding will? Ans.: 'Yes.'

"3. Was the execution of said paper writing procured through undue influence, as alleged in the caveat? Ans.: 'No.'

"4. Is said paper writing, and each and every part thereof, the last will and testament of Gus Coffield, deceased? Ans.: 'Yes.'"

The court below rendered judgment on the verdict sustaining the will. The court further rendered the following judgment: "In the above entitled action, it appearing to the court that Elbert S. Peel, Hugh G. Horton and J. C. Smith, attorneys for Paul D. Roberson, represented the propounders of the last will and testament of Gus Coffield and performed valuable services in that connection, and acted as counsel for said

estate in other matters pertaining thereto: Now, therefore, it is ordered and adjudged that said Elbert S. Peel, Hugh G. Horton and J. C. Smith be allowed the sum of $750.00 as fees in said capacity up until the signing of this judgment, same to be paid by Paul D. Roberson, executor of the last will and testament of Gus Coffield. Henry A. Grady, Judge Presiding."

The caveators made numerous exceptions and assignments of error and appealed to the Supreme Court. The material assignments of error and necessary facts will be set forth in the opinion.

Peel & Manning, J. C. Smith, and Hugh G. Horton for propounders.
P. H. Bell and Coburn & Coburn for caveators.

CLARKSON, J. On 17 May, 1938, Gus Coffield executed his will. On 18 May, he was married to Fannie Coffield, who survives him. A will is revoked by marriage. N. C. Code 1935 (Michie), sec. 4134.

On 20 February, 1939, he executed a paper writing. In it is the following: "I, Gus Coffield, of said County and State, make this codicil to my last will and testament published by me, and dated the 17th day of May, 1938, which I ratify and confirm, except as the same shall be changed hereby. Whereas, I have changed my mind as to Item #5 thereof, I hereby make the following devises and bequeaths," etc.

It is contended by the caveators that the paper writing was not a will and the will of 17 May, 1938, was revoked by statute and there was no valid reëxecution and therefore the paper writing purporting to be a will was null and void. We cannot so hold under the authorities in this State, which we think are borne out by reason and logic.

In *Murray v. Oliver,* 41 N. C., 56 (57), it is written: "Whatever doubt was once entertained, it is now unquestionably settled, that adding a codicil is a republication, and the codicil brings the will to it, and makes it a will from the date of the codicil."

In *Sawyer v. Sawyer,* 52 N. C., 134 (139-140), it is said: "So, our conclusion is that a holograph will revoked by the marriage of the testator, can only be revived and republished by a written instrument setting forth his intention, duly attested by two witnesses, or written by the testator himself, and found among his valuable papers or handed to one for safe-keeping; as if he makes an entry to that effect on the holograph, or strikes out the date and inserts a new one, or adds a codicil and puts the paper back among his valuable papers, or deposits it for safe-keeping, so as to meet all the requirements of the statute." *Watson v. Hinson,* 162 N. C., 72 (80); *In re Will of Margaret Deyton,* 177 N. C., 494.

We think the words used in the codicil incorporates and revives the will except in so far as it is changed by the codicil. No question was raised in the court below as to the proper execution of the first will. In fact, in the charge of the court below it is stated, to which no objection was made: "I do not understand that there is any question about the execution of this first paper writing."

Caveators contend that the paper-writing, or codicil, was null and void (1) that Gus Coffield was not mentally competent to execute a will; (2) the execution of the codicil was procured by fraud and undue influence.

As to the third issue, in regard to undue influence, the court below held that there was no evidence to go to the jury on that question. From a careful review of the record, we think the court below correct.

The battleground was the second issue: "At the time of the execution of said paper writing on 20 February, 1939, did Gus Coffield have sufficient mental capacity to make a valid and binding will?" The jury answered "Yes." The evidence on this issue was conflicting and it was purely a question of fact for the jury. We can see no error in the trial and the charge of the court below on this issue. The charge does not impinge C. S., 564, nor is the case of *S. v. Rinehart,* 209 N. C., 152, applicable. The testimony of David Grimes, a registered druggist, was competent to corroborate Dr. Vernon Ward—the probative force was for the jury. We think the prayer for instructions requested by the caveators was substantially given in the charge.

The court below allowed counsel for propounders the sum of $750.00 as attorneys' fees. *Wells v. Odum,* 207 N. C., 226, holds that counsel fees may be awarded to attorneys for propounders. Sec. 1244, Michie's Code, *supra,* is amended by Laws of 1937, ch. 143. 1937 Supplement to 1935 Code reads: "The word 'costs' as the same appears and is used in this section shall be construed to include reasonable attorneys' fees in such amount as the court shall in its discretion determine and allow." *In re Will of Slade,* 214 N. C., p. 361, allowed fees to attorneys for unsuccessful caveators. The statute puts the allowance of attorneys in the discretion of the court below. The court heard all the facts connected with the services of the attorneys, and we see no reason to disturb the judgment.

We see no prejudicial or reversible error in the record.

No error.

CARL ROSE AND T. W. ROSE v. MRS. R. G. FRANKLIN.

(Filed 11 October, 1939.)

1. Boundaries § 1—

The construction of a deed as to the effect of the language describing the boundary is a question of law for the court.

2. Boundaries § 4—

The calls in a State grant of lands to a tree on the bank of a non-navigable stream and thence "down the angles of the river to the beginning" makes the river the boundary and extends the call to the middle or thread of the stream opposite the tree and thence down the thread or middle of the stream to the beginning.

3. Estoppel § 4—Admission of record precludes contention at variance therewith.

Defendant admitted that plaintiffs' title was good as to all lands embraced in the description in plaintiffs' deeds. The calls in plaintiffs' deeds were to a point on the bank of a non-navigable river and thence down the angles of the stream to the beginning. Defendant contended that the rule that such calls took the boundary to the thread of the stream was inapplicable because of defendant's claim under a prior grant embracing the bed of the stream. *Held:* Defendant's contention was precluded by her admission which conceded better title in plaintiffs as to all lands embraced in their deeds.

APPEAL by defendant from *Alley, J.,* at May Term, 1939, of SURRY.

Civil action in ejectment.

Plaintiffs allege that they are the owners in fee simple of a certain tract of land in the town of Elkin, lying west of old river bridge, described in a deed of W. C. Lewis to plaintiffs dated 21 April, 1936, registered 15 May, 1936, in Book 125, page 320, of the deed records of Surry County, North Carolina, in which deed these calls appear: "thence south 22-00 degrees east 90 feet, more or less, to the Yadkin river; thence down the meanders of the river as it meanders 150 feet, more or less, to an iron stake on the west margin of Bridge Street; thence north with west margin of Bridge Street 136.6 feet to the beginning."

Plaintiffs trace their title through, and offer in evidence *mesne* conveyances in connected chain to a deed from Rich Gwynn to Richard R. Gwynn, dated 29 November, 1866, registered 21 June, 1869, in Book 12, page 234, of the records of deeds of Surry County, North Carolina.

As a part of the description in that deed which includes the land described in the said deed from W. C. Lewis to plaintiffs, there appear these calls: "Thence along the road south about 32 degrees east 15 chains to a large burch on the bank of the river below the ferry landing and

mouth of Big Elkin; thence down the angles of the river to the beginning, including 697 acres, more or less."

The call in the deed to plaintiffs "thence down the meanders of the river as it meanders 150 feet more or less" is a part of the call "thence down the angles of the river to the beginning," in the deed from Rich Gwynn to Richard R. Gwynn.

Plaintiffs offered evidence tending to show that they and those under whom they claim title have had adverse possession of the lands so described to the middle or thread of the stream over a long period of years.

It is admitted that the Yadkin River at the point in question is a non-navigable stream. The defendant admits that the plaintiffs have a good and valid title to all the land embraced in the boundaries of the several deeds under which they claim. However, the defendant does not admit that plaintiffs' title extends to the thread or middle of the Yadkin River, for that she claims that the title to the bed of the river remained in the State and was granted by the State in Grant No. 12524 on 5 July, 1894, to R. G. Franklin, from whose heirs at law she received deed. Defendant introduced in evidence record of that grant and of that deed. "Without prejudice to plaintiffs' rights, plaintiffs admit that the description in the grant introduced by the defendant described the bed of the river adjacent to the property owned by the plaintiffs."

Upon these admissions the court below held as a matter of law that the description in the deed to plaintiffs extends to the middle or thread of Yadkin River, and entered judgment declaring the plaintiffs to be the owners in fee simple and entitled to the possession of the lands in question, up to the middle or thread of the Yadkin River.

Defendant appeals to the Supreme Court, and assigns error.

Wm. M. Allen and Hoke F. Henderson for plaintiffs, appellees.
Earl C. James for defendant, appellant.

WINBORNE, J. Appellant presents this question as determinative of this appeal: Did the court below err in holding as a matter of law that the description of the land in the deeds under which plaintiffs claim extends to the middle or thread of the Yadkin River?

With that ruling we are in accord.

Defendant, having admitted that the plaintiffs have a good and valid title to all the lands embraced within the boundaries described in those deeds, and the Yadkin River at the point in question being non-navigable as admitted by all parties, the question involves the construction of what is the boundary. This is a question of law for the court. *Brown v.*

House, 118 N. C., 870, 24 S. E., 786; *Power Co. v. Savage,* 170 N. C., 625, 87 S. E., 629, and numerous other decisions.

In accordance with well settled principle of law, a description of riparian lands by which a line runs to a monument on the bank, and thence with the river, makes the river the boundary. *Sandifer v. Foster,* 2 N. C., 237. The underlying principle has been enunciated in many later decisions of this Court, among which are *Cherry v. Slade,* 7 N. C., 82; *Shultz v. Young,* 25 N. C., 385; *Bowen v. Gaylord,* 122 N. C., 816, 29 S. E., 340; *Power Co. v. Savage, supra.*

In *Sandifer v. Foster, supra,* the last line of a boundary was from a white oak (which stood half a mile from the river), thence along the river to the beginning. The Court held that the river is the boundary.

Likewise, as stated by *Brown, J.,* in *Wall v. Wall,* 142 N. C., 387, 55 S. E., 283, "There is no rule of common law better settled, and more universally adopted in this country, than that which prescribes that a grant of land bounded in terms by a creek or river not navigable carries the land to the grantee *usque ad filum aquae,* to the middle or thread of the stream." *Wilson v. Forbes,* 13 N. C., 30; *Ingram v. Threadgill,* 14 N. C., 61; *Pugh v. Wheeler,* 19 N. C., 50; *Williams v. Buchanan,* 23 N. C., 535; *Rowe v. Lumber Co.,* 128 N. C., 301, 38 S. E., 896; *Rowe v. Lumber Co.,* 133 N. C., 433, 45 S. E., 830; *Dunlap v. Light Co.,* 212 N. C., 814, 195 S. E., 43.

Applying these principles to the facts of the present case, the calls "to a large burch on the bank of the River," "thence down the angles of the river to the beginning" make the river the boundary, and carry the next to last call to the thread or middle of the stream, and thence down the thread or middle of the stream as it meanders to the beginning.

Defendant contends, however, that the principle cannot apply when the bed of the stream has been previously granted—citing *Williams v. Buchanan, supra.* This contention is apparently based upon the theory that plaintiffs have shown no grant from the State, and that she has shown a grant to her predecessor in title. But, in this contention, appellant loses sight of the fact that title of plaintiffs is admitted to be good and valid to whatever land the description in their deeds covers. This admission presupposes that plaintiffs have an older paper title originating in a grant from the State, or that they have had adverse possession with or without color of title for a sufficient length of time to ripen title, not only as against her but as against the State. Otherwise, the title would not be good and valid.

In the judgment below, we find

No error.

ANNIE MAE WILLIAMS AND HUSBAND, H. E. WILLIAMS; ALICE GRAY WHITLEY AND HUSBAND, E. A. WHITLEY; SELMA BAKER AND HUSBAND, F. K. BAKER; T. E. WOLFE AND WIFE, RUTH WOLFE; WILLIE WOLFE, BY HER NEXT FRIEND, W. BLOUNT RODMAN, v. L. S. THOMPSON AND WIFE, DORIS THOMPSON.

(Filed 11 October, 1939.)

1. **Wills § 33d: Trusts § 1a—Precatory words merely expressing the wish of testatrix as to future use of land do not create a trust.**

A devise of a remainder after a life estate to a church to be used by its legal representatives as a parsonage and for no other purpose in order to secure the possession of testatrix' burying ground to the church does not impress a trust upon the land, since the words merely express the wish of the testatrix as to the future use of the land.

2. **Wills § 35b—Devise held to carry fee in remainder and not a devise upon condition subsequent nor upon special limitation.**

A devise of a remainder after a life estate to a church to be used by its legal representatives as a parsonage and for no other purpose in order to secure the possession of testatrix' burying ground to the church *is held* to convey the fee, since the devise cannot be held upon condition subsequent since it does not provide for reëntry or forfeiture for condition broken, nor one upon special limitation, since it does not provide for reversion in the testatrix or her heirs nor for limitation over to any other person.

APPEAL by defendants from *Bone, J.*, Washington Superior Court. Affirmed.

This was a controversy without action to determine the title to land, the subject of a contract to convey. Defendants refused to accept deed on the ground that plaintiffs could not convey a fee simple title to the land. From judgment for plaintiffs, defendants appealed.

Z. V. Norman for plaintiffs.
Carl L. Bailey for defendants.

DEVIN, J. The question of title to land presented for decision by this appeal depends upon the proper construction to be given to the following clause in the will of Sallie F. C. Long:

"Item I: I leave to my niece Clarentine F. Clift lot No. 108, in the Town of Plymouth during her natural life, and after her death I give and bequeath the said lot with all improvements and hereditaments to the Methodist Episcopal Church in this place, to be used by the stewards or legal representatives of the said Church in the Town of Plymouth as a parsonage for the minister and for no other purpose, in order to secure

the possession of my burying ground to the aforesaid Church and to its keeping and care."

The will was probated in 1881, and on 9 November, 1900, the life tenant conveyed her life estate in the land to T. B. Wolfe, and on 19 November, 1900, the trustees of the Methodist Episcopal Church in Plymouth conveyed the remainder in the property in fee simple to the said T. B. Wolfe. The life tenant is now dead. T. B. Wolfe and his wife are dead, and the plaintiffs are his only heirs at law. They have contracted to convey a good and indefeasible title to the land to the defendants. Defendants have refused to accept the deed tendered by plaintiffs and to pay the purchase price on the ground that the title is other than fee simple, due to the provisions in the quoted clause in the will of Sallie F. C. Long.

The language contained in the will, indicating that the property was to be used as a parsonage for the minister of the church in order to secure the possession of the burying ground to the church and to its keeping and care, cannot be held to have the effect of impressing a trust upon the legal title (*St. James v. Bagley,* 138 N. C., 384, 50 S. E., 841), nor can it be held to constitute a condition subsequent, for the reason that there is nowhere in the devise a clause providing for reëntry or forfeiture for condition broken (*Lassiter v. Jones,* 215 N. C., 298). Thirty-nine years have elapsed since the trustees of the church conveyed the property in fee simple to plaintiffs' ancestor. The language used in the will expresses the wish of the testatrix as to future use of the land, but it cannot be given the legal effect of creating a trust such as to require the aid of a court of equity to enforce its administration. No right of reëntry is preserved to the heirs of the testatrix, nor is limitation over granted to another. There is no right or remedy in favor of the devisor or her heirs or anyone else to enforce appropriation of the land to the purpose mentioned in the will. Where the property is given absolutely and without restriction, the absence of any clause or phrase in the will to indicate such an intention compels the conclusion that no right of forfeiture for condition broken was intended to be reserved.

The rule is thus stated in Pomeroy's Equity, sec. 1016: "In order that a trust may arise from the use of precatory words, the court must be satisfied from the words themselves, taken in connection with all the other terms in the disposition, that the testator's intention to create an express trust was as full, complete, settled and sure as though he had given the property to hold upon a trust declared in express terms in the ordinary manner."

In *St. James v. Bagley, supra,* where the deed conveyed property to the Vestry and Wardens of St. James Church for the purpose of aiding in the establishment of a home for indigent widows or orphans, the

Court, in holding that the grantees could convey the property freed of trust or restriction, quoted from 2 Devlin on Deeds, sec. 838, as follows: "A grantor can impose conditions and can make the title conveyed dependent upon their performance. But if he does not make any condition, but simply expresses the motive which induces him to execute the deed, the legal effect of the granting words cannot be controlled by the language indicating the grantor's motive." *Springs v. Springs,* 182 N. C., 484 (487), 109 S. E., 839.

In the recent case of *Lassiter v. Jones,* 215 N. C., 298, the deed there considered conveyed land to trustees, "for the exclusive use of Palenta Male and Female Academy . . . to be used exclusively . . . for school purposes . . . and for no other purpose." In a suit by the heirs of the grantor to recover the property it was held that the grantees under the deed took title in fee. This Court said: "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 to the original grantor."

In *Hall v. Quinn,* 190 N. C., 326, 130 S. E., 18, property was conveyed to trustees "in trust for the use and benefit of the Wilmington Presbytery forever, and to be used for the purposes of education and for no other purposes." It was held that, as the deed contained none of the forms of expression indicative of the purpose to create a condition subsequent, nor clause of reëntry or forfeiture for condition broken, the grantees had power to convey in fee simple. The Court said: "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 grantor 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."

"Conditions subsequent are not favored by the law." *Church v. Bragaw,* 144 N. C., 126, 56 S. E., 688.

In *Tucker v. Smith,* 199 N. C., 502, 154 S. E., 826, where the conveyance was "for the use and benefit of the white children in said school district and no further," these words were held "merely to make out and identify the purpose of the conveyance and do not rise to the dignity of imposing a trust or condition subsequent, working a reversion of the title." To the same effect is the holding in *University v. High Point,* 203 N. C., 558, 166 S. E., 511.

In *Helms v. Helms,* 135 N. C., 164, 47 S. E., 415, conveyance in consideration of the support of the grantor by the grantee, with no con-

dition expressed, was held not to constitute a condition subsequent, the breach of which would entitle the grantor's heirs to avoid the deed or divest the title of the grantee to the land. The same rule was laid down in *Brittain v. Taylor,* 168 N. C., 271, 84 S. E., 280.

In *Hinton v. Vinson,* 180 N. C., 393, 104 S. E., 897, where the conveyance contained the words, "The party of second part accepts this deed with condition that he will erect no mill on the streams leading to the mill pond," it was held that in the absence of provision for forfeiture or reëntry the words did not constitute a condition subsequent, but a covenant implying promise to pay damages for its breach.

For the reasons stated and upon the authorities cited, we concur in the ruling of the court below that plaintiffs' proper deed would convey a good and indefeasible title to the land. The judgment of the Superior Court is

Affirmed.

CONSOLIDATED REALTY CORPORATION v. E. S. KOON.

(Filed 11 October, 1939.)

1. Controversy Without Action § 2—

In the submission of a controversy without action the statement of facts agreed should include only pertinent facts upon which the parties are in agreement, and evidence from which other facts may be found has no place therein, and since the procedure is statutory, compliance with the provisions of the statute is necessary and the statute must be strictly construed, C. S., 626.

2. Controversy Without Action § 4—

In hearing a case submitted under a statement of facts agreed, the court is restricted to the facts therein presented and it may not hear evidence and find additional facts, although if the facts agreed are insufficient the court has discretionary power to permit amendments concurred in by the parties.

3. Same—

Where persons having an interest in the subject matter of a controversy without action are not parties thereto, they may be afforded opportunity to come in by consent and join in the submission upon the facts agreed, or upon a new statement of facts, or upon additional facts agreed to by all the parties, in order that the entire controversy may be finally adjudicated, but additional parties cannot be compelled to come in against their will.

APPEAL by defendant from *Pless, J.,* in Chambers in Asheville, 16 June, 1939, of BUNCOMBE.

This is a controversy without action under C. S., 626.

The case was here on former appeal and remanded to the end that the court below make disposition of the case in accordance with the opinion then rendered. 215 N. C., 459.

The record as constituted on this appeal contains affidavits of parties, statement of facts supported by exhibits, affidavits and admissions of counsel, *findings of fact by the judge,* and judgment. The case comes here for the purpose of determining whether the plaintiff can "make a valid fee simple title" to the defendant for the land in controversy.

In the statement of agreed facts it is stipulated: "That the court shall find the facts from the agreed statement of facts and the exhibits thereto attached, and such other evidence as is heard by the court, and that the findings of fact by the court shall be binding on all parties hereto."

It further appears that the case was reheard by the judge below upon "the agreed statement of facts, exhibits, and affidavits thereto attached, and admissions of counsel," from which the court finds facts touching the whole controversy, in part as set forth in the statement of agreed facts, and in part from evidence before it. It also appears that from facts found from evidence before it the court concludes that certain named persons, who are not parties to the action, are estopped to challenge the validity of a deed in controversy.

Upon the findings of fact the court, being of opinion that the plaintiff is the owner in fee of the land in controversy, and can convey such title to the defendant, rendered judgment for specific performance of the contract of sale and purchase between the parties.

Defendant appeals to the Supreme Court and assigns error.

Daniel M. Hodges for plaintiff, appellee.
Reed Kitchin for defendant, appellant.

WINBORNE, J. Upon this record the judgment below cannot be sustained.

The statute, C. S., 626, provides that: "The parties to the question in difference which might be the subject of civil action may, without action, agree upon a case containing the facts upon which the controversy depends, and present a submission of the same to any court which would have jurisdiction if an action had been brought." It further provides that: "The judge shall hear and determine *the case,* and render judgment *thereon* as if an action were pending."

The purpose of the statute is to dispense with the formalities of a summons, complaint and answer, and to permit the case to be submitted to the court on statement of agreed facts. *McKethan v. Ray,* 71 N. C., 165.

The statute must be strictly construed. *Waters v. Boyd,* 179 N. C., 180, 102 S. E., 196. And, in submitting a case under it, the procedure, being statutory, must be complied with to render the judgment valid. McIntosh P. & P., 556. Only facts pertinent to the controversy and with respect to which the parties are in agreement have a place in the case. Evidence from which other facts may be found has no place there.

The case is to be heard only upon the facts presented and the court cannot go outside of the statement of facts. McIntosh P. & P., 556. *McKethan v. Ray, supra; Overman v. Sims,* 96 N. C., 451, 2 S. E., 372; *Waters v. Boyd, supra; Wagoner v. Saintsing,* 184 N. C., 362, 114 S. E., 313; *Realty Corp. v. Koon,* 215 N. C., 459, 2 S. E. (2d), 360.

However, as stated by *Barnhill, J.,* in the opinion on the former appeal in this case, "if the facts are insufficient to support a judgment the court has the discretionary power to permit amendments thereto which are concurred in by the parties."

All persons having an interest in the controversy must be parties, to the end that they may be concluded by the judgment, and the controversy be finally adjudicated as in the case of an action instituted in the usual way. *McKethan v. Ray, supra.* But, being a consent proceeding, additional parties cannot be compelled to come in against their will. *Waters v. Boyd, supra; Wagoner v. Saintsing, supra.*

In the latter case *Walker, J.,* said: "Nor do we compel the persons we have designated as proper or necessary parties to be brought in against their will (*in invitum*), but merely afford them the opportunity of coming in by consent and joining in the submission of the controversy upon the facts as they are now stated, or if the parties and interested persons are so advised and agree, upon a new state of facts, or such facts additional to those already agreed upon, as may meet with the consent of the parties, the case may be submitted to the judge again, if found to be necessary, and the parties so agree, for his decision, or such other and further proceedings may be had as may be in accordance with the law and the course and practice of the court."

In accordance with these principles, the court below is without authority to find facts. The judgment there rendered is set aside, and the case is remanded for further proceeding.

Remanded.

EVELYN AMANDA PEELE v. LLOYD THOMAS PEELE.

(Filed 11 October, 1939.)

Divorce § 11: Constitutional Law § 17—Provisions of C. S., 1667, empowering court to grant subsistence pendente lite is constitutional.

Defendant's contention that the provisions of C. S., 1667, empowering the court to allow subsistence and counsel fees *pendente lite* to plaintiff in her action for alimony without divorce are unconstitutional as depriving him of a property right without trial by jury is untenable, since he is under duty to support plaintiff until the adjudication of issues relieving him of that duty, and since such allowance by the court does not form any part of the ultimate relief sought nor affect the final rights of the parties.

APPEAL by defendant from *Bone, J.*, at Chambers in Nashville, N. C., 18 May, 1939. Affirmed.

Tyler & Jenkins and J. Buxton Weaver for plaintiff, appellee.

S. R. Lane, J. A. Pritchett, and J. H. Matthews for defendant, appellant.

SEAWELL, J. In this case plaintiff sued for alimony without divorce under C. S., 1667, and applied for subsistence and counsel fees *pendente lite*. From an order making such allowance, defendant appealed.

The power of the judge to allow alimony and attorneys' fees to the wife *pendente lite* in divorce cases and to find the necessary facts for his guidance in the exercise of that power without the aid of a jury has been long recognized. C. S., 1666, Michie's Code of 1935. Observe historical note. Formerly, in this State, alimony without divorce was a matter of equity jurisdiction. *Crews v. Crews,* 175 N. C., 168, 95 S. E., 149. The statutory cause of action was created by chapter 193, Public Laws of 1871 and 1872. Early decisions on this statute settled in the negative the mooted question whether the court had power to pass upon issues raised in the pleadings and grant permanent alimony, since the right to trial by a jury, where final determination of property rights is concerned, is guaranteed by Article I, section 19, of the Constitution. *Crews v. Crews, supra,* and similar decisions, are confined to this principle and have no concern with allowances of subsistence and attorneys' fees *pendente lite.*

The power to make allowances to the wife for support and counsel fees *pendente lite* in actions for alimony without divorce was given by chapter 24, Public Laws of 1919, Michie's Code of 1935, section 1667.

The defendant challenges this statute as unconstitutional in that, as he contends, it deprives him of a property right without trial by jury, in contravention of the above cited section of the Constitution.

While, of course, it is the privilege of the defendant, if occasion arises, to challenge the constitutionality of both laws, it is difficult to see any distinction in principle between the power given under C. S., 1667, and that exercised without question under the former laws relating to divorce. Compare the following cases, some of which relate to alimony *pendente lite* in divorce cases, and others to allowances for support and counsel fees *pendente lite* in actions for alimony without divorce: *Barbee v. Barbee,* 187 N. C., 538, 122 S. E., 177; *Vickers v. Vickers,* 188 N. C., 448, 124 S. E., 737; *Vincent v. Vincent,* 193 N. C., 492, 137 S. E., 426; *Moore v. Moore,* 185 N. C., 332, 117 S. E., 12; *Taylor v. Taylor,* 197 N. C., 197, 148 S. E., 171; *Massey v. Massey,* 208 N. C., 818, 182 S. E., 446. In actions for alimony and divorce a similar property right, as well as the status of the parties, is also involved.

The power to make these allowances pending the litigation is based, in part at least, on the duty of the husband to support the wife until she has been definitely deprived of the right to such support by her own act or the force of law. Allegation by the husband of some cause which he deems might relieve him does not automatically terminate the duty, even when the gravamen of the action is itself alimony. When facts are investigated and findings made as a guide to the court in the exercise of statutory power to make these allowances, they do not affect the ultimate rights of the parties and do not require reference to a jury. Indeed, it has been held that under C. S., 1667—that is, in actions for alimony without divorce—where the complaint is sufficient in its allegations, the facts need not be found. *Price v. Price,* 188 N. C., 640, 125 S. E., 204; *Vincent v. Vincent, supra.*

In *Holloway v. Holloway,* 214 N. C., 662, 200 S. E., 426 (1939), the rationale of the proceedings receives this comment: ". . . this Court proceeds upon the theory that it would be manifestly unfair to permit a husband to maintain an action which might well stigmatize his wife with foul imputation or deprive her of her marital rights without at the same time requiring him to furnish the necessary funds to enable her to so defend the action as to bring about a fair investigation of the charges and a just determination of the issues. Unless he does so the Court will withhold its aid from him. Unless she answers and defends in bad faith she will not be deprived of the support due her from her husband until a jury has determined the issues adversely to her in a trial in which she has had a fair opportunity, and reasonable means with which to defend herself."

To summarize, the allowances *pendente lite* form no part of the ultimate relief sought, do not affect the final rights of the parties, and the power of the judge to make them is constitutionally exercised without the intervention of the jury.

The order of the court below is

Affirmed.

HENRY JONES v. GATE CITY LIFE INSURANCE COMPANY.

(Filed 11 October, 1939.)

Insurance §§ 15, 18—In an action to reform policy for fraud, plaintiff must show that agent had the authority to make the contract as claimed.

The policy in suit provided that it should not cover death from childbirth occurring within nine months from the effective date of the policy, and that the policy should be effective from the date of delivery. Insured died from childbirth within nine months from the delivery of the policy but more than nine months from the date of application and payment of the first weekly premium. Plaintiff beneficiary instituted this action to reform the policy for fraud upon his contention that insured's local soliciting agent represented that the policy was in force from the date of application and payment of the first weekly premium. *Held:* Even though plaintiff's action is to reform the contract for fraud so that it should conform to the agreement claimed to have been made with the agent, plaintiff must show the authority of the agent to make the agreement as claimed, and in the absence of evidence of such authority, testimony as to the agreement made with the local soliciting agent was properly excluded, and *held further*, the agreement as claimed would be in contravention of C. S., 6458, prohibiting any agent from making a contract of insurance or agreement relating thereto other than as plainly expressed in the written policy.

APPEAL by plaintiff from *Carr, J.*, at May Term, 1939, of BEAUFORT. Affirmed.

Grimes & Grimes and LeRoy Scott for plaintiff, appellant.
S. M. Blount for defendant, appellee.

SCHENCK, J. This is an action to reform an insurance policy issued by the defendant upon the life of Nora Jones wherein the plaintiff was the beneficiary, and to recover the death benefits thereunder. The policy contained *inter alia* the provisions that (1) "No obligation is assumed by the Company prior to the date and delivery of this policy," and that (2) "No benefits will be paid for death resulting directly or indirectly

from childbirth . . . during the first nine months this policy is in force." Application for the policy was signed and the first weekly premium of 25c was paid to the soliciting agent on 13 September, 1937, and the policy was dated and delivered on 27 September, 1937. The insured Nora Jones died of childbirth on 15 June, 1938. The death of the insured therefore occurred within nine months of the date and delivery of the policy, but not within nine months of the date of the application therefor and payment of the first premium thereon.

The plaintiff offered his own testimony to the effect that Earl Flemming, the local agent of the company, took his application for the policy on the life of his wife, Nora Jones, on 13 September, 1937, and that he paid Flemming the first premium of 25c upon that date, and that Flemming then said to him, "This is in force right now." "I can neither read nor write." Objection to this testimony was sustained and plaintiff reserved exception.

At the close of plaintiff's evidence the court sustained defendant's motion for judgment as in case of nonsuit, and to judgment accordant with such ruling the plaintiff excepted and appealed, assigning error.

This appeal presents the question as to whether the court erred in sustaining the objection to the plaintiff's testimony. If such testimony was properly excluded it follows that the nonsuit was properly entered, but if such testimony was improperly excluded the plaintiff is entitled to a new trial.

". . . it is also accepted doctrine that when the parties have bargained together touching a contract of insurance, and reached an agreement, and in carrying out, or in the effort to carry out, the agreement a formal written policy is delivered and accepted, the written policy, while it remains unaltered, will constitute the contract between the parties, and all prior parol agreements will be merged in the written instrument; nor will evidence be received of prior parol inducements and assurances to contradict or vary the written policy while it so stands as embodying the contract between the parties." *Floars v. Insurance Co.*, 144 N. C., 232.

Plaintiff, however, contends that since this is an action to reform the policy on the ground of fraud perpetrated on him by the agent Flemming, so as to make it correctly state the contract between the parties, the testimony was competent to establish what this contract was, namely, that the policy should be in full force from the date of the application therefor, 13 September, 1937.

Flemming was merely a local soliciting agent thereof and as such had no authority to bind the defendant company. *Graham v. Ins. Co.*, 176 N. C., 313. There is no evidence in the record that the agent Flemming had any authority or power to make the contract as claimed by the plain-

tiff, and in the absence of such evidence it was clearly incompetent to show what he said in furtherance of such contract.

The burden was on the plaintiff to show that the contract was within the agent's power, real or apparent, *Floars v. Ins. Co., supra; Biggs v. Ins. Co.,* 88 N. C., 141; and it would seem that the contract as claimed by the plaintiff would be in contravention of C. S., 6458, which reads, in part: "nor shall any such company (life insurance company doing business in this State) or any agent thereof make any contract of insurance or agreement as to such contract other than as plainly expressed in the policy issued thereon."

"In order to reform a policy by reason of an alleged mutual mistake of the applicant and agent, it should be shown that the contract, as claimed, must be one that the agent had the power to make." *Floars v. Ins. Co., supra.* The doctrine here applied to policies obtained by mutual mistake is likewise applicable to agreements, contracts and policies procured by fraud.

The judgment of the Superior Court is

Affirmed.

LAURA E. FISHER v. MARY JACKSON (WIDOW), JAMES JACKSON, CECIL C. JACKSON, ET AL.

(Filed 11 October, 1939.)

Ejectment § 15: Evidence § 6—Burden of proof is a substantial right and conflicting instructions thereon entitle the prejudiced party to a new trial.

In an action in ejectment the burden of proof on issue as to plaintiff's title and right to possession of the property remains on plaintiff throughout the trial, and an instruction correctly placing the burden upon plaintiff but subsequently charging the jury that the burden was upon defendant to satisfy the jury upon the issue by clear, strong, and cogent proof is error entitling defendants to a new trial, the burden of proof being a substantial right. *Semble:* Defendant's contention that the *locus in quo* was included in the deed of trust under which plaintiff's claimed, by fraud or mutual mistake should have been submitted under a separate issue.

APPEAL by defendants from *Pless, J.,* at May Term, 1939, of BUNCOMBE. Reversed.

Zeb F. Curtis for plaintiff, appellee.

I. C. Crawford for defendants, appellants.

SCHENCK, J. This is an action in ejectment commenced in the general county court of Buncombe County, and heard upon defendants' appeal to the Superior Court upon exceptive assignments of error.

The plaintiff alleged and offered evidence tending to prove that she was the owner and entitled to the possession of the land described in the complaint, and that the defendants refused to surrender such possession which they wrongfully held. The defendants denied that the plaintiff was the owner of the lands described in the complaint, and by way of further defense alleged that a certain deed of trust, through the foreclosure of which the plaintiff claims title, contained the land described in the complaint as a result of fraud and mistake, and that said deed of trust had been fraudulently and wrongfully foreclosed.

The jury returned the following verdict:

"1. Did the person who acted for the Central Bank and Trust Company, trustee, as agent in selling the property at said foreclosure sale, also act as agent for plaintiff Laura E. Fisher in purchasing said property at the foreclosure sale? Answer: No.

"2. Is the plaintiff the owner of the premises described in the complaint and entitled to the possession thereof? Answer: Yes.

From judgment of the general county court predicated on the verdict the defendants appealed to the Superior Court, where all exceptive assignments of error were overruled and the judgment affirmed. From the judgment of the Superior Court the defendants appealed to the Supreme Court.

After charging the jury that if they answered the first issue in the affirmative they need not answer the second issue, the trial court properly charged that the burden of proof on the second issue was upon the plaintiff, but followed this by charging: "Defendants contend you ought to answer this (second) issue No, even if you should answer the first issue No, defendants contending there was a mistake made and they had no proper notice of the sale, that they were not present at the sale, did not have an opportunity to bid on the property, and they had never considered the property was included in the deed of trust. As I say, the burden is on the defendants to satisfy you of these facts by evidence which convinces you by its strength and cogency and convincing qualities."

To this charge the defendants preserved exception, and we think, and so hold, that the exception was well taken. The burden of proof on the second issue was upon the plaintiff at the outset and remained there throughout the trial, and the charge assailed by the exception in effect shifted the burden to the defendants to prove their allegations "by evidence which convinces you by its strength and cogency and convincing qualities," which the court had theretofore instructed the jury was

"slightly more than evidence required to establish preponderance or greater weight of the evidence."

"The rule as to the burden of proof is important and indispensable in the administration of justice. It constitutes a substantial right of the party upon whose adversary the burden rests; and, therefore, it should be carefully guarded and rigidly enforced by the courts. *S. v. Falkner,* 182 N. C., 798, and cases there cited." *Hosiery Co. v. Express Co.,* 184 N. C., 478.

It might have been well to have presented the question as to whether the land described in the complaint had been included in the deed of trust by fraud or mistake under a separate issue, as well also as the question involving the alleged fraudulent and wrongful foreclosure of said deed of trust.

For the error assigned the judgment of the Superior Court is

Reversed.

STATE v. WILLIE RICHARDSON.

(Filed 11 October, 1939.)

1. Burglary § 1—

A person who burglariously breaks and enters a dwelling at nighttime while the same is occupied is guilty of burglary in the first degree, and the fact that the value of goods stolen from the dwelling is less than $20.00 is no defense to the capital charge, the provision of C. S., 4251, dividing larceny into two degrees, by its terms having no application to burglary.

2. Criminal Law § 33—

A confession is to be regarded as *prima facie* voluntary and admissible and it is incumbent upon defendant to ask that its voluntariness be determined before its introduction, but failure of defendant to challenge its competency will not be held fatal to his objection if its involuntariness appears from the State's evidence.

3. Same—

A confession is not rendered involuntary and incompetent by the mere fact that, at the time of making it, defendant is in prison or under arrest.

APPEAL by defendant from *Thompson, J.,* at March Term, 1939, of NASH.

Criminal prosecution tried upon indictment charging the defendant with burglary in the first degree.

Verdict: Guilty of burglary in the first degree.
Judgment: Death by asphyxiation.
The defendant appeals, assigning errors.

Attorney-General McMullan and Assistant Attorneys-General Bruton and Patton for the State.
O. B. Moss and N. M. Batchelor for defendant.

STACY, C. J. It is in evidence that on the night of 10 February, 1939, the defendant entered the home of Mr. and Mrs. Frank Butler, Rocky Mount, N. C., which was occupied at the time by Mrs. Butler, with intent the goods and chattels of the owners therein feloniously to steal. Upon the discovery of defendant's presence in the house, which was made known to him, he engaged Mrs. Butler in an altercation and escaped through the kitchen door. It was later found that he had taken a pocketbook and a package of cigarettes from the living room. On 16 February, following the arrest of the defendant, he confessed to entering the Butler home on the night in question, taking a lady's pocketbook which he threw away as he found no money in it, and a package of Chesterfield cigarettes which he carried home with him. The empty pocketbook was found in the yard of the Butler home and the cigarettes in the home of the defendant.

The point is made *arguendo* on demurrer to the evidence, that as the value of the goods stolen is less than $20, or not shown to be more than this amount, the evidence fails to make out a case of burglary in the first degree. *S. v. Morris,* 215 N. C., 552. It was said in *S. v. Spain,* 201 N. C., 571, 160 S. E., 825, that the value of the goods stolen was not material on an indictment for burglary, the statute, C. S., 4251, dividing larceny in two degrees, the one a misdemeanor and the other a felony, having, by its terms, no application to a charge of this kind. The argument is unavailing. *S. v. Shuford,* 152 N. C., 809, 67 S. E., 923.

The defendant objects to the introduction in evidence of an alleged confession or statements made by him to the State's witnesses on the ground that he was in the Penitentiary at the time. He did not ask that its voluntariness be determined before its introduction. *S. v. Alston,* 215 N. C., 713. This, however, might not have been fatal to his objection, had the involuntariness of the confession appeared from the State's evidence, which it does not. *S. v. Anderson,* 208 N. C., 771, 182 S. E., 643. Unless challenged, the voluntariness of a confession will be taken for granted. *S. v. Sanders,* 84 N. C., 729. Ordinarily, a confession is to be regarded as *prima facie* voluntary and admissible in evidence. *S. v. Moore,* 210 N. C., 686, 188 S. E., 421; *S. v. Christy,* 170 N. C., 772, 87 S. E., 499. "This Court has held consistently and

uniformly that statements made by a defendant, although in custody or in jail, are competent, if made voluntarily, and without any inducement of hope or fear"—*Connor, J.*, in *S. v. Rodman,* 188 N. C., 720, 125 S. E., 486.

Where there is no duress, threat or inducement, the fact that the defendant was in prison or under arrest at the time the confession was made, does not perforce render it incompetent. *S. v. Stefanoff,* 206 N. C., 443, 174 S. E., 411. "We are not aware of any decision which holds a confession, otherwise voluntary, inadmissible because of the number of officers present at the time it was made. Nor has the diligence of counsel discovered any." *S. v. Gray,* 192 N. C., 594, 135 S. E., 535; *S. v. Caldwell,* 212 N. C., 484, 193 S. E., 716; *S. v. Exum,* 213 N. C., 16, 195 S. E., 7.

There are other exceptions, more or less of a technical nature, all of which have been examined without discovering any of serious moment, and none has been found to warrant elaboration or discussion. The case seems to have been tried in conformity to the applicable decisions, and the judgment appears to be such as the law commands. The verdict and judgment will be upheld.

No error.

MRS. RAY TINDALL, WIDOW OF RAY TINDALL, DECEASED, EMPLOYEE, v. AMERICAN FURNITURE COMPANY, EMPLOYER, AND LUMBERMEN'S MUTUAL CASUALTY COMPANY, CARRIER.

(Filed 18 October, 1939.)

1. Master and Servant § 55d—

The findings of the Industrial Commission on controverted issues of fact are conclusive on the courts when supported by any competent evidence, even if it should appear that the Industrial Commission also admitted and considered evidence that might be objectionable under technical rules of evidence pertaining to courts of general jurisdiction.

2. Master and Servant § 40b—

Conflicting expert testimony on the question of whether the deceased employee died as the result of an occupational disease, caused by exposure to benzol poisoning, arising out of and in the course of his employment, *is held* sufficient to sustain the Commission's award of compensation to the employee's dependent.

3. Master and Servant § 52e—

An appellant to the Full Commission has no substantive right to require it to hear new or additional testimony, but the Commission's duty to do so applies only if good ground therefor be shown, Public Laws of 1929,

ch. 120 (59), and its rules in regard thereto, adopted pursuant to sec. 54 of the act, are in accord with the decisions of the Supreme Court relating to the granting of new trials for newly discovered evidence.

4. Master and Servant § 55g—

Whether the Superior Court, on appeal from an award of the Industrial Commission, should remand the proceedings to the Commission on the ground of newly discovered evidence rests in its sound discretion.

5. Master and Servant § 52e—

The findings of the Industrial Commission that an appellant from an award of the hearing Commissioner had had full opportunity prior to the hearing to prepare its case and obtain the evidence relied on to sustain its motion for leave to offer new or additional evidence, and had not made such motion until after an adverse award had been rendered against it, sustains the ruling of the Commission denying the motion.

6. Master and Servant § 46a—

The Industrial Commission is primarily an administrative agency of the State, but in hearing and determining the facts upon which the rights and liabilities of employers and employees depend, it has certain judicial functions which it must exercise accordant with orderly procedure essential to the due administration of justice according to the law.

APPEAL by defendants from *Warlick, J.*, at June Term, 1939, of WILKES. Affirmed.

This was a proceeding under the North Carolina Workmen's Compensation Act to recover compensation for the death of plaintiff's intestate, resulting from an occupational disease claimed to have been caused by benzol poisoning while employed by defendant Furniture Company.

The hearing Commissioner, after finding that the parties were subject to the Workmen's Compensation Act, reported the following material finding of fact: "The Commissioner further finds as a fact that Ray Tindall, deceased, was a regular employee of the American Furniture Company for a period of approximately three years immediately preceding his death on March 21, 1937, and that his particular duties assigned him by the defendant employer during that period of time was that of an employee in the finishing room, which room the Commissioner finds to have been 30 x 50 feet in size, with a ceiling some eight to ten feet from the floor; that this finishing room was partitioned off in one corner of the main factory building and located just outside of this finishing room was the painting or spraying room; that the furniture in the painting or spraying department was sprayed with a paint, a varnish sealer or other liquid compound containing a compound solution of 15% benzol; that immediately after this solution containing 15% benzol was sprayed upon the furniture and while the same was still wet it was rushed into the finishing room, where Tindall worked, as above described, where Ray Tindall and three or four other employees were engaged in

striping the furniture while wet; that while so engaged in the poorly ventilated finishing room the fumes from the 15% benzol emanated from the furniture filling the room with fumes and vapors which at times became so dense that persons working therein could see it like gaseous vapor, rising between them and the light.

"The Commissioner further finds as a fact that during the fall of 1936, the deceased, Ray Tindall, while continuing his work in the finishing room as above described during which time he was working overtime frequently and long hours, began to lose weight and became anemic; that his nose and gums frequently bled; that he lost his appetite, ate very little and ate then not to satisfy a desire for food but to supply strength which he required to do his work; that he became restless, during the Fall of 1936, and was unable to sleep at night.

"The Commissioner finds that all of these conditions continued until February 2, 1937, at which time he became too weak and ill to continue his work so that he stopped work on February 2, rested about his home until March 3, at which time he consulted Dr. H. B. Smith.

"It is the opinion of Dr. Smith, who treated Ray Tindall from March 3 until his death on March 21, 1937, that his death was naturally and unavoidably caused by breathing the benzol fumes during the course of his employment as heretofore described. It is also the opinion of Dr. McNeill, who collaborated with Dr. Smith in the examination, diagnosis, and treatment of Ray Tindall from the time he was admitted to the Wilkes Hospital on the 15th of March, until his death, on the 21st, that Tindall's death was due to and produced naturally and unavoidably from the breathing of the benzol fumes in the course of his employment as heretofore described."

Following a *post mortem* examination by Drs. Smith and McNeill, certain of the internal organs removed from the body were sent to Dr. Bullitt, pathologist at the University of North Carolina, for examination and opinion, and by him later sent to Dr. Carpenter, pathologist at Wake Forest. Both these testified the opinion that the exposure to benzol fumes had nothing to do with the death of Ray Tindall.

The hearing Commissioner, however, found as a fact that the deceased came to his death as a result of breathing the benzol fumes, and that the same resulted naturally and unavoidably in his death from an occupational disease as set out in the Act of 1935, ch. 123, and thereupon made an award in favor of plaintiff in accordance with the provisions of the Workmen's Compensation Act.

The opinion of the hearing Commissioner was filed 17 January, 1938, and defendants gave notice of appeal to the Full Commission, which set the hearing for 10 March, 1938. At the hearing before the Full Commission the defendants filed motion for leave to introduce further or new

evidence and to remand the case for the taking of additional evidence, on the ground that on 15 February, 1938, defendants had caused a test of the air in the room where deceased had worked to be made by Dr. E. C. Markham, a skilled chemist, which test showed that the percentage of benzol or benzine in the air of the room under ordinary working conditions was very small, and they desired to offer this testimony and that of Dr. Heyward M. Taylor, toxicologist and bio-chemist in the School of Medicine, Duke University, to show that the amount of benzine or benzol thus found would not produce or cause the injury and death of Ray Tindall, nor aggravate the heart ailment with which it was alleged he suffered at the time he quit work for defendant employer. The defendants also proposed to offer testimony of two witnesses that the working conditions of the room, as to air and ventilation, were the same on 15 February, 1938, as they were when Ray Tindall worked there.

Upon this motion the Industrial Commission made the following ruling:

"First, the defendants' petition that the case be remanded for additional evidence; and second, that if the case is not remanded, that compensation should be denied.

"The Full Commission has carefully reviewed several times the findings of facts, conclusions of law and the award, and the 130 pages of evidence.

"As to the petition of the defendants that the case be remanded to an individual Commissioner for the taking of additional evidence of experts, the Full Commission points to the fact that disability began in this case February 9, 1937. The defendants received the original medical reports April 8, 1937. The case was first set for hearing at Wilkesboro, July 18, 1937, and was continued at the request of the defendants, as Dr. Bullitt, one of their medical experts, was then in New England. The case was heard September 24, 1937, and the defendants at that time came prepared to the extent of having Dr. Bullitt and Dr. Carpenter, who performed an autopsy on the deceased, to testify in their behalf.

"It appears to the Full Commission that the defendants have had ample time in which to prepare its case to the extent of having all necessary experts, medical or otherwise, present. Certainly the defendants had the benefit of an autopsy study and report.

"Dr. Smith and Dr. McNeill, treating physicians, testified that in their opinions the deceased died from chronic benzol poisoning. Dr. Bullitt testified that the autopsy disclosed a thrombosis which could cause a heavy strain on the heart. Dr. Bullitt gave as his opinion that death was due to the heart condition and terminal pneumonia; that terminal pneumonia often occurs under similar conditions. Dr. Bullitt further testified that benzol didn't cause the thrombi but that benzol

caused or could cause all the conditions except the heart condition and the leucocytosis; and that benzol poisoning could 'contribute greatly to his death.'

"Dr. Carpenter, the other medical expert who testified based upon the autopsy, said that the deceased died 'from chronic heart disease plus infection in his heart and in the blood stream with terminal pneumonia, bronchial pneumonia, which I failed to mention just now in the description of the reports of the case, the bronchial pneumonia.'

"The Full Commission denies the petition to remand the case for additional evidence, and affirms the findings of facts, conclusions of law, and the award of the hearing Commissioner."

Defendants appealed to the Superior Court, where the judgment and award of the Industrial Commission were in all respects affirmed, and defendants appealed to the Supreme Court.

A. H. Casey and Whicker & Whicker for plaintiff.
Henderson & Henderson and Geo. M. Chapman for defendants.

DEVIN, J. The defendants challenge the correctness of the judgment below upon two grounds: (1) That there was not sufficient competent evidence to sustain the award, and (2) that the court should have allowed their motion and application for leave to introduce further or new evidence before the Full Industrial Commission, or a hearing Commissioner.

1. In accord with the provisions of the Workmen's Compensation Act, it has been established by the uniform decisions of this Court that the findings of fact made by the Industrial Commission, when supported by competent evidence, must be held conclusive on appeal, and not subject to review. *Lassiter v. Telephone Co.*, 215 N. C., 227; *Porter v. Noland Co.*, 215 N. C., 724; *Plyler v. Country Club*, 214 N. C., 453. And the application of the rule of the conclusiveness of the findings of the Industrial Commission as to controverted issues of fact, when based on competent evidence, is not defeated by the fact that some of the testimony offered may be objectionable under the technical rules of evidence appertaining to courts of general jurisdiction, as was pointed out in *Maley v. Furniture Co.*, 214 N. C., 589, and *Consolidated Edison Co. v. National Labor Relations Board*, 305 U. S., 197. Here the appellant noted certain exceptions to the hearing Commissioner's rulings on the reception of testimony, but we find them without merit. There was sufficient competent evidence to support the findings of the Commission that the deceased came to his death as a consequence of breathing benzol fumes in the regular course of his employment, and that his death resulted from an occupational disease caused by exposure to benzol poisoning as a part of

his employment, within the provisions of ch. 123, Acts of 1935, thus constituting an injury by accident arising out of and in the course of his employment by defendant Furniture Company.

2. Appellants complain that the Industrial Commission denied their motion for leave to offer new or additional evidence, and except to the judgment of the Superior Court affirming the judgment and award of the Industrial Commission.

The Workmen's Compensation Act (Acts 1929, ch. 120) provides that the Industrial Commission or any of its members shall hear the evidence and determine the dispute in a summary manner. The award and statement of the findings of fact are required to be filed and a copy sent to parties (sec. 58). If proper application be made, the Full Commission "shall review the award, and, if good ground be shown therefor, reconsider the evidence, receive further evidence, rehear the parties or their representatives, and, if proper, amend the award" (sec. 59).

There is nothing in the Workmen's Compensation Act that gives to a party, against whom an award has been made by the hearing Commissioner, a substantive right to require the Full Commission to hear new or additional testimony. It may, and should, do so if the due administration of justice requires. But the duty to receive further evidence, in addition to reviewing the award, applies only if good ground therefor be shown.

Here the appellants waited until after notice of award against them by the hearing Commissioner before making tests of the quantity of benzol under working conditions in the room where deceased had worked a year before.

In the Superior Court, upon appeal from an award by the Industrial Commission, the court has power in proper case to order a rehearing, and to remand the proceeding to the Industrial Commission, on the ground of newly discovered evidence, but this is a matter within the sound discretion of the court. *Byrd v. Lumber Co.*, 207 N. C., 253, 176 S. E., 572; *Butts v. Montague Bros.*, 208 N. C., 186, 179 S. E., 799. The record does not disclose that motion for remand for rehearing by the Industrial Commission was made in the Superior Court. There was no evidence of abuse of discretion.

The rules of the Industrial Commission, adopted pursuant to sec. 54 of the Workmen's Compensation Act, relative to the introduction of new evidence at a review by the Full Commission, are in accord with the decisions of this Court as to granting new trials for newly discovered evidence. *Johnson v. R. R.*, 163 N. C., 431, 79 S. E., 690; *Bullock v. Williams*, 213 N. C., 321, 195 S. E., 791; *Farris v. Trust Co.*, 215 N. C., 466; *Winslow v. Carolina Conference Assn.*, 211 N. C., 571, 191 S. E., 403.

The Industrial Commission is primarily an administrative agency of the State, charged with the duty of administering the provisions of the Workmen's Compensation Act, but, in hearing and determining facts upon which the rights and liabilities of employers and employees depend, it exercises certain judicial functions to which appertain the rules of orderly procedure essential to the due administration of justice according to law. *Hanks v. Utilities Co.*, 210 N. C., 312, 186 S. E., 252.

The facts found by the Industrial Commission and assigned as ground for the denial of defendants' motion for leave to offer new or additional evidence, amply support the ruling. There was no error in the judgment of the Superior Court.

Judgment affirmed.

A. F. SANDERS AND WIFE, LULA J. SANDERS; JESSE SANDERS, ELBERT SANDERS AND WIFE, McGURTHA SANDERS; AND THE FOLLOWING, A. F. SANDERS, JESSE SANDERS AND ELBERT SANDERS, TRADING AS A. F. SANDERS & SONS, v. THE ATLANTIC COAST LINE RAILROAD COMPANY, A CORPORATION; AND THE TOWN OF SMITHFIELD, A MUNICIPAL CORPORATION.

(Filed 18 October, 1939.)

1. Pleadings § 17—

A demurrer to the complaint on the ground that it does not state facts sufficient to constitute a cause of action challenges its sufficiency to state any cause of action, admitting the truth of the facts alleged, and it is not required that the demurrer point out defects and deficiencies more specifically or definitely.

2. Municipal Corporations § 39—Defendant town held empowered to close street at railroad crossing in the interest of public safety.

Defendant town, in coöperation with the Federal and State authorities in procuring the construction of an underpass and the elimination of two grade crossings, closed two of its streets at the railroad crossings. This action was instituted by property holders adjacent to the railroad tracks and along one of the closed streets, alleging that the order closing the streets was *ultra vires* and resulted in the creation of a nuisance causing injury to plaintiffs' property. *Held:* Defendant town had authority, under express provision of its charter, chapter 424 of Private Laws of 1907, and under C. S., 2787, to close the said streets at the crossings in the interest of public welfare, and therefore the closing of the streets was in the exercise of a discretionary governmental power with which the courts can interfere only in instances of fraud or oppression constituting a manifest abuse of discretion, and did not constitute a nuisance, and, in the absence of an allegation of abuse of discretion, defendant town's demurrer to the complaint was properly sustained. Whether injury to plaintiffs' property, resulting from the closing of the street by the municipality, constituted a "taking" for which plaintiffs may recover compensation, *quære.*

3. Pleadings § 18—

The citation of the law upon which defendant relies as a basis of his demurrer does not constitute the demurrer a speaking demurrer, since such citation is not a statement of fact, and plaintiffs' exception is particularly untenable when the same statute is cited in the amended complaint.

4. Railroads § 7—

A railroad company cannot be held liable by the owners of property along a street for its action in closing the street at the public grade crossing pursuant to a valid ordinance enacted by the municipality in the exercise of its governmental powers in the interest of public safety.

APPEAL by plaintiffs from *Parker, J.*, at February Term, 1939, of JOHNSTON. Affirmed.

Civil action to recover damages resulting from the maintenance of a public nuisance allegedly created by the closing of a public street in the town of Smithfield.

The plaintiffs own land on the east side of and adjacent to the right of way of the defendant railroad company, and abutting on Massey Street, which street extends to the main part of the defendant town and is known as Johnson Street from the railroad west. There is a mercantile building and dwellings located on plaintiffs' property. Certain of the plaintiffs, trading as A. F. Sanders & Sons, conduct a mercantile business in the store building.

The defendant town, through its mayor and board of commissioners, adopted a resolution approving the improvement designated by the State Highway and Public Works Commission as Project No. C. O. 270, for the construction of an underpass on East Market Street from Eighth Street crossing the railroad tracks to the city limits. In the resolution the town agreed to furnish the necessary right of way for the construction of said underpass and to close Massey Street and the old Goldsboro road at the respective crossings of the railroad company's track. Pursuant thereto the crossing at Massey Street was closed by the erection of posts and railings on both sides of the right of way of the defendant railroad company.

The plaintiffs, as owners of real estate bordering the defendant railroad's right of way on its east, and some of them as owners of the mercantile business, instituted this action to recover damages alleged to have been suffered by the closing of said grade crossing, alleging that the closing thereof constituted a public nuisance. Each defendant separately demurred to the complaint for the reasons set out in the demurrers, which appear of record. The court below sustained each demurrer and entered judgment accordingly. The plaintiffs excepted and appealed.

Parker & Lee for plaintiffs, appellants.

Ward, Stancil & Ward for defendant Town of Smithfield, appellee.

Thomas W. Davis, Abell & Shepard, and Rose & Lyon for defendant Atlantic Coast Line Railroad Company, appellee.

BARNHILL, J. It may be that, under a liberal interpretation, the original complaint could be construed as an action as against the town to recover compensation for an interest in real property taken by a governmental agency for public use. If so, any doubt in respect thereto is laid at rest by the amendment to the complaint in which it is alleged "that on account of the unlawful, wrongful and joint tortious conduct of the defendants in depriving the plaintiffs of their rights and easements in and to said part of said street as above set out, the defendant, the town of Smithfield, in unlawfully authorizing the closing of said street, and the defendant, the Atlantic Coast Line Railroad Company, pursuant to said unlawful and void ordinance, in closing said street and totally obstructing the same and any traffic thereon in that part of it across the said defendant railroad company's right of way as above set out, said defendants have jointly, tortiously and unlawfully created a public nuisance to the great and particular and special injury of the plaintiffs in this action and thereby injured and practically destroyed the grocery business of the plaintiffs."

This allegation, together with the allegations in the complaint to the effect that the action of the board of aldermen of the town of Smithfield, in adopting the resolution closing Massey Street, was *ultra vires,* makes it clearly appear that the plaintiffs are suing upon the theory of a joint tort committed by the defendants. In their brief the plaintiffs argue to the same effect. It is there stated: "The plaintiffs are calling upon the defendants to respond in damages to their property for their joint tort."

The defendant town's first cause of demurrer is that "the complaint with the amendment to complaint does not state facts sufficient to constitute a cause of action." The plaintiffs challenge this assignment as being too general and indefinite. Their position in this respect cannot be sustained. The defendants' objection to the complaint is not to its form but to its substance. It does not assert that the complaint is a defective statement of a good cause of action, but that it is a statement of a defective cause of action. It admits all the facts set out in the complaint and challenges the sufficiency thereof to constitute any cause of action. This is the grounds for demurrer *ore tenus* and no other defects or deficiencies are required to be pointed out.

Did the town act *ultra vires* in authorizing the underpass and in closing Massey Street at the railroad crossing as a necessary part of the plan

adopted, and did it, by closing the street, become liable in damages for creating a public nuisance?

Local, State and Federal authorities in this day of congested traffic are coöperating to the end that railroad grade crossings may be eliminated as rapidly as possible. The action of the defendant town, in cooperating with the State Highway Commission in procuring the construction of an underpass and the elimination of two grade crossings, was in furtherance of this necessary policy. Its action in so doing was for the public safety and convenience and was in the exercise of a governmental function.

There is statutory authority for its action both under its charter provisions, ch. 424, Private Laws 1907, sec. 34; ch. 219, Private Laws 1911, sec. 25, and in the Public Law; C. S., 2787, subsec. 11. It has power "to . . . close any street or alley that is now or may hereafter be opened . . . as it may deem best for the public welfare of the citizens of the city." There is no allegation in the complaint that the town authorities in exercising this power acted arbitrarily or capriciously or that there was any abuse of discretion in the adoption of the resolution closing Massey Street. In so doing, the town was exercising a discretionary and legislative power as a governmental agency. In such cases the court can interfere only in instances of fraud or oppression constituting a manifest abuse of discretion. *Tate v. Greensboro,* 114 N. C., 410; *Hoyle v. Hickory,* 164 N. C., 79.

Acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though the consequences may impair its use, are uniformly held not to be a "taking" within the meaning of the constitutional provision. They do not entitled the owner of such property to compensation from the State or its agents, or give him any right of action. This is supported by an immense weight of authority. *Transportation Co. v. Chicago,* 99 U. S., 635; Cooley Const. Lim., 542; *Hoyle v. Hickory, supra.* There is no constitutional provision or statute which limits the right in this State, and, on the contrary, the defendant has full authority for its action under the provisions of its charter and of the public law. *Hoyle v. Hickory, supra,* and cases there cited. Also see *Ham v. Durham,* 205 N. C., 107.

As the defendant town was vested with authority to close Massey Street in the public interest under the statute cited in the amendment to the complaint, as well as under the express provisions of its charter, and there is no allegation of abuse of discretion or arbitrary and capricious action, the defendant town did not create and was not a party to the creation of a public nuisance in closing the street. Merely to call the action of the town authorities *ultra vires* does not make it so.

The plaintiffs first challenge the sufficiency of the demurrer of the defendant railroad company for that it is a speaking demurrer in that the demurrer makes reference to the particular section of the code which gives the town authority to close streets. This objection cannot be sustained. The citation of a statute or decision in a demurrer through which the defendant calls to the attention of the court the law upon which it relies is a citation of law and not a statement of facts such as would make the demurrer a speaking demurrer. In no event could these plaintiffs complain in respect thereto for the reason that in their amendment to the complaint they cite the same statute, thus making it appear upon the face of the complaint.

The defendant town had the authority to construct and maintain a public street across the right of way of the defendant railroad company. So long as such street was maintained the defendant railroad company had no right to objection thereto or to prevent members of the public from crossing the tracks over such a street. When, however, the town, under lawful authority, closed the street at the crossing and thus abandoned and affirmatively relinquished its easement, the crossing was no longer a public thoroughfare. It became private property relieved of the easement. It was the duty of the railroad company to abide by and observe the action of the governmental authorities of the town and it had a right to prevent the use of its property by the public at any point other than at a public road or street crossing. In blocking its right of way at the point where Massey Street existed before it was closed, the defendant railroad company was performing the duty it owed to observe the lawful action of the town in closing the street. In so doing, it committed no wrong.

As the complaint fails to state any cause of action it follows, as a matter of course, that there is no misjoinder of parties and causes of action.

A governmental agency may take or appropriate private property for the public use. This power carries the corresponding duty to pay just compensation for the property taken. Whether the action of the town in surrendering its easement in the land of the defendant railroad company at the Massey Street crossing and in closing the street at that point constitutes a "taking" of an interest in the property of plaintiffs, for which it must compensate the plaintiffs, is not here presented or discussed.

The judgment below is

Affirmed.

STATE OF NORTH CAROLINA, ON THE RELATION OF B. RAY COHOON, v. ROBERT L. SWAIN.

(Filed 18 October, 1939.)

1. Elections § 19—

In an action to recover possession of a public office, the complaint alleging the election of relator, the issuance of a certificate of election to him by the county board of elections, relator's qualification as provided by statute, and the refusal of defendant to surrender the office, states a cause of action and defendant's demurrer *ore tenus* to the complaint is properly overruled.

2. Same—

The statutory certificate of election is *prima facie* proof that the person therein designated is entitled to the office specified upon his qualification, and is conclusive until reversed or adjudged to be void in a proper proceeding by a court of competent jurisdiction, and such certificate and evidence of qualification is sufficient to overrule defendant's motion to nonsuit in relator's action for possession of the office.

3. Pleadings § 8—

A plea by denial simply controverts the material allegations of the complaint and puts plaintiff to proof; while a plea in confession and avoidance sets up new matter, which is matter not appearing in the complaint, constituting an affirmative defense, C. S., 519, and such new matter must be properly alleged in order to give notice that it will be used.

4. Elections § 19—Mere denial by defendant of issuance of certificate of election to relator does not entitle defendant to attack legality of election.

In this action for possession of a public office, plaintiff relator alleged, and offered supporting evidence, that he had been elected, that certificate of election had been issued to him by the county board of elections, and that he had duly qualified for the office, but that defendant holding over after the expiration of his term of office, refused to give up possession. Defendant merely denied the material allegations of the complaint. *Held:* The answer merely put relator to formal proof of the matters alleged, and evidence in support of defendant's contention that irregular and illegal ballots had been cast in the election was properly excluded in the absence of supporting allegation, irregularity and illegality in the election being new matter constituting an affirmative defense which must be alleged in order to give notice that it will be used.

APPEAL by defendant from *Carr, J.*, at April Term, 1939, of TYRRELL. No error.

Civil action instituted by plaintiff, elected sheriff for the term beginning the first Monday in December, 1939, to recover the physical possession of the office, books, etc., from the defendant, the sheriff for the preceding term, who is holding over.

The defendant was appointed in 1937 to fill the unexpired term of the sheriff who died. Said term expired on the first Monday in December, 1938. He and the relator were rival candidates for said office in the general election of 1938. The several registrars and judges of election in the various polling precincts in said county counted and canvassed the vote and duly made returns thereof to the county board of elections of Tyrrell County. When the county board of elections met to canvass the vote the defendant challenged the returns of the precinct election officials and demanded an investigation. Pursuant thereto the county board of elections set a date for and held a hearing. As a result thereof the said board determined and declared that the relator had received the highest number of legal votes cast in said election for said office and had been elected to same and so certified, as required by law. Thereupon, the defendant appealed to the State Board of Elections. The State Board of Elections set a date for and held a hearing in which the parties and counsel appeared. Upon said hearing the said board dismissed the appeal of the defendant and affirmed the finding of the county board of elections, and so certified to said county board, and the county board issued and delivered to the relator a certificate of election. Thereafter, on the first Monday in December, 1938, the relator presented his certificate of election to the county board of commissioners, took and subscribed the oath of office before the clerk of the Superior Court of Tyrrell County, and tendered to the board of commissioners the statutory bonds with good and sufficient sureties, which were received, approved and accepted by the board of commissioners of Tyrrell County. Having thus duly qualified for the office of sheriff, as required by statute, the relator made demand upon the defendant to turn over to him said office, together with the property and effects of the same, which the defendant refused to do. Thereupon, the relator, with leave of the Attorney-General of the State of North Carolina, instituted this action to compel the defendant to forthwith surrender to him the said office, together with the books, property and effects of the same.

The defendant, in his answer, entered a general denial of the several allegations contained in the complaint. He did not allege any fraud or irregularity in the conduct of the election or in the counting of the ballots. He denied the issuance to the relator of a certificate of election but made no affirmative attack thereon.

When the case came on for trial, after the plaintiff had offered evidence tending to support the allegations of his complaint, the defendant tendered evidence for the purpose of showing that certain absentee ballots were illegally cast and counted, sufficient in number, as he contends, to change the result of the election. He likewise offered evidence which, he contends, will tend to show the illegality of such ballots. On objec-

tion, this evidence was excluded and the defendant excepted. Issues were submitted to the jury as follows:

"1. Is the relator, B. Ray Cohoon, the duly elected and qualified sheriff of Tyrrell County for the term beginning 5 December, 1938, as alleged in the complaint?

"2. Is the respondent wrongfully in possession of said office, its property and effects, as alleged in the complaint?"

The court in its charge instructed the jury that if it believed the evidence, found the facts to be as the testimony tended to show and so found by the greater weight of the evidence, it should answer each issue "Yes." Upon the verdict of the jury in favor of the relator in accord with the charge the court entered judgment, to which the defendant excepted and appealed.

McMullan & McMullan and W. L. Whitley for relator, appellee.

M. B. Simpson, Sam S. Woodley, and John H. Hall for defendant, appellant.

BARNHILL, J. The defendant interposed a demurrer *ore tenus* to the complaint. Exception to the judgment of the court overruling the demurrer cannot be sustained. The complaint alleges the election of the relator, the issuance of a certificate of election, his qualification as provided by statute and the refusal of the defendant to surrender the office. These averments are the essentials of his cause of action.

Nor can the exception to the refusal of the court to enter judgment of nonsuit be sustained. The certificate of election issued to the successful candidate is an official document having legal import and effect. It is authorized and required by statute and it proves *prima facie* the pertinent facts stated therein. *Roberts v. Calvert,* 98 N. C., 580. The declaration of election as contained in the certificate conclusively settles *prima facie* the right of the person so ascertained and declared to be elected to be inducted into, and exercise the duties of the office. *Gatling v. Boone,* 98 N. C., 573; *Cozart v. Fleming,* 123 N. C., 547; *Harkrader v. Lawrence,* 190 N. C., 441; *Lyon v. Commissioners,* 120 N. C., 237; *Rhodes v. Love,* 153 N. C., 468. "The law contemplates and intends generally that the result of an election as determined by the proper election officials shall stand and be effective until it shall be regularly contested and reversed or adjudged to be void by a tribunal having jurisdiction for that purpose." *S. v. Cooper,* 101 N. C., 684; *Bynum v. Comrs.,* 101 N. C., 414; *S. v. Jackson,* 183 N. C., 695; *Jones v. Flynt,* 159 N. C., 87. "The certificate of election is not subject to attack except in a civil action in the nature of a *quo warranto* proceeding. *Gatling v. Boone, supra; Cozart v. Fleming, supra; Swain v. McRae,*

80 N. C., 111. The evidence offered by the relator was amply sufficient to defeat the motion to nonsuit.

The defendant further assigns as error the refusal of the court below to admit evidence in respect to alleged irregular and illegal ballots cast in the election tending to show that certain votes have been wrongfully and fraudulently counted for the relator.

The defendant, in his answer, denies the election of the relator and the issuance of a certificate of election. He likewise denies that the relator took and subscribed the required oath and filed the statutory bonds which were approved and accepted by the county board of commissioners. He alleges and asserts no fact which would challenge or tend to invalidate the certificate of election or impeach the due qualification and induction into office of the relator.

The answer must contain any new matter relied on by the defendant as constituting an affirmative defense. C. S., 519. Setting forth new matter as a defense is an affirmative pleading on the part of the defendant and the facts should be alleged with the same clearness and conciseness as in the complaint. McIntosh, sec. 461. The defendant merely denies the existence of a certificate of election. He raises no issue in his pleadings as to its validity. The certificate proved *prima facie* the pertinent facts stated in it and puts the burden on him who alleges the contrary to prove it clearly. *Roberts v. Calvert, supra.* But the defendant made no allegations and asserts no fact in his answer which challenges the correctness or truth of the facts recited in the certificate. The plea by denial simply controverts the material allegations of the complaint and forces the plaintiff to prove them; and new matter as a defense is a plea in confession and avoidance. It confesses the validity of the plaintiff's claim, except for the matters alleged to avoid it. New matter as a defense means that it does not appear in the complaint and it must, therefore, be pleaded in order to give notice that it will be used. McIntosh, sec. 461.

Upon the production of the certificate of election the defendant, in fact, became the complaining party under the contentions he now makes, that is, he undertakes to assert that the certificate is invalid for irregularities in the election and in the votes cast, and that he is the duly elected candidate.

He is in possession of the office holding over after his term expired. He denies that the relator holds a certificate of election and has duly qualified for office. If he wished to proceed further and to controvert the validity of the certificate on the ground of illegality in the election or in the casting or counting of votes, and to affirmatively assert his right to the office for the new term under the election, he was required to allege the essential facts in respect thereto so as to put the relator on

notice as to the nature of his defense. If it was his desire to impeach the election for irregularities in the manner in which it was conducted or in respect to votes improperly cast and counted so as to show that he was the successful candidate, it was his duty to plead the same and he cannot offer evidence thereof in the absence of such plea.

In regard to the admissibility of the evidence impeaching the election and the certificate of election without supporting allegation, this seems to be a case of first impression in this Court. We have found no case, and none has been called to our attention, in which the point has been raised heretofore. Perhaps this is due to the fact that the unsuccessful candidate is the one who ordinarily institutes the action.

While the defendant relies on *Smith v. Lee,* 171 N. C., 260, that case is not in point. There the vote was a tie. No certificate of election was issued. The relator alleged that the election officials had failed to count the vote of one Powell, which, if counted, would give him a majority. The defendant denied the right of Powell to vote and affirmatively pleaded that the election was void. He likewise cites *S. v. Jackson,* 183 N. C., 695. In that case the defeated candidate was the relator and expressly alleged in his complaint fraud and misconduct on the part of the pollholders, registrars, and judges of election. Likewise, in all other cases we have examined where evidence of fraud or illegality was admitted, there was allegation of such either in the complaint or the answer.

There being no plea of illegality or fraud in the answer, we are of the opinion that the court below properly excluded the tendered evidence.

Strictly speaking, this is not an action to try title to office. The relator, having received a certificate of election and having duly qualified, instituted the action against the defendant, the sheriff during the preceding term who was holding over under the law until his successor was duly elected and qualified, to compel the defendant to forthwith "surrender the said office to him, together with the books, property and effects of the same, and that he be compelled to account for and pay over to the relator any and all sums which may have come into his hands since the qualification of the relator as aforesaid." Nowhere in the pleadings is it asserted that the defendant was elected or is entitled to the office for the current term. He has never attempted to qualify therefor and is simply holding over until his successor qualifies. He denies the issuance of the certificate of election and that the relator has been inducted into office. These are the only issues raised by the pleadings. The defendant has elected to simply require the relator to formally prove his right as defendant's successor.

No error.

FRED ROBINSON v. SEARS, ROEBUCK & COMPANY ET AL.

(Filed 18 October, 1939.)

Principal and Agent § 10a—Evidence held to disclose that assault by store employee on customer was personal and not in course of employment.

The evidence tended to show that plaintiff, a customer in the corporate defendant's store, remonstrated with an employee in regard to language used by such employee to girls employed in the store, that the employee thereupon invited plaintiff out the back door and assaulted him. *Held:* The evidence discloses that the assault was purely personal and unconnected with the employer's business and the corporate defendant's motion to nonsuit was properly sustained, the doctrine of *respondeat superior* applying only when the relationship of master and servant is shown to exist at the time of, and in respect to the particular wrongful act of the employee complained of.

SEAWELL, J., dissenting.

APPEAL by plaintiff from *Rousseau, J.*, at July Term, 1939, of BUNCOMBE.

Civil action to recover damages for personal injuries alleged to have been sustained by reason of the willful wrong or negligent act of the defendant.

The facts are these: On Saturday evening, 10 September, 1938, just after dark, the plaintiff went to the store of the corporate defendant in Asheville to pay a bill. Max Lewis was in the store at the time in the discharge of his duties as an employee of the corporate defendant. While the young lady in the office was receiving plaintiff's payment, the defendant Max Lewis called to her from the main floor, "Don't be so damned slow." Whereupon she remarked to the plaintiff: "That's the contrariest, hatefulest fellow I have ever seen."

After paying his bill and obtaining receipt therefor, the plaintiff started down the steps from the office to the main floor, and near the foot of the steps he met Max Lewis, who remarked to him, "That is the damnest slowest bunch of girls I have ever seen." The plaintiff replied, "You are no gentleman or you wouldn't talk to them that way." His retort was, "I will do you worse than that." He turned around and said, "Come this way." The two went out the back door and engaged in a fist fight near an alleyway. Plaintiff sues to recover for the injuries sustained in the fight.

On cross-examination the plaintiff stated that the conversation which he had with Lewis was not about the business of the corporate defendant: "It was about a personal matter between me and Lewis. . . .

I just didn't think he was a gentleman or he wouldn't talk to them like that. I thought it was my place to tell him and that is what I told him."

From judgment of nonsuit as to the corporate defendant, the plaintiff appealed to the Superior Court of Buncombe County where the judgment of the general county court was affirmed.

Plaintiff again appeals, assigning error.

Don C. Young for plaintiff, appellant.
Harkins, Van Winkle & Walton for defendant, appellee.

STACY, C. J. When the plaintiff went out of his way to reprimand the individual defendant for his manner of speech or his intemperate language about the girls in the store, he fell under the proverbial comparison of "He that passeth by, and meddleth with strife belonging not to him, is like one that taketh a dog by the ears." Prov. 26:17. The plaintiff was under no legal duty to reprove the defendant Lewis, however strongly he may have been inclined to do so. His business with the corporate defendant had ended, and he concedes "the fight was over a personal matter." This brings the case within the principle of *Snow v. DeButts,* 212 N. C., 120, 193 S. E., 224, where the motion to nonsuit was sustained, and distinguishes it from *Munick v. Durham,* 181 N. C., 188, 106 S. E., 665, cited and relied upon by plaintiff. *Cf. Long v. Eagle Store Co.,* 214 N. C., 146, 198 S. E., 573; *Robinson v. McAlhaney, ibid.,* 180, 198 S. E., 647; *Dickerson v. Refining Co.,* 201 N. C., 90, 159 S. E., 446.

The authorities are to the effect that where an assault by an employee is purely personal, having no connection with the employer's business but a merely accidental or incidental one, the doctrine of *respondeat superior* is inapplicable and cannot be successfully invoked to support a recovery against the employer. *Parrish v. Mfg. Co.,* 211 N. C., 7, 188 S. E., 817; *Linville v. Nissen,* 162 N. C., 95, 77 S. E., 1096; *Bucken v. R. R.,* 157 N. C., 443, 73 S. E., 137; *Dover v. Mfg. Co., ibid.,* 324, 72 S. E., 1067; Annotations: 40 A. L. R., 1212; 114 A. L. R., 1033.

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

The foregoing was quoted with approval in *Bright v. Tel. Co.,* 213 N. C., 208, 195 S. E., 391; *Liverman v. Cline,* 212 N. C., 43, 192 S. E., 489; *Linville v. Nissen, supra; Van Landingham v. Sewing Machine Co.,* 207 N. C., 355, 177 S. E., 754, and is universally held for law. *Doran v. Thomsen,* 76 N. J. L., 754. See *Tribble v. Swinson,* 213 N. C., 550, 196 S. E., 820; *Cole v. Funeral Home,* 207 N. C., 271, 176 S. E., 553; *Martin v. Bus Line,* 197 N. C., 720, 150 S. E., 501; *Wilkie v. Stancil,* 196 N. C., 794, 147 S. E., 296; *Grier v. Grier,* 192 N. C., 760, 135 S. E., 852.

It results that the motion to nonsuit was properly sustained.

Affirmed.

SEAWELL, J., dissenting: On the abstract proposition that the principle *respondeat superior* does not apply where in his sin of commission or omission the peccant servant was not about his master's business, I have seen many opinions *pro* and none that I recall *contra.* Thus far, the thing seems to me rather self-evident and the statement very general —too general, I think, to dispose of the more serious question presented in the case at bar, which I may be permitted to formulate as follows: Does the owner and keeper of a store owe to invited customers, who come upon the premises to transact business, the duty of reasonable protection while there? If the assault made by defendant's manager upon the plaintiff was contrary to such a duty—resting alike on the defendant owner and on his employees, including the assailant manager —the doctrine of *respondeat superior* is again enthroned.

This Court has in the past answered our question, inferentially at least, in the affirmative. *Munick v. Durham,* 181 N. C., 188, 195, 106 S. E., 665; *Seawell v. R. R.,* 132 N. C., 856, 44 S. E., 610. And for this there is abundant outside authority: See cases cited in *Munick v. Durham, supra.*

There is no reason why this salutary principle should be confined to railroad companies or municipalities, unless it is on the theory that the larger the corporation the more soulless it becomes. In this connection we should remember that some great mercantile companies probably come into contact with more persons daily than the average railroad and have at least equal opportunities for petty oppression. Also, the sound judgment, wisdom, and tact of leaders who have built up and control these commendable enterprises may be at such a distance from these public contacts as to make the operation equally impersonal as to them.

Approaching the subject on one line, in negligence cases we find that the owner of premises owes an invitee the duty of reasonable protection against dangerous conditions. *Clark v. Drug Co.,* 204 N. C., 628, 169 S. E., 217; *Jones v. R. R.,* 199 N. C., 1, 153 S. E., 637; *Ellington v.*

Ricks, 179 N. C., 686, 102 S. E., 510. Converging upon our objective along another line, we find that certainly the duty of reasonable protection to an invitee upon the premises is extended to railroad corporations and to municipalities. If both lines are cut and stopped here, the doctrine stands out frustrated, incomplete, wanting in symmetry, like a truncated cone; and the principle, as the courts continue to apply it, discriminatory and invidious. In justice there can be no closed category of corporations to which the principle may be confined.

If this be established, I think the Court, as a court of law, has carried the burden of adjustment to its jurisdictional limit, and there should turn it over to the jury. I cannot see how it is competent for us to pass upon the amenities which the gentlemen involved in the crucial transaction owed each other in the diplomatic stages preceding active hostilities, nor do I see how it pertains to the functions of this Court either to believe or disbelieve the plaintiff when he testifies that he understood the store manager merely to be showing him a shorter way out when he led him into a dimly lighted room and assaulted him. *Dickerson v. Reynolds,* 205 N. C., 770, 772, 172 S. E., 402; *Lewis v. Basketeria Stores, Inc.,* 201 N. C., 849, 161 S. E., 924; *Stevens v. Rostan,* 196 N. C., 314, 145 S. E., 555; *Smith v. Safety Coach Line,* 191 N. C., 589, 132 S. E., 567.

The evidence, taken in the light most favorable to the plaintiff, calls for consideration by the jury. *Newbern v. Leary,* 215 N. C., 134; *Reid v. Coach Co.,* 215 N. C., 469; *Fox v. Army Store,* 215 N. C., 187, 190. However much sporadic verdicts may disturb our faith—they are never epidemic—after all, trial by a jury is an old English custom, rating honorable mention in the Constitution.

STATE OF NORTH CAROLINA, EX REL. UTILITIES COMMISSION, v. CAROLINA SCENIC COACH COMPANY.

(Filed 18 October, 1939.)

1. Utilities Commission § 1—

The Utilities Commission is a statutory board exercising at times *quasi*-judicial functions.

2. Utilities Commission § 4—

The right of appeal from the Utilities Commission or Commissioner is solely statutory and the general law regulating such right of appeal is C. S., 1097, made applicable to the commission by chapter 108, Public Laws of 1937.

3. Utilities Commission § 2—

The Utilities Commission is given jurisdiction by section 7, Chapter 108, Public Laws of 1937, to hear and determine a petition by a common carrier for the removal of a restriction in its franchise prohibiting it from carrying passengers in purely local traffic between two cities on its line.

4. Utilities Commission § 4—

The general law governing appeals from the Utilities Commission, C. S., 1097, authorizes a petitioner to appeal to the Superior Court from an adverse ruling of the Utilities Commission on its petition for the removal from its franchise of a restriction in regard to the carriage of passengers, and the contention that no appeal lies from such order because the right of appeal is governed by the motor carrier laws authorizing an appeal from an order affecting franchise only when entered for violation of law, is untenable.

5. Same—

The contention that no appeal will lie from an order of the Utilities Commission denying a petition to remove the restrictions in petitioner's charter because the order does not affect any property right, is untenable, since the right of appeal given by the general law, C. S., 1097, does not confine the right to appeal to matters affecting a property right.

APPEAL by defendant from *Rousseau, J.*, at May-June Term, 1939, of HENDERSON. Reversed.

The defendant, Carolina Scenic Coach Company, had obtained a franchise to operate motor vehicles on the highways of North Carolina from the South Carolina line, south of Hendersonville, through Hendersonville *via* Mills River section, to Asheville, N. C. The franchise contained a restriction whereby the defendant was prohibited from taking on passengers going from Hendersonville to Asheville and, likewise, prohibited it taking on passengers going from Asheville to Hendersonville. Defendant filed a petition for removal of this restriction, setting out that at the time the original franchise was applied for and obtained from the State Commission it was not deemed important to the traveling public that this petitioner handle local passenger business between Asheville and Hendersonville. This situation, however, petitioner claims to be much changed on account of the increasing population of the cities referred to, and the greatly increased travel incident thereto, especially as the city of Hendersonville is a "resort city" as well as a large trade center for an increasing population through thickly settled rural communities. The petition also sets up similar facts with regard to the city of Asheville.

It appears from the petition that the Atlantic Greyhound Lines are serving the public between the cities and over the route designated, but because of the changed conditions referred to the petitioner now alleges

that there is a public necessity for the increase of service and asks that the restriction be removed, in order that it may engage therein.

The matter was heard before the Utilities Commissioner, and on 12 December, 1938, an order was made dismissing the petition.

The order sets up in detail the facts brought to the attention of the Commissioner, both by the petitioner and by the Atlantic Greyhound Lines referred to as already performing the passenger service between Asheville and Hendersonville, and follows with the conclusion that no public convenience or necessity exists upon which to base the removal of the restriction, but that on the contrary the service between the two points would be impaired because of the fact that there would not be sufficient business to support the two bus lines. There followed the dismissal of the petition.

The petitioner filed exceptions to the report of the Commissioner, which were overruled on 19 December, 1938, and thereupon the petitioner appealed to the Superior Court. Upon such appeal, under the statute, the proceedings were transferred to the Superior Court of Henderson County.

There the Atlantic Greyhound Corporation, protestant in the proceedings above described, moved to dismiss the appeal for that (a) the Utilities Commission had no authority in law to entertain the petition filed before it by the Carolina Scenic Coach Company, nor to enter an order thereon for the purpose of removing the restriction imposed on the franchise certificate at the time of issuance; and, (b) even if the Utilities Commission had authority at law to entertain a petition, conduct hearing in connection therewith and enter order thereon, no appeal lies to the Superior Court from an order denying the prayer of the petitioner.

Upon the hearing of this motion, Judge Rousseau, presiding at the May-June Term, 1939, of the Superior Court of Henderson County, entered an order dismissing the appeal, and from such order the petitioner appealed to this Court.

J. W. Pless for Carolina Scenic Coach Company, appellant.

L. B. Prince, H. G. Hudson, and Bailey & Lassiter for Atlantic Greyhound Corporation, appellee.

SEAWELL, J. The Utilities Commission is a statutory board, exercising at times *quasi*-judicial functions. There is no appeal from its orders except as allowed by statute. There is a general statute regulating appeals from the Utilities Commissioner, C. S., 1097. This is, of course, the old statute relating to appeals from the Corporation Commission, but as to matters coming within its purview it becomes applicable to appeals from the Utilities Commission under the peculiar form of

amendment to the law by which the Utilities Commissioner and Utilities Commission assumed the functions of the discarded Corporation Commission. See chapter 108, Public Laws of 1937.

It is the contention of the appellee that this section does not authorize an appeal from the Utilities Commission or Commissioner in this particular instance, since such matter has been dealt with more specifically in the Motor Carrier Laws—Public Laws of 1925, ch. 50 (codified 1927), ch. 136, Public Laws of 1927.

The appellee advances two reasons why the subject matter of the appeal in this case is not covered by this general statute: First, that the Utilities Commission did not have jurisdiction in the first place to remove the restriction, since that would constitute an amendment to the franchise for which no authority is given the Commission under the statute; and, second, that the Motor Vehicle Law is the original grant of power to the Commission to give or refuse a franchise to an applicant for reasons of public convenience and necessity, is *sui generis,* and specifically provides an appeal on the only matter as to which the Legislature thought it advisable to give that right; that is to say, when an investigation is made of a suggested violation of the law and an order is made suspending, revoking, altering, or amending the certificate in consequence of such violation found, the holder of the certificate may appeal to the Superior Court. See section 8.

This position, it seems to us, is incompatible with section 7 of the act, conferring on the Commission regulatory powers, many of which if not subject to review would impose serious hardships upon franchise holders, even destroying or impairing property rights, without the possibility of review. We do not believe that upon a fair interpretation of the law the right of appeal was intended to be confined to the single instance pointed out, or that appeal in any other instance is unprovided for by statute on the theory *expressio unius est exclusio alterius.* Such an inferential conclusion would violate the rules of liberal construction which we think ought to be given to procedural laws protecting property rights.

Another theory suggested to sustain the lower court in dismissing the appeal is the absence of any personal or property right for the protection of which the appeal could be allowed. Certainly the applicant for a franchise or privilege has no property right until it has been granted, and its denial cannot be considered an invasion of property right. Such an applicant has the right to have his application passed upon fairly and without discrimination or abuse of discretion; and possibly arbitrary and capricious action on the part of the Commission might be reviewed by a proper proceeding if there were no right of appeal. We can readily conceive the propriety of a procedure which did not provide for appeal, because the subject of the application is a highly privileged

activity performed only under public franchise and ordinarily requiring the exercise of discretion on the part of the board which passes upon the petition. We can readily understand, also, that it might not be to the public interest to have a question of that sort passed on by a jury after its consideration by a board or commission more competent to deal with all the considerations involved.

Persuasive as these arguments might be, however, we are confronted with a statute which does not confine appeals to matters of property right and does not seem to refer the final determination to the discretion of the board or commission. C. S., 1097, Michie's 1935 Code, is too comprehensive in its phraseology to deny its application to defendant's appeal. "From all decisions or determinations made by the Utilities Commissioner any party affected thereby shall be entitled to appeal." We omit the procedural part of the statute. Also, in chapter 134, Public Laws of 1933, section 12, the most general language possible is employed to cover matters of appeal from the Utilities Commissioner and his Associate Commissioners, who "shall hear and determine such matter, thing, or controversy in dispute, pass upon and determine the issues of fact raised thereon, and the questions of law involved therein, and make and enter their findings and conclusions thereon as the judgment of the said Utilities Commissioner of North Carolina. From the decision of said Utilities Commissioner, or the said Utilities Commission, any party to said proceeding may appeal to the Superior Court at term as designated in and under the rules of procedure required by sections 1097, 1098, 1099, 1100, 1101, and 1102 of the Consolidated Statutes," etc.

Taking the law as we find it, we are of the opinion that the appeal was improperly dismissed, and the order to that effect is

Reversed.

JESSE W. JACKSON v. W. N. PARKS.

(Filed 18 October, 1939.)

1. Trial § 22b—

Upon a motion to nonsuit, the evidence will be considered in the light most favorable to plaintiff, and only the evidence favorable to plaintiff will be considered.

2. Appeal and Error § 40e—

Where the allegations and evidence are sufficient to show an actionable wrong committed by defendant against plaintiff, judgment sustaining defendant's motion to nonsuit will be reversed on appeal, and it is unneces-

sary to determine whether plaintiff's cause of action is founded upon malicious prosecution or malicious abuse of process.

3. Limitation of Actions § 2e—

It appeared that plaintiff's cause of action based upon the alleged wrongful and unlawful act of defendant in swearing out a warrant against plaintiff charging plaintiff with larceny, accrued within three years prior to the issuance of summons in this suit. *Held:* Plaintiff's cause of action was not barred by the statute of limitation, C. S., 441 (5).

4. Process § 16—

Evidence of malice on the part of defendant against plaintiff, and that defendant gave alleged false information to a third person who procured plaintiff's detention in an insane asylum *is held* sufficient to connect defendant with the alleged wrongful detention of plaintiff.

5. Limitation of Actions § 2g—

It appeared that plaintiff's cause of action based upon the alleged wrongful act of defendant in causing plaintiff's detention in an insane asylum was instituted less than one year from the date plaintiff was discharged as sane. *Held:* Plaintiff's cause of action was not barred by the statute of limitation, C. S., 443 (3).

6. Limitation of Actions § 7—

Plaintiff's cause of action was based upon the alleged wrongful act of defendant in causing plaintiff's detention in an insane asylum. *Held:* Defendant will not be allowed to take advantage of his own wrong, and as to defendant, plaintiff was *non sui juris* for the period during which plaintiff was detained, and the statute of limitations did not run against plaintiff's cause of action during that period, C. S., 407.

APPEAL by plaintiff from *Bone, J.*, at March Term, 1939, of WAYNE. Reversed.

Plaintiff brought this action to recover of the defendant damages alleged to have been caused by the conduct of defendant in unlawfully and maliciously causing his arrest upon a false charge of larceny and unlawfully and maliciously procuring his confinement in an insane asylum, all for the purpose of harassing, persecuting and punishing plaintiff, and preventing him from effectively asserting his legal rights as tenant against the defendant landlord.

The plaintiff, a colored man, was minister of a local church for a long term of years, during which the church building was erected and he continued to serve as pastor and minister; he was also a colporteur evangelist, a carpenter, a brickmason and farmer. His wife testified at the trial that they had "nine head of living children." Plaintiff earned from his various activities about $40.00 per week.

He became a tenant of the defendant Parks in 1935, raising a crop that year and settling for his dues to the landlord. The evidence tends to show that the defendant took charge of all of plaintiff's crop, assum-

ing to do so as landlord, and plaintiff was compelled to bring an action at law to compel defendant to settle with him, upon the final hearing of which he recovered judgment against the defendant. While this suit was pending, and shortly after it was instituted, the defendant Parks made a sworn complaint and procured the arrest of the plaintiff under a warrant charging him with the larceny of the seed from two bales of cotton. Upon the trial the defendant Parks admitted that he had given the plaintiff permission to sell the seed and pay for the picking of the cotton. The case was dismissed as malicious and frivolous. Before this trial, on a request of Jackson for one day's continuance to prepare his case, the defendant demanded that Jackson be required to give a justified bond or be locked up. A witness for plaintiff testified: "Mr. Parks came into my office before the hearing and arbitration and made the statement that Jackson had been on his place for three years and that he had gotten smart; he had been settling as he, Parks, wanted to settle before; he had gone now and issued summons and brought him into court, also got a tenant, Copney, who had been with him two years, to bring him into court, and Mr. Herring that had been with him nine years, got him to sue him; and that Jackson was responsible for it; that he was going to run Jackson and Copney and Herring off, that they had been living there before and settling as he said, and as for Jackson being responsible for all of this he was going to persecute, prosecute him, was going to run him crazy, was going to starve him and his family to death."

As to further allegations of his complaint, the plaintiff testified: "On the night of 7 January, 1936, I was sitting on my bed and these two white men opened the door and came in. I was confined to the State Hospital during the year 1936. I was taken there and put in there on the 9th of January, 1936, and I remained there four days. . . . After I was discharged from the hospital four days after I was taken there on January 9, 1936, I was later confined in the State Hospital. This occurred on January 9, 1937, the same day of the month both times. I remained in confinement this last time six months and twenty-one days to the best of my recollection. I was released on July 29, 1937."

The defendant admitted "reporting" to his nephew, H. B. Gardner, "what they said about the man in the neighborhood" prior to the arrest and detention of plaintiff in a lunacy proceeding. Gardner made the complaint and prosecuted the proceeding. The defendant also admitted calling the sheriff, and testified "they went out and got him that night."

There is evidence tending to show that when the plaintiff was released from the insane asylum, after only four days detention, the defendant Parks took the matter up by way of protest with Dr. Linville, the superintendent. "I called H. B. Gardner when Mr. Parker phoned

Dr. Linville to get him. I didn't see the sheriff much. I talked to H. B. I couldn't hear right good over the phone so I asked Mr. Parker to call for me and he talked to Dr. Linville." He referred to Mr. Parker as his attorney.

The second detention of plaintiff in the State Hospital for the Insane lasted nearly seven months, that is, from 9 January, 1937, to 29 July, 1937, and during this time there was no jury hearing on his sanity. He was discharged as sane, and there is evidence tending to show he was actually sane during the whole period.

The evidence tends to show that plaintiff was discharged from his pastorate because of his confinement in the asylum, and he is now broken in health and unable to provide adequately for his family.

From a judgment of nonsuit plaintiff appealed.

Scott B. Berkeley, Sutton & Greene, and Allen & Allen for plaintiff, appellant.

Fred P. Parker, Jr., and Paul B. Edmundson for defendant, appellee.

SEAWELL, J. Upon a motion to nonsuit, the evidence must be taken in the most favorable light to the plaintiff (*Smith v. Coach Line,* 191 N. C., 589, 132 S. E., 567, and cases cited), and the above statement of plaintiff's evidence is made upon that principle. We do not deem it necessary, for the purpose of decision, to deal with the rebutting evidence. That is a matter for the jury.

There seemed some confusion in the argument of this case as to whether plaintiff's cause of action must be considered as arising out of malicious prosecution or malicious abuse of process; and it was strongly urged upon the Court that plaintiff was insisting here upon the latter view, whereas, in the court below, he depended on the former, thus changing the theory of the case between the trial and review in the appellate court. These refinements do not concern us at this stage of the case. We do not see how a choice either way in technical nomenclature could shorten the arm of the Court in its attempt to reach justice between the parties. There is sufficient in the complaint and in the evidence to be submitted to the jury, however the alleged mistreatment of the plaintiff may be legally tagged, growing out of his first prosecution, and also sufficient, we think, in connection with his alleged unlawful imprisonment in the State asylum for the insane.

The statute of limitations cannot be successfully invoked against the first suggested cause of action, which clearly accrued within the three years prior to the issuing of summons in this case. C. S., 441 (5).

As to the liability of the defendant growing out of the alleged detention of the plaintiff in the State Hospital, it was argued that there was

no evidence to connect him with the second detention. With this we do not agree. Passing, then, to the application of the statute of limitations to this cause of action, we find that the plaintiff was discharged as sane 29 July, 1937, and this action was begun 20 July, 1938. The year had not elapsed since his discharge. C. S., 443 (3). Considering the evidence in the light most favorable to the plaintiff, the defendant during this period had managed to deprive the plaintiff of his legal status as a sane person and is estopped from pleading the statute of limitations for that period of time. *Daniel v. Comrs. of Edgecombe,* 74 N. C., 494; *Haymore v. Comrs.,* 85 N. C., 268; *Whitehurst v. Dey,* 90 N. C., 542. He cannot be permitted to take advantage of his own wrong, and as to him the plaintiff was *non sui juris* and his rights unaffected by the statute. C. S., 407 (2).

The judgment of the court below is

Reversed.

LEON SUSKIN v. R. H. HODGES, ADMINISTRATOR C. T. A. OF LOUIS B. SUSKIN, DECEASED.

(Filed 18 October, 1939.)

1. Evidence § 3: Abatement and Revival § 17—Courts of this State will take judicial notice of pertinent laws of any other state or of the United States.

The courts of this State are required to take judicial notice of pertinent laws of any other state, territory, or of the United States, chapter 30, Public Laws of 1931, and therefore, in an action to recover for the alleged tortious conversion of personalty by a nonresident, instituted in this State after the death of the nonresident, against his personal representative, the failure of the complaint to allege that the cause of action survived under the laws of the state in which it arose does not render the complaint demurrable.

2. Courts § 12—

This action to recover for alleged tortious conversion of corporate stock and dividends thereon by a nonresident was instituted after the death of the nonresident against his personal representative in this State. *Held:* Upon the allegations, the cause of action arose in the state in which deceased resided and the laws of that state control the cause of action.

3. Corporations § 13a—Complaint held insufficient to allege wrongful conversion of corporate stock.

This action was instituted against the personal representative of a deceased nonresident. The complaint alleged that plaintiff had possession of corporate stock and had not endorsed same, but that the nonresident had converted same and the dividends thereon to his own use. *Held:*

Conceding that the action for tortious conversion of personalty survived against the personal representative of the nonresident (*Suskin v. Trust Co.*, 214 N. C., 347), the complaint fails to allege a cause of action for wrongful conversion, since under the laws of the state in which the nonresident resided and in which the cause of action arose, no act of the nonresident or of the corporation could effect a transfer of the ownership of the stock in the absence of delivery with endorsement (chapter 376, Laws of Maryland, 1927), and since, if the alleged wrongful conversion was effected by obtaining a fraudulent issuance of the stock to the nonresident under the by-laws or charter provisions of the corporation for the replacement of lost or destroyed stock, the complaint fails to plead the pertinent by-laws and charter provisions of the corporation, which by-laws and charter provisions, not being public laws, must be pleaded if relied on, and therefore defendant's demurrer to the complaint should have been sustained.

APPEAL by defendant from *Carr, J.*, at June Term, 1939, of BEAUFORT. Reversed.

Civil action to recover damages for the wrongful conversion of preferred stock and dividends thereon, heard on demurrer.

Louis B. Suskin, late of the city of Baltimore, Maryland, died 12 January, 1935, leaving a last will and testament. As he owned property within this State, located in Beaufort County, the clerk of the Superior Court of Beaufort County appointed the defendant R. H. Hodges his administrator *c. t. a.*, under authority of C. S., sec. 1 (3). The pertinent facts, as alleged in the complaint, are fully set out in *Suskin v. Trust Co.*, 214 N. C., 347.

The court below entered judgment overruling the demurrer interposed by the defendant, and the defendant excepted and appealed.

R. E. Whitehurst and L. I. Moore for plaintiff, appellee.

W. B. R. Guion, Rodman & Rodman, J. C. B. Ehringhaus, and Chas. A. Poe for defendant, appellant.

BARNHILL, J. The defendant demurs for that: (a) It appears upon the face of the complaint that the cause of action, if any, arose under the laws of the State of Maryland and the plaintiff fails to plead any Maryland law under which the cause of action survives; and, (b) it appears upon the face of the complaint that the plaintiff never at any time transferred, assigned or delivered the certificates of preferred stock to anyone, from which it is manifest that even if the defendant's intestate secured from the Overall Company a certificate for the same amount of stock, such did not and could not affect, in any way, plaintiff's stock, or his legal right in reference thereto, or his right to dividends thereon.

It is clear that the demurrer cannot be sustained for the reason first

assigned in the demurrer. When any question arises as to the law of any other state or territory, or of the United States, the courts of this State are now required to take judicial notice thereof. Ch. 30, Public Laws 1931.

Does the statement of the plaintiff in his complaint that he received the certificates of preferred stock and that he has never transferred or assigned the same so negative the other allegations in the complaint as to defeat his alleged cause of action?

The deceased was a resident of the State of Maryland. The alleged tort, if committed at all, was committed in the State of Maryland. That the plaintiff's cause of action is controlled by the laws of that state is so well established that the citation of authority is not necessary.

Under the laws of that state, title to a certificate and to the shares represented thereby can be transferred only, (a) by delivery of the certificate endorsed either in blank or to a specified person by the person appearing by the certificate to be the owner of the shares represented thereby; or (b) by delivery of the certificate and a separate document containing a written assignment of the certificate or a power of attorney to sell, assign or transfer the same or the shares represented thereby, signed by the person appearing by the certificate to be the owner of the shares represented thereby. Ch. 376, Laws of Maryland, 1927, which repeals and reënacts, in corrected form, sec. 51, Art. 23 of Bagby's Ann. Code of Public General Laws of Maryland.

It is further provided that: "The provisions of this section shall be applicable, although the charter or article of incorporation, or code of regulations, or by-laws of the corporation issuing the certificate and the certificate itself, provide that the shares represented thereby shall be transferable only on the books of the corporation, or shall be registered by a registrar, or transferred by a transfer agent."

The provision contained in the Uniform Stock Transfer Act for the issuance of a new certificate to replace one lost or destroyed is not contained in the Maryland statute. The only provision in its statute in relation to lost or destroyed certificate is contained in sec. 78 of Art. 23, Bagby's Code, and is as follows: "The directors of a corporation may, unless otherwise provided in the by-laws, determine the conditions upon which a new certificate of stock may be issued in place of a certificate which is alleged to have been lost or destroyed. They may, in their discretion, require the owner of such certificate or his legal representative to give bond, with sufficient surety, to the corporation to indemnify it against any loss or claim which may arise by reason of the issue of a certificate in place of the missing one."

It appears from the allegations in the complaint that the three certificates for a total of fifty shares of the preferred stock of the Standard

Overall Company, being the stock in controversy, were issued and delivered to the plaintiff on or about 15 September, 1919, and that the plaintiff has not, at any time since receipt by him of said stock, transferred or assigned the said certificates, or either of them, to any person. He now owns the stock and holds the certificates issued to him. His possession is a continuing affirmation of ownership and his power over the stock until withdrawn or surrendered in lawful manner. *Holbrook v. New Jersey Zinc Co.*, 57 N. Y., 616.

The certificates and the shares represented thereby are transferable only upon surrender duly endorsed. They have never been endorsed or transferred. Therefore, he has parted with no interest therein and no action by the deceased or the corporation has or can deprive him thereof. A corporation which proceeds to transfer stock "in the absence of the original certificate," as here, does so "at its own peril" and the real owner of the stock, evidenced by such certificate, loses nothing thereby. *Supply Ditch Co. v. Elliott*, 10 Colo., 327, 15 Pac., 691, 3 Am. St. Rep., 586; *Holly Sugar Corp. v. Wilson*, 75 Pac., 149.

Under the Uniform Stock Transfer Act, the principal provisions of which have been adopted by Maryland, the certificate is the property owned by the stockholder and his property interest in the corporation can be transferred only by endorsement and delivery of the certificate as provided by statute. Plaintiff's ownership of the certificates for shares of preferred stock in a Maryland corporation is unaffected by anything done by the deceased or by the corporation. See *Rosler v. General Gas, etc., Corp.*, 255 N. Y. S., 342; *O'Dwyer v. Verdon*, 100 N. Y. S., 588; 7 R. C. L., 271.

It may be that the Standard Overall Company, acting under the provisions of section 78, Article 23, Bagby's Code, has adopted a method by which, and has prescribed the conditions upon which, a new certificate of stock may be issued in place of a certificate which is alleged to have been lost or destroyed and that the deceased undertook to have the certificates issued to the plaintiff transferred to him on allegation that they had been transferred to him and then lost or destroyed. If so, the by-laws and charter provisions of the corporation not being a public statute or law of Maryland, the plaintiff must plead the regulations of the corporation and the procedure thereunder by the deceased in obtaining apparent title to his stock. This he fails to do. In the absence of such plea—and we do not hold that it would be effective to constitute a cause of action—plaintiff has failed to allege facts sufficient to show that his property rights in his stock, or in the dividends accruing thereon, have been invaded by the deceased. His rights against the corporation, upon the allegations contained in the complaint, have in no wise been impaired.

The statement in *Suskin v. Trust Co., supra,* that "the action can be maintained only against the personal representative of the deceased" has reference to the Maryland executors and does not affect our present position. Plaintiff's right to maintain an action against the personal representative of the deceased was not there presented. At most, the statement is mere *dictum.*

The judgment of the court below is

Reversed.

R. L. CHESSON v. KEICKHEFFER CONTAINER COMPANY.

(Filed 18 October, 1939.)

1. Contracts § 25b—

Damages recoverable for breach of contract are those which are the natural consequences of such breach and which are reasonably certain and not speculative, and special damages are recoverable only when the special circumstances out of which they arise are communicated or known to the party sought to be charged.

2. Same—New trial awarded for error on issue of damages in this action for breach of contract to purchase pulpwood.

This action for damages was instituted to recover for alleged breach of contract by defendant under which contract defendant agreed to purchase pulpwood cut by plaintiff from a certain tract of land and to provide plaintiff with the equipment and means for cutting and delivering the wood to defendant. *Held:* A new trial must be awarded for error on the issue of damages in permitting the jury to consider the total amount of the purchase money note given by the defendant to the owner of the land for the timber when it appeared that upon plaintiff's abandonment of his contract the owner of the land took over the location prior to the expiration of the time given plaintiff to remove the timber, and for error in submitting the question of damages under separate issues as to losses sustained and gains prevented by defendant's breach of the contract under instructions permitting the jury to award, under both issues, the difference between the price defendant agreed to pay for the wood delivered and the price plaintiff agreed to pay for the timber, plus his expenses in cutting and removing same.

APPEAL by defendant from *Carr, J.,* at April Term, 1939, of CHOWAN. New trial.

This action was brought to recover damages for a breach of contract between plaintiff and defendant under which, as it is alleged, defendant agreed to purchase all the pulpwood plaintiff might cut and deliver from a certain tract of land, which timber the plaintiff had undertaken to buy.

It is alleged that the contract obligated defendant to pay $4.50 per unit for the pulpwood delivered, or more if the market price advanced.

In addition, it is alleged that in order to provide the quantities of material which defendant was anxious to purchase, it agreed to furnish the plaintiff necessary team, trucks, and equipment for the cutting and handling of the pulpwood, and to advance the funds necessary for plaintiff's pay roll in cutting, preparing, and loading it. The defendant, it is alleged, was to retain fifty cents per cord out of the purchase price, to reimburse it for this service, and for the advancements.

The plaintiff alleges that he prepared himself to carry out his contract at great expense and loss of time and began the cutting and shipping; but that defendant breached its contract, furnished plaintiff no equipment or advancement, and refused to buy and pay for the pulpwood, except as to a small quantity initially delivered; that depending on the performance of the contract by defendant, and as was known to the defendant at the time the contract was made, plaintiff had entered into a purchase agreement for the timber on the tract described, under which contract he had a limited time to cut and remove the timber; and that because of the breach of the contract he was unable to pay the purchase price. That because of the defendant's monopoly of the pulpwood business it was impossible to sell it elsewhere; and that it was also impossible for him to sell the timber upon the place for other uses. Plaintiff further alleged that his note was still outstanding for the purchase price of the timber; that defendant had caused him to incur expenses and loss of time and had damaged him to the extent of $11,000.

The answer of the defendant denied all of the substantial allegations of the complaint except those that are merely formal.

The evidence relating to the issue of damages, which is the more immediate subject of consideration by the Court, may be briefly summarized. Upon that issue the plaintiff testified that he had made a note dated 10 June, 1937, maturing one year from date, for the timber on the Small tract containing the pulpwood defendant agreed to take, which note was yet unpaid; that he had told Mr. Henderson, manager of the company, that he had a limited time to cut the timber and asked him if eighteen months was a sufficient time to take. The time ran from the early part of June, 1937, and he so informed Mr. Henderson.

There was evidence for the plaintiff that the Small tract would cut from 2,000 to 2,400 cords of pulpwood, and evidence as to the reasonable cost of cutting, hauling, and delivering at the place agreed upon, of the price which plaintiff was to receive per unit therefor, and the value of the stumpage. Plaintiff also introduced evidence in support of his allegation that defendant agreed to furnish him with the equipment

described in the complaint and to advance money for the pay roll, and testified that defendant did neither.

Further evidence related to the value of the stumpage and the difficulty or impossibility of cutting the timber without the assistance which the defendant had promised to give and of the inability of the plaintiff to minimize his damages either by the sale of the timber or its cutting and delivery as pulpwood to any other purchaser.

The evidence discloses that plaintiff either abandoned or forfeited his contract with the owner of the timber and that the location was taken over by such owner prior to the expiration of the full term given to the plaintiff to cut it. The evidence discloses no payment by the plaintiff of any part of his note given for the purchase price.

J. Henry LeRoy and J. H. Hall for plaintiff, appellee.
Z. V. Norman and W. D. Pruden for defendant, appellant.

SEAWELL, J. We are not sure that the evidence in its present form justified the submission to the jury, as an element of damages, losses sustained by the plaintiff with reference to the value of the timber or his present outstanding obligation to pay for it. Provable damages must be reasonably certain and not rest upon doubt or speculation. *Brewington v. Loughran,* 183 N. C., 558, 112 S. E., 257; *Newsome v. Telegraph Co.,* 153 N. C., 153, 69 S. E., 10; *Newbold v. Fertilizer Co.,* 199 N. C., 552, 155 S. E., 167. Generally, damages recoverable because of breach of contract are those which are the natural and probable consequences of such breach and are, therefore, presumed to be within contemplation of the parties at the making of the contract. *Lane v. R. R.,* 192 N. C., 287, 134 S. E., 855, 51 A. L. R., 1114; *Equipment Co. v. Gadd,* 183 N. C., 447, 111 S. E., 771. Special damages are recoverable only when the special circumstances out of which they arise are communicated or known to the party sought to be charged. *Barrow v. R. R.,* 184 N. C., 202, 113 S. E., 785; *Iron Works v. Cotton Oil Co.,* 192 N. C., 442, 135 S. E., 343; *Peanut Co. v. R. R.,* 155 N. C., 148, 71 S. E., 71; *Hadley v. Baxendale,* 9 Eng. Exch., 341. It is to be noted, also, that there is no evidence that plaintiff has as yet sustained a loss by reason of his outstanding obligation to pay for the timber or what such loss might be in view of the fact that the owner took over the location before the expiration of the time given plaintiff to remove the timber.

But if we concede the loss of the stumpage to be a proper element of damage, the instructions to the jury covering this, and its complementary subject of damage under the issue submitted, cannot be approved.

Without attributing error to the charge in that respect, we doubt the propriety of the division of the issue as to damages into the two items;

but at any rate the instructions were such as might likely confuse the jury, and in one respect the subjects—gains prevented and losses sustained—are so related as to overlap. The findings as to loss sustained might, in some respects, partly duplicate the damages permitted to be found as gains prevented. As to gains prevented, the jury was instructed that it might apply as a measure of damages the difference between the price which plaintiff would have obtained for his pulpwood delivered according to the contract, and the cost to him incident thereto, including the price that he had to pay for the stumpage; and they were further instructed upon the item of losses sustained to consider the value of the timber which he claimed to have lost by reason of defendant's breach of the contract. It is evident that this value might have exceeded the cost price, and since the timber itself must necessarily have been consumed by plaintiff in carrying out his contract, he might, under this theory, recover double damages as to the excess of value over purchase price.

We do not consider other objections or exceptions, in view of the conclusion we have reached. In the respects mentioned we find error entitling the defendant to a new trial.

New trial.

MRS. PATTIE W. CHERRY v. E. L. WHITEHURST.

(Filed 18 October, 1939.)

1. Actions § 9—

An action is commenced when the summons is issued against defendant, C. S., 404.

2. Actions § 8—

A civil action is commenced by issuing a summons, C. S., 475.

3. Actions § 9—Determination of date summons is issued.

Ordinarily, summons is issued and the action is pending from the time summons leaves the hands of the clerk or the justice of the peace for service, but when summons leaves the hands of the justice of the peace two days prior to its date under instructions that it should not be served until its date, and it is actually served on its date, the summons does not leave the control of the justice of the peace for the purpose of service until the date of the summons, and the action is not instituted until that date.

4. Ejectment § 3—

Held: In this action in summary ejectment, summons did not leave the control of the justice of the peace for the purpose of service until the second day after the termination of defendant's lease, and therefore

defendant's motion to dismiss on the ground that the action was instituted prior to the termination of his term and the accrual of the cause of action, was properly denied.

5. Landlord and Tenant § 5—

Where a tenant holds over and the landlord continues to recognize the relationship after the expiration of the tenant's lease for a year or longer, the tenant becomes a tenant from year to year, in the absence of qualifying facts or circumstances, which tenancy continues under the same terms and stipulations as contained in the original lease as far as they may apply.

6. Landlord and Tenant § 19—C. S., 2354, does not preclude the parties from making a different agreement as to notice of intention to terminate tenancy.

C. S., 2354, requiring one month's notice before the expiration of the term to terminate a tenancy from year to year does not preclude the parties from making a different agreement between themselves, and where a tenant in an action in ejectment contends that the parties agreed that notice of intention to terminate the lease should be given six and one-half months prior to the expiration of the term, and that the landlord did not give notice as required by the agreement, the exclusion of the tenant's evidence of such agreement is error.

DEVIN and BARNHILL, JJ., dissent.

APPEAL by defendant from *Carr, J.*, at February Term, 1939, of PASQUOTANK. New trial.

Robert B. Lowry and John H. Hall for plaintiff, appellee.
Henry LeRoy and M. B. Simpson for defendant, appellant.

SCHENCK, J. This is an action in summary ejectment instituted before a justice of the peace under C. S., 2365 *et seq.*, wherein the plaintiff alleges that the defendant was her tenant in possession of her real estate and holds over after his term has expired, heard *de novo* in the Superior Court upon defendant's appeal.

The evidence tended to show that the defendant was the lessee of the plaintiff under a verbal lease from year to year, from the year 1929; that the term was from 1 January to 31 December of each year.

The defendant contends that the action should have been dismissed for the reason that it appears it was commenced on 31 December, 1938, before the expiration of the term, and therefore before the cause of action accrued, and preserved exception to denial of the court of his motion for dismissal. Plaintiff denies that it appears that the action was commenced on 31 December, 1938, and contends that it was commenced on 2 January, 1939, and that defendant's motion for dismissal was properly denied.

All of the evidence upon the motion for dismissal tends to show that the summons was dated 2 January, 1939, although signed and delivered to plaintiff's husband by the justice of the peace on Saturday evening, 31 December, 1938, and by said husband delivered to the constable on 31 December, 1938, but at the time of the delivery of the summons to the husband of the plaintiff by the justice of the peace the justice instructed the husband that the summons was not to be served before its date, 2 January, 1939, and that said husband instructed the constable at the time he (husband) delivered the summons to him (constable) that it was not to be served before its date, 2 January, 1939; and that at the time the husband of the plaintiff and the constable received the summons they both knew and understood that it was not to be served before its date, 2 January, 1939; and that the summons was actually served on 2 January, 1939.

An action is commenced when the summons is issued against the defendant, C. S., 404, and a civil action is commenced by issuing a summons, C. S., 475. So the question presented is when was the summons issued in this action, on 31 December, 1938, or on 2 January, 1939. If on the former date, the defendant's motion to dismiss should have been granted; if on the latter date, the motion should have been denied.

Stacy, C. J., in *Morrison v. Lewis*, 197 N. C., 79, says: "The rationale of our decisions on the subject seems to be that when a summons passes out of the hands of the clerk for service, whether delivered directly to the sheriff or to another for him, and is duly served on or before the day fixed for its return, nothing else appearing, the action is regarded as pending from the time the summons left the clerk's office, under his sanction and authority, for the purpose of being served."

It will be noted that it is said, "nothing else appearing, the action is regarded as pending from the time summons left the clerk's office . . . for the purpose of being served." In the instant case something else appears, namely, that the summons was dated two days later than the day it left the justice's hands, and that the justice instructed the recipient of the summons, who in turn instructed the constable, to whom the summons was delivered for service, that it was not to be served before its date, and that such instructions were understood and observed by all parties involved. We think that while the summons physically left the hands of the justice on 31 December, 1938, it did not leave his control "for the purpose of being served" until 2 January, 1939. We, therefore, concur in his Honor's ruling in denying the motion to dismiss.

The defendant offered in evidence his own testimony, corroborated by the testimony of his wife, tending to show that in 1929 there was an agreement between him and the plaintiff to the effect that the plaintiff was to give the defendant notice not later than 15 June if she (plaintiff)

wanted the property the following year, and that this agreement continued on through the subsequent years, and that the plaintiff first gave the defendant notice that she wanted the property in 1939 on 31 July, 1938. The court sustained the plaintiff's objection to this evidence, and the defendant preserved exception. We think, and so hold, that this exception is well taken.

While it is true that when a tenant for a year or a longer time holds over after his lease expires and is recognized as a tenant by the landlord after such expiration, without qualifying facts or circumstances, he becomes a tenant from year to year, *Murrill v. Palmer,* 164 N. C., 50, and, nothing else appearing, such tenancy may be terminated by notice to quit given one month or more before the end of the current year of tenancy, C. S., 2354. However, this provision of the statute does not prevent the parties to a lease from year to year agreeing to a different time for the giving of the notice to quit, nor from showing that such an agreement existed. The statute does not exclude the rights of the parties to stipulate differently from its provisions, which are only permissive.

"He (landlord) may treat his tenant, who holds over, as a trespasser, and eject him, or he may recognize him as tenant; but when such recognition has been made, a presumption arises of a tenancy from year to year, and as stated, *under the terms and stipulations of the lease* as far as the same may apply. *Murrill v. Palmer, supra.*

There must be a

New trial.

DEVIN and BARNHILL, JJ., dissent.

E. F. WATSON, EXECUTOR OF THE LAST WILL AND TESTAMENT OF CORA RAY WATSON, DECEASED, v. LILLIE RAY CHASE PETERSON, GLADYS COLLETTA AND HUSBAND, P. C. COLLETTA, DRUID CHASE AND WIFE, ELOISE CHASE, AND LUCILE CHASE.

(Filed 18 October, 1939.)

1. Pleadings § 19—

All grounds for demurrer other than want of jurisdiction and failure of the complaint to state a cause of action are waived by failure to file formal demurrer, but defendant may demur on these grounds at any time, even in the Supreme Court.

2. Executors and Administrators § 13b—

In a proceeding to sell lands to make assets to pay debts of the estate, C. S., 74, an averment that insufficient personalty remained in the hands of

the petitioner to pay debts and legacies is insufficient and the petition is demurrable, since the statute, C. S., 79, prescribes that the petition should set forth the value of the personal estate and the application thereof, and it is necessary that the requirement of the statute should be observed.

APPEAL by plaintiff from *Ervin, Special Judge,* at February Term, 1939, of YANCEY. Remanded.

This is an action brought by plaintiff against defendants to sell certain lands of his testatrix to pay certain debts and legacies of his testatrix. The defendant denied the allegations of the complaint and the right of plaintiff to sell the land, and further set up the fact that the legacies have been renounced "and no longer exist."

The court below found certain facts and denied the petition of plaintiff. The plaintiff made numerous exceptions and assignments of error and appealed to the Supreme Court. The necessary facts for a decision of the case will be set forth in the opinion.

Charles Hutchins, Dover R. Fouts, and Frank H. Watson for plaintiff.
Briggs & Atkins and Huskins & Wilson for defendants.

CLARKSON, J. We do not think it necessary on this record to consider the various exceptions and assignments of error made by plaintiff to the findings of fact and conclusions of law made by the court below.

The proceeding is instituted under N. C. Code, 1935 (Michie), sec. 74, which is, in part, as follows: "When the personal estate of a decedent is insufficient to pay all the debts, including the charges of administration, the executor, administrator or collector may, at any time after the grant of letters, apply to the Superior Court of the county where the land or some part thereof is situated, by petition, to sell the real property," etc.

Sec. 79 is as follows: "The petition, which must be verified by the oath of the applicant, shall set forth, as far as can be ascertained: (1) The amount of debts outstanding against the estate. (2) The value of the personal estate, and the application thereof. (3) A description of all the legal and equitable real estate of the decedent, with the estimated value of the respective portions or lots. (4) The names, ages and residences, if known, of the devisees and heirs at law of the decedent."

The allegations of the complaint for the determination of this controversy reads as follows: "That before the marriage of Gladys Chase, your petitioner had paid to Mrs. Lillie Ray Chase, the chief legatee under said will, practically all of the ready cash or the proceeds of notes collected, which had come into the hands of your petitioner, and there does not now remain enough personal property of any kind or character to pay off said legacies and stock assessment or cost of administration, but it is absolutely necessary, if said legacies shall be paid, that the real

estate, all or a portion thereof, herein described, shall be sold by order of this court to raise funds with which to pay said legacies. . . . WHEREFORE, your petitioner prays the court that he be authorized by this court to sell all of the interest of the late Cora Ray Watson in the foregoing tracts of land, or so much thereof as may be necessary to pay off the specific legacies hereinbefore referred to, and mentioned, and any other charges against the said estate of the said Cora Ray Watson and for such other and further relief as to the court may seem equitable and just."

The defendants demurred *ore tenus* on the ground that "the complaint does not state facts sufficient to constitute a cause of action." Michie, *supra,* sec. 511 (6).

All objections except those on the ground that the court has no jurisdiction of the person of the defendants or the subject matter of the action, and that the complaint does not state facts sufficient to constitute a cause of action, are waived unless they are taken by demurrer or answer. But the exceptions referred to may be taken advantage of by demurrer even in the appellate court. *Clements v. Rogers,* 91 N. C., 63 (64); *Gurganus v. McLawhorn,* 212 N. C., 397 (408); *Carpenter, Solicitor, v. Boyles,* 213 N. C., 432 (445).

We think the demurrer should be sustained. In the present case the petition alleges "and there does not now remain enough personal property," etc. In *Neighbors v. Evans,* 210 N. C., 550, the complaint stated "and the personal estate of said E. G. Talton is not sufficient to pay said debts." We held this was insufficient and said, at p. 553: "In *McNeill v. McBryde,* 112 N. C., 408 (411-12), it is said: 'We think, however, that the petition is deficient in that it does not comply with section 1437 of The Code (now C. S., 79), which requires that it shall set forth "the value of the personal estate and the application thereof." It simply states that the personal estate "is wholly insufficient to pay his (intestate's) debts and the costs and charges of administration." The purpose of the statute, in requiring the particulars therein mentioned to be stated in the petition, was to enable the court to see whether a sale was necessary; but the present allegation wholly fails to give any such information. It is important that the requirements of the statute should be observed, and we must sustain the demurrer upon this ground. *Shields v. McDowell,* 82 N. C., 137.'" See *Clarke v. Wineke, ante,* 238. The demurrer *ore tenus* is sustained. The action is

Remanded.

STATE v. A. W. HARDIE.

(Filed 18 October, 1939.)

1. Barbers § 3; Indictment § 20—

The indictment charged defendant with practicing barbering "without first obtaining a certificate of registration." The evidence tended to show that defendant practiced barbering after his license had been revoked. *Held:* There is a fatal variance between the indictment and proof, proof of lack of a license not being proof of lack of a certificate of registration.

2. Statutes § 8—

Penal statutes must be strictly construed.

APPEAL by defendant from *Armstrong, J.*, at August Term, 1939, of WILKES. Reversed.

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

Trivette & Holshouser for defendant, appellant.

SCHENCK, J. The bill of indictment charges "that A. W. Hardie, . . . on the 7th day of October, 1938, . . . unlawfully and willfully for pay practiced barbering . . . without first obtaining a certificate of registration, either as a registered apprentice or as a registered barber, from the State Board of Barber Examiners, . . ." The bill is drawn in accord with secs. 1 and 21, ch. 119, Public Laws 1929, as amended by sec. 6, ch. 138, Public Laws 1937. (Michie's N. C. Code of 1935, secs. 5003 [a] and 5003 [u].)

The State called but one witness, namely, one J. M. Cheek, who testified to the effect that he was a member of the North Carolina Board of Barber Examiners, that he saw the defendant on 8 October, 1938, and on various later dates, cutting the hair of and shaving various persons for pay, and that the defendant "did not have a license"—that he knew that the defendant did "not have a license to practice barbering" upon the dates mentioned. On cross-examination the witness testified that the defendant at one time "held a license to practice barbering," and on redirect examination that such license was revoked, "and subsequent thereto the State Board did not issue to the defendant a new certificate as a barber." The date or time of the revocation of the license does not appear from the evidence.

It will be noted that the bill charges that the defendant practiced barbering without first obtaining a "certificate of registration" and the

proof is that the defendant practiced barbering without having a license. The term "certificate of registration" is not once used in the testimony of the witness, the nearest approach to such use being in the last sentence thereof, when the witness stated that the defendant's license was revoked, "and subsequent thereto the State Board did not issue to the defendant a new certificate as a barber."

The evidence does not support the charge—there is a fatal variance between the *allegata* and the *probata*. The crime for which the defendant was being tried being a statutory offense, the statute must be construed strictly in favor of the defendant and against the State. *S. v. Heath,* 199 N. C., 135. When this rule of construction is applied the proof of the lack of a license cannot be construed as proof of lack of a certificate of registration.

The judgment of the Superior Court is

Reversed.

JOHN R. WYNN, ADMINISTRATOR, v. EDWARD H. ROBINSON ET AL.

(Filed 18 October, 1939.)

Process § 8—In this action for alleged negligent operation of automobile, service of process on nonresident through Commissioner of Revenue held valid.

An affidavit of a salesman that the details of his schedule and the control of his automobile were determine by him, subject to the approval of his corporate employer, supports the finding of the court that the automobile was being operated for the corporate employer and under its control and direction, express or implied, within the meaning of chapter 75, Public Laws of 1929, and, in an action to recover for alleged negligent operation of the car, service of process on the corporate employer through the Commissioner of Revenue under the provisions of the statute is valid, and *held further*, the statute is constitutional.

APPEAL by defendant, The Alligator Company, from *Bone, J.,* at August Term, 1939, of JOHNSTON.

Civil action to recover damages for death of plaintiff's intestate alleged to have been caused by the neglect, default or wrongful act of the defendants when the automobile driven by defendant Edward H. Robinson struck plaintiff's intestate as he was crossing the highway after alighting from a school bus near his home in Johnston County on the afternoon of 3 March, 1939.

Service of summons was had upon the Commissioner of Revenue of North Carolina, as agent of the nonresident defendant, The Alligator Company, under ch. 75, Public Laws 1929.

The corporate defendant entered a special appearance and moved to vacate the attempted service of process and to dismiss for want of jurisdiction.

Touching the operation of the automobile in question, the court found the following facts:

1. That the automobile was owned by Edward H. Robinson, an employee or salesman of the corporate defendant, and was being driven by him at the time, in the discharge of his duties, as such employee or salesman, from Fayetteville, N. C., to Smithfield, N. C.

2. That the corporate defendant "exercised some degree of control over Robinson with respect to the manner in which he was to engage in soliciting orders for it and the times and places therefor."

3. That the corporate defendant "exercised some degree of control over the automobile operated and owned by Robinson and the hours, times and places in which he worked."

These findings are based upon an affidavit of Robinson in which he says the details of his schedule and the control of his automobile were determined by him "subject to the approval of the company."

From denial of the motion lodged by the corporate defendant on special appearance, The Alligator Company appeals, assigning errors.

L. L. Levinson and Lawrence H. Wallace for plaintiff, appellee.
Thomas W. Ruffin for defendant, appellant.

STACY, C. J. It is provided by ch. 75, Public Laws 1929, that in any action or proceeding against a nonresident, "growing out of any accident or collision in which said nonresident may be involved by reason of the operation by him, for him, or under his control or direction, express or implied, of a motor vehicle on any of the public highways of this State," service may be obtained through the Commissioner of Revenue. Compliance with the provisions of this statute is conceded in the instant case.

The question for decision is whether the automobile which struck plaintiff's intestate was being operated at the time "for" the corporate defendant, or under its "control or direction, express or implied." The court found that the automobile was so operated at the time, and accordingly denied the defendant's motion to vacate the service of process and to dismiss for want of jurisdiction. *Denton v. Vassiliades,* 212 N. C., 513, 193 S. E., 737. The ruling is supported by the record. *Bigham v. Foor,* 201 N. C., 14, 158 S. E., 548.

The case of *Plott v. Michael,* 214 N. C., 665, 200 S. E., 431, cited by appellant, is not in point. It involved an attempted service of process under a different statute, C. S., 1137. See *White v. Lumber Co.,* 199

N. C., 410, 154 S. E., 620. Likewise, the case of *Smith v. Haughton,* 206 N. C., 587, 174 S. E., 506, is distinguishable, for in that case there was no evidence that the automobile, there owned by the agent and representative of the corporate defendant, was being operated at the time in the business of the corporate defendant, "for" it, or under its "control or direction, express or implied." Here, just the reverse appears.

The constitutionality of ch. 75, Public Laws 1929, was upheld in *Ashley v. Brown,* 198 N. C., 369, 151 S. E., 725. Defendant's present challenge must meet with a like result.

The ruling from which the defendant appeals will be upheld.

Affirmed.

GEORGE WASHINGTON LEE v. VERLIN LEE.

(Filed 18 October, 1939.)

Wills § 46—

A devise of certain lands to a person "for his natural life in fee simple" followed by a residuary clause in favor of such person, gives the devisee the fee simple title to the lands, there being no other item of the will affecting the lands, since if the first devise carries only a life estate the residuary clause perfects title in the devisee.

Appeal by defendant from *Bone, J.,* at August Term, 1939, of JOHNSTON. Affirmed.

This was a controversy without action to determine the title to land. Plaintiff has contracted to convey the land to the defendant in fee simple, subject to the dower right of his mother. Defendant declined to accept tendered deed and pay the purchase price on the ground that plaintiff has only a life estate in the land. From judgment for plaintiff, defendant appealed.

Parker & Lee for plaintiff, appellee.
Ezra Parker for defendant, appellant.

DEVIN, J. The plaintiff's title to the land contracted to be conveyed was derived from the joint will of Merilda and Ersula Lee. The pertinent provisions of the will are as follows:

"Item 2: We give and devise to our cousin, T. W. Lee, the tract of land on which we now reside, containing one hundred seventeen and one-half (117½) acres for his natural life in fee simple.

"Item 9: Our will and desire is that all of the residue of our estate, if any, after taking out the devise, and legacies above mentioned, and marking our graves with tume stones shall go to our cousin, T. W. Lee."

Upon the death of the testators the joint will was probated in 1913. It was admitted that all the legacies and debts of the devisors have been paid. It was also admitted that the plaintiff is the only heir at law of T. W. Lee, the devisee mentioned in the will.

Whatever may have been the effect of the devise to T. W. Lee "for his natural life in fee simple," it is apparent that the later devise of "all of the remainder of our estate . . . to our cousin, T. W. Lee," perfects title in fee in the named devisee; for if he took only a life estate by Item 2, the remainder passed to him by the inclusive terms of the residuary clause in Item 9. Thus the life estate and the remainder became united in the same person. 19 Am. Jur., 592.

It was well said in *Edens v. Williams,* 7 N. C., 27: "Every part of the will is to be considered in its construction, and no words ought to be rejected, if any meaning can be possibly put upon them. Every string should give its sound." *Heyer v. Bulluck,* 210 N. C., 321.

We concur in the ruling of the court below that plaintiff's proper deed would convey fee simple title to the land, subject to the dower right of plaintiff's mother, as agreed, and that upon tender of deed plaintiff is entitled to recover the balance of the purchase price of the land.

Judgment affirmed.

S. A. STEVENS v. CORNELIA VANDERBILT CECIL.

(Filed 18 October, 1939.)

1. Process § 5—

Where it appears that the cause of action alleged had theretofore been finally determined against plaintiff in a prior suit, such cause of action will not support service of process by publication and attachment.

2. Same—

An action to cancel a judgment of *retraxit* will not support the service of process by publication and attachment, since it is not one to recover a sum of money only nor damages for one or more of the causes of action enumerated in the statute, C. S., 798.

APPEAL by plaintiff from *Pless, J.,* at February Term, 1939, of BUNCOMBE. Affirmed.

Don C. Young and Frank Carter for plaintiff, appellant.
Adams & Adams for defendant, appellee.

SCHENCK, J. This is an appeal from an order vacating an attachment made upon motion of the defendant lodged under a special appearance.

The plaintiff had summons to issue against the defendant which was returned "Due search made, defendant not to be found in Buncombe County." Upon the plaintiff's filing proper undertaking, the clerk issued a warrant of attachment, and ordered that service of summons and of the attachment be made by publication. The sheriff served the summons and attachment upon C. D. Beadle, Secretary-Treasurer and North Carolina process officer of the Biltmore Company, and an order to said C. D. Beadle requiring him to appear before the clerk and answer upon oath as to the ownership of capital stock in the Biltmore Company by the defendant.

The defendant entered a special appearance and moved to dismiss the attachment and order of garnishment for that it appeared from the complaint filed that an attachment did not lie.

The complaint, which was used as an affidavit to procure the attachment, alleges two causes of action. The first cause of action alleged being that the plaintiff, while an employee of the defendant, was permanently injured by the negligence of the agents of the defendant and had instituted action for damages caused by said injury, and that shortly after issue was joined in said action the defendant's agent and manager falsely and fraudulently represented to the plaintiff that he had power to settle and compromise said action, and thereby induced the plaintiff to compromise said action for the nominal sum of $75.00 and a contract for permanent employment, which contract the defendant breached. The cause of action thus alleged has been determined adversely to the plaintiff. *Stevens v. Cecil,* 209 N. C., 738. Hence it plainly appears from the pleadings that the so-called "first cause of action" must fail and that it was proper so far as said "first cause of action" was concerned to vacate the attachment. *Knight v. Hatfield,* 129 N. C., 191.

The prayer for relief in the second cause of action alleged in the complaint is that the "*retraxit* be canceled and the aforementioned judgment of nonsuit be stricken out and that said former action be reinstated on the Civil Issue Docket of this court for trial according to the course and practice of the courts." It is apparent that this action is neither "to recover a sum of money only," nor "damages for one or more" of the causes enumerated in the statute, C. S., 798. Hence the attachment was properly vacated in so far as the second cause of action alleged in the complaint is concerned.

The judgment of the Superior Court is

Affirmed.

J. H. HARRIS v. HELEN SMITH, ADMINISTRATRIX.

(Filed 18 October, 1939.)

1. Trial §§ 22b, 24—

Upon a motion to nonsuit, the evidence must be considered in the light most favorable to plaintiff, and the case must be submitted to the jury if a cause of action is made out, even though the damages shown be slight or only nominal.

2. Agriculture § 7e—

Evidence of lease agreement to rent farm lands for a term of one year and the landlord's breach of the agreement *held* sufficient for the jury.

APPEAL by plaintiff from *Williams, J.*, at March Term, 1939, of PITT.

Civil action to recover damages for breach of rental contract.

There is evidence on the record permitting the inference that in December, 1937, defendant's intestate, Marcellus Smith, agreed to rent to the plaintiff for the ensuing year "four acres in tobacco, four acres in cotton and six acres in corn"; that it is the general custom "when the landlord furnishes the team, each gets one-half of the crop"; that plaintiff cleaned up the vacant house which he was to occupy on defendant's place, but was prevented from moving in because there had been "some backing out." Plaintiff worked elsewhere during 1938, but made very little.

From judgment of nonsuit entered at the close of plaintiff's evidence, he appeals, assigning errors.

R. T. Martin for plaintiff, appellant.
John Hill Paylor for defendant, appellee.

STACY, C. J. Viewing the evidence in its most favorable light for the plaintiff, as we are required to do on motion to nonsuit, it appears to be sufficient to carry the case to the jury, albeit the damages shown would seem to be slight or only nominal. See *Gulley v. Raynor,* 185 N. C., 96, 116 S. E., 171; *Perry v. Kime,* 169 N. C., 540, 86 S. E., 337; *Machine Co. v. Tobacco Co.,* 141 N. C., 284, 53 S. E., 885; *Herring v. Armwood,* 130 N. C., 177, 41 S. E., 96; *Spencer v. Hamilton,* 113 N. C., 49, 18 S. E., 167.

Reversed.

WALTER J. SYKES AND INDUSTRIAL BANK v. ÆTNA INSURANCE COMPANY, INC.

(Filed 18 October, 1939.)

Parties § 7—

A party permitted to intervene under its claim of an interest in the subject matter of the action, Michie's N. C. Code, 460, must file its pleading to be entitled to an adjudication of its rights.

APPEAL by plaintiff Industrial Bank from *Carr, J.*, and a jury, at March Term, 1939, of PASQUOTANK. No error.

This is an action brought by Walter J. Sykes and the Industrial Bank was afterwards made a party plaintiff, against Ætna Insurance Company, Inc., defendant. The plaintiff Walter J. Sykes sued the defendant to recover $550.00, with interest from 6 March, 1937, on a policy in the defendant company then in force on a Tudor Sedan Ford, 1936 model, on which the premium was paid. In the policy was the following:

"G. *Theft, Robbery and Pilferage:* (Broad form) Theft, Robbery and Pilferage, *excepting by any person or persons in the Assured's household,* or in the Assured's service or employment, whether the theft, robbery or pilferage occurs during the hours of such service or employment or not, and excepting by any person, or agent thereof, or by the agent of any firm or corporation to which person, firm or corporation the Assured, or any one acting under express or implied authority of the Assured, voluntarily parts with title and/or possession, whether or not induced so to do by any fraudulent scheme, trick, device or false pretense; and excepting in any case, other than the theft of the entire automobile described herein, the theft, robbery or pilferage of tools or repair equipment." (Italics ours.)

The following appears in the record: "Upon the cause being called for trial, M. B. Simpson, attorney for plaintiff, moved that the Industrial Bank of Elizabeth City, Incorporated, be made a party plaintiff to this action, and stated that he represented the said Industrial Bank of Elizabeth City, Incorporated, and it appearing to the court that the said Industrial Bank of Elizabeth City, Incorporated, is mentioned in the policy sued on in this action, and is the holder of the conditional sales contract on the automobile referred to in this action. The motion to make the said bank a party is allowed, and the defendant excepts.

LEO CARR, Judge."

It was in evidence that the car was stolen by a person "in the assured's household."

The issue submitted to the jury was: "What damages, if any, are the plaintiffs entitled to recover of the defendant?" The jury answered: "Nothing."

Sykes did not appeal but the Industrial Bank did.

Forrest V. Dunstan, R. Clarence Dozier, and M. B. Simpson for plaintiff bank.

McMullan & McMullan for defendant.

PER CURIAM. Plaintiff Walter J. Sykes did not appeal—thus he is out of the picture. The Industrial Bank did appeal.

N. C. Code, 1935 (Michie), sec. 460, in part, is as follows: "When in an action for the recovery of real or personal property, a person not a party to the action, but having an interest in its subject matter, applies to the court to be made a party, it may order him to be brought in by the proper amendment."

After the bank was made a party, we can find in the record no pleading filed in the cause by the bank. It is not now in a position to complain.

We find in the judgment of the court below

No error.

A. J. BRADSHAW v. WILLARD WARREN AND WIFE, MARY WARREN.

(Filed 18 October, 1939.)

1. Courts § 2c—

Where the clerk of the Superior Court erroneously hears a proceeding over which he does not have jurisdiction, an appeal to the Superior Court confers jurisdiction upon it to hear and determine the whole matter. Michie's N. C. Code, 637.

2. Pleadings § 23—

In this processioning proceeding, Michie's N. C. Code, 361-364, the Supreme Court granted a new trial for error of law, and upon the subsequent hearing the trial court allowed petitioner to amend to allege mutual mistake in entering one of the calls in the deeds of the parties. *Held:* The amendment does not substantially change the cause of action, and the ruling of the court upon the petition to be allowed to amend is not reviewable in the absence of abuse of discretion.

APPEAL by defendants from *Armstrong, J.*, at May Term, 1939, of CALDWELL. Appeal dismissed.

This is a processioning proceeding instituted by the petitioner appellee, A. J. Bradshaw, against the defendants Willard Warren and wife, Mary Warren, on 28 July, 1938, under chapter 9, Public Laws of North Carolina, entitled "Boundaries," being sections 361-364 of the Code (Michie), to establish the boundary line between the petitioner and the defendants' adjoining lots in the city of Lenoir, North Carolina, the petitioner claiming ownership of Lot No. 2, and the defendants claiming ownership of Lot No. 1 of Jennings-Dimmette subdivision, of record in Plat Book No. 1, page 47, office of the register of deeds for Caldwell County.

The proceeding was erroneously heard before the clerk of the Superior Court of Caldwell County, the defendants in their answer having denied petitioner's ownership, and from a judgment in favor of the petitioner defendants appealed to the Superior Court.

The proceeding came on for trial in Superior Court of Caldwell County before Warlick, Judge, and a jury, at the January Special Term, 1939, on the original petition and answer filed, and from a verdict and judgment in favor of the defendants, the petitioner appealed to the Supreme Court. At the Spring Term, 1939, the petitioner was awarded a new trial on the ground of insufficient instructions to the jury.

The case being remanded for a new trial, the petitioner, at the May Term, 1939, of Caldwell Superior Court, moved, orally, to amend his petition in several respects and asked leave of the court to file the "Amended Petition" herein set forth, dated 22 May, 1939. From an allowance of this motion and order permitting the amendments the defendants excepted, assigned error, and appealed to the Supreme Court.

Townsend & Townsend for plaintiff, petitioner.
Thos. L. Warren and G. W. Klutz for defendants, respondents.

PER CURIAM. This case was here before. *Bradshaw v. Warren,* 215 N. C., 442. At page 445 it is said: "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."

The order of the court below, in part, says: "It is ordered, therefore, in the exercise of the court's discretion that the petitioner be permitted to amend his petition," etc.

The 5th allegation in petitioner's "amended petition" reads as follows: "That the call of the line in controversy as noted in the plat to which both the deed of your petitioner and the defendants refer was set as a call 'S. 89½ deg. E. 275 feet to a point in the T. W. Austin line,' and

said call is erroneous, and should have been 'S. 79½ deg. W. 275 feet to a point in the T. W. Austin line'; that said error was committed by the draftsman in setting down the plat of the line constituting the boundary between petitioner and respondents, which error and mistake is a proper subject of correction by the court; petitioner further alleges that it was the intention of all parties, when said line was platted, that same should be a right-angle or 90-degree line, with the call 'S. 79½ deg. W.' instead of 'S. 89½ deg. E.,' and that the erroneous noting of the call as above stated was a mutual mistake and should be corrected by this court."

N. C. Code, 1935 (Michie), sec. 637, is as follows: "Whenever a civil action or special proceeding begun before the clerk of a Superior Court is for any ground whatever sent to the Superior Court before the judge, the judge has jurisdiction; and it is his duty, upon the request of either party, to proceed to hear and determine all matters in controversy in such action, unless it appears to him that justice would be more cheaply and speedily administered by sending the action back to be proceeded in before the clerk, in which case he may do so." *Sharpe v. Sharpe,* 210 N. C., 92 (97).

It is well settled that no amendment will be allowed which substantially changes the cause of action. In the present case the amendment does not substantially change the cause of action and the court below did not exceed its power in allowing the amendment. Allowance or refusal to allow amendment to a pleading cannot be reviewed on appeal, except for an abuse of discretion.

For the reasons given, the appeal is

Dismissed.

STATE v. PAUL JORDAN.

(Filed 1 November, 1939.)

1. Criminal Law § 53h—

The charge of the court will be construed contextually as a whole.

2. Homicide § 27f—Charge on right to kill in self-defense when defendant is assaulted on own premises held without error.

A charge on the question of self-defense that if defendant was assaulted while on his own premises, defendant was not required to retreat to avoid a combat *held* not error for failure to add at that particular point that under such circumstances defendant would have the right to kill if necessary or apparently necessary in his self-defense, when in other portions of the charge the right to kill in self-defense is correctly set forth, since the enunciation of the principle of the right to kill in self-defense applied to the statement of defendant's right to stand his ground, and therefore the charge is without error when construed contextually as a whole.

3. Same—Instruction on defendant's right to stand his ground held sufficiently full.

When all the evidence discloses that defendant was on his own premises at the time of the fatal encounter, an instruction that under the circumstances defendant was not required to retreat *held* not error for failing to charge on the principle of the right to stand one's ground in the face of a sudden, felonious assault affording no opportunity for retreat, since the jury was instructed that under the circumstances defendant had the right to stand his ground in the face of any kind of assault.

4. Homicide § 18a—

The competency of testimony of a dying declaration is a question of law for the court.

5. Homicide § 30—

Upon an exception to the admission of testimony of a dying declaration the ruling of the trial court will be reviewed solely to determine whether there is evidence tending to show facts necessary to support the ruling.

6. Homicide § 18a—Competency of dying declarations.

Dying declarations relating to the *res gestæ* are competent when, at the time, declarant is in actual danger of death, has full apprehension of such danger, and death ensues, and when declarant, if living, would be a competent witness to testify as to the matter.

7. Same—Evidence held to show that declarant was in actual danger of death and had full apprehension of such danger.

The evidence disclosed that at the time of making the declarations declarant was lying on an operating table with a fatal pistol wound in his abdomen, that the attending physician told him that he was in a serious condition, that he would not give "ten cents" for his life, and that declarant then made the statements. *Held:* The evidence discloses that declarant was in actual danger of death and had full apprehension of that danger sufficient to support the trial court's ruling admitting testimony of the declarations, it not being necessary that declarant himself should express his apprehension of impending dissolution, since it is sufficient that the circumstances disclose that he was fully aware of his condition.

8. Same—

When declarations are made under an apprehension of impending dissolution it is not necessary that death immediately ensue; in this case declarant died about three days after making the declarations, and testimony of the declarations *is held* competent.

9. Criminal Law § 53f—Court need not charge that failure of defendant to testify should not be considered against him in absence of request.

Defendant excepted to the charge on the ground that the court failed to instruct the jury that defendant's failure to testify in his own behalf should not be taken to his prejudice, C. S., 1799. Defendant made no request for such instructions. *Held:* Neither C. S., 564, nor precedent require the court to give such instructions in the absence of a proper request.

APPEAL by defendant from *Bobbitt, J.,* at June Term, 1939, of RANDOLPH. No error.

Criminal prosecution tried upon indictment charging the defendant with the murder of one Dave Fowler.

Verdict: Guilty of manslaughter.

Judgment: Imprisonment in the State's Prison for a term of three years.

The defendant appeals, assigning errors.

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

J. V. Wilson, Moser & Miller, and C. T. Kennedy for defendant.

SEAWELL, J. Many exceptions appear in the record which offer no serious challenge to the correctness of the trial. We have not thought it necessary to discuss them in this opinion. Meriting more detailed consideration are three aspects of the trial involving exceptions on which the defense more strongly relies:

1. There was evidence on the part of the State tending to show that the defendant shot the deceased through the abdomen, without justifiable cause, and rebuttal evidence on the part of defendant tending to show that the shooting was upon defendant's own premises and in his necessary self-defense, under a reasonable apprehension of death or great bodily harm.

Among the exceptions to the instructions relating to the right of self-defense, we find the following: "Under the evidence in this case the court charges you that the defendant was on his own premises; that Dave Fowler, the deceased, also was on the premises of the defendant; that the defendant had the legal right to require Dave Fowler to leave his premises and to use such force as was reasonably necessary to compel him to leave, and that, if Dave Fowler, the deceased, made an assault upon the defendant upon his own premises, the defendant would be under no duty to retreat to avoid a combat, but was legally entitled to stand his ground." Exception to this is upon the ground that it did not contain the further instruction that under such circumstances the person assailed would have the right to kill his adversary without retreating.

Where the subject of complaint is the omission, within the immediate focus of the objection, of something deemed essential, we are mindful of the fact that all the law cannot be crowded into a single sentence without danger to that vehicle of thought, and, so, we look further into the caravan for the missing item. In other words, on a test of its adequacy the charge must be taken as a whole, contextually. *Collins v. Electric Co.*, 204 N. C., 320, 168 S. E., 500; *In re Will of Brown*, 203 N. C., 347, 166 S. E., 72; *Marriner v. Mizzelle*, 207 N. C., 34, 175 S. E., 711;

Beal v. Coal Co., 186 N. C., 754, 120 S. E., 333. In this instance we find no trouble with the charge after the exceptive brackets have been removed.

In the paragraph immediately preceding, we find: "A person has a legal right to use any means at his command when acting in self-defense. He may injure, even kill, a person who wrongfully assaults him whenever it is necessary for him to do so in order to defend and protect himself from death or great bodily harm. He may also do so when it is not actually necessary if he believes it to be necessary and has reasonable grounds for that belief."

The right to kill an assailant, in apparently necessary self-defense, under a reasonable apprehension of death or great bodily harm, is not peculiar to the circumstance that the person so situated happens to be upon his own premises and, therefore, need not retreat, nor is it peculiar to the situation where one is suddenly subjected to a felonious assault, which gives him no opportunity of retreat, and is sufficiently stated in the formula generally covering the right of self-defense, as contained in the charge considered as a whole.

Since there was no dispute about the fact that the defendant was at the time of the alleged assault and the killing upon his own premises, and under that score got the benefit of the charge that he need not retreat under any kind of an assault, it would seem to be supererogation to add to it that he would have the same right under a sudden felonious assault.

We have examined the other exceptive assignments of error pertaining to the subject of self-defense in connection with the whole evidence and find no error upon this phase of the case.

2. Defendant's counsel objected on the trial to the introduction of the statements made by Dave Fowler, after receiving the fatal wound, as dying declarations. The objection is based upon the alleged insufficiency of the evidence to show that at the time the declaration was made the deceased was under sufficient apprehension of death.

The evidence pertinent to this inquiry is substantially as follows:

J. B. Coltrane testified for the State: "I am a police officer in the city of High Point. This service station and dance hall is around eight or nine miles from High Point. On the night of the 19th of September I saw the deceased, Dave Fowler, at the Guilford General Hospital, High Point. That was at eleven o'clock. He was on the operating table. Mr. Lee and Dr. Slate, Dr. Stanton and two or three nurses were present with me. When we answered the call by the time we got to the hospital they had already strapped Dave down to his knees. His shirt was pulled up here and there was a wound approximately two inches to the left of his navel and maybe a quarter of an inch below. It was

a bullet wound. I didn't see any other wound on him at that time. He was conscious then. I had known the deceased a couple of years. At this time, while the deceased was on the operating table, I heard Dr. Slate make a statement in the presence and hearing and to Dave Fowler. Dr. Slate is a practitioner of medicine.

"I asked Dr. Slate if the deceased was conscious at the time and if we might say something to him, and he said he was conscious. He said he wouldn't give ten cents for his life. He said he didn't think he would recover under any circumstances; and then he reached over and laid his hand on his, the deceased's abdomen, and said, 'Dave, you are in a bad way, go ahead and tell these officers anything that you want to; if you want to make a statement to them go ahead and make a statement.'

"When the doctor made that statement to him in our presence he said that he would make a statement; that he didn't have any prejudice against anyone. He said that Paul Jordan shot him and he shot him in his service station; that he was fixing to leave, was coming out the door, coming through the door, and Paul came around the counter and fired, just fired pointblank at him and hit him. Said that is all there was to it. Said he didn't know any reason in the world why he should have shot him.

"There were two doctors in the room when I went to the hospital. Dr. Slate was standing right by the table and Dr. Stanton was preparing himself for the operation. There were two or three nurses there, and the other officer."

D. S. Lee testified for the State: "I am an officer at High Point. I was present on the night at the hospital with Mr. Coltrane. I was in the operating room at the time the deceased was there. Dr. Slate and Dr. Stanton and two or three nurses were going in and out. The deceased, Dave Fowler, was alive at that time. He was conscious.

"Dr. Slate was standing by the operating table and he laid his hand over on Dave and said, 'Dave, if you want to make any statement to these officers, go ahead and make it; I wouldn't give ten cents for your life.'

"He said he and Mr. Loman, Mr. Simpson, Pauline Pierce and Jewel Phillips were down at the station and they had started to leave and he had started out the door when Mr. Jordan fired pointblank at him and hit him in the stomach.

"I went to the hospital at 11 p.m. We went out to investigate the case. We had been called there by the doctor. Dr. Slate and Dr. Stanton and two or three nurses were there."

Dr. T. M. Stanton testified for the State: "I am a practitioner of medicine.

"I am now connected with the Guilford General Hospital and was on the 19th of September, last year. This hospital is in High Point. I saw the body of Dave Fowler in the hospital on the 19th of September. It must have been between 10 and 11 o'clock. I examined the deceased. I found that Dave Fowler had a bullet wound on the left front of his abdomen about half way between his hip bone and his ribs. After I opened him up to find out the extent of the injury, it damaged four or five feet of the small intestines. I treated him. He remained in the hospital for several days. He died there. His death was caused as a result of this bullet tearing his bowels and he developed peritonitis. Dr. Slate was there with me on the night the deceased, Dave Fowler, was on the operating table. At that time he was in right much shock.

"I told him that he was severely wounded and in all probability wouldn't get well, and if he had any statement to make I advised him to make it.

"He said he was standing in the door of Mr. Jordan's filling station fixing to leave and Mr. Jordan shot him.

"That was the night of the injury, and he lived several days after that. He got along very well for several days, about three days, and knew about everything that was going on, then he died."

The reasons usually advanced in support of the universal practice of admitting dying declarations in evidence on homicide trials is part of the conventional learning of the profession. We do not care to make an unnecessary display of erudition. On that subject a collection of authorities may be found in *S. v. Stewart,* 210 N. C., 362, 186 S. E., 488, and to these we refer. A study of these authorities convinces us that the public policy that has been strong enough to strike down the rule against the admission of hearsay evidence, to the extent that dying declarations, unsworn and untested by cross-examination, are admitted in evidence, is justified by its agreement with our common experience of the truthfulness of such declarations, and still more so, perhaps, by the necessity of preserving the evidence of one of the principals in a tragedy, in which he is often the only eye-witness of his own murder. Since such evidence is already confined to the act of killing and attendant circumstances—the *res gestæ*—public policy should not be further narrowed by limitations not within its spirit, to the extent that such an important instrument of proof should be impaired or destroyed.

The admissibility of evidence of this kind is addressed to the court and not the jury. And, on appeal, the action of the court below will be reviewed only to determine whether there was evidence tending to show the facts necessary to the decision. *S. v. Stewart, supra.*

The conditions under which such evidence may be admitted have been variously stated, but the summary, by *Adams, J.,* in *S. v. Collins,* 189

N. C., 15, 126 S. E., 98, is sufficiently clear: "The rule for the admission of dying declarations is thus stated: (1) At the time they were made the declarant should have been in actual danger of death; (2) he should have had full apprehension of his danger; (3) death should have ensued. *S. v. Mills,* 91 N. C., 581, 594." For the sake of completeness, although not important in the case at bar, we might add to this a fourth condition that the declarant, if living, would have been a competent witness to testify as to the matter. *S. v. Beal,* 199 N. C., 278, 297, 154 S. E., 604.

We have to consider here whether the evidence in this case is sufficient to sustain the decision of the court below to admit the evidence under the two conditions first named above, that is, that the declarant was in actual danger of death and that he had a full apprehension of such danger. Under the evidence in this case, we should consider it a waste of time to debate the question whether a man shot through the abdomen, with his bowels torn—four or five feet of his intestines damaged—was in danger of death. The objection raises the question whether the evidence is sufficient to show that the wounded man was aware of that danger and had that apprehension of his dissolution which would qualify his statement as a dying declaration. At the time he was upon the operating table, surrounded by nurses and doctors, and one of the latter had just told him that he would not give ten cents for his life. *S. v. Watkins,* 159 N. C., 480, 75 S. E., 22. These are circumstances from which it may be reasonably inferred that he was fully aware of his condition and was under a sense of impending death. It was not necessary that the declarant should express any opinion about the matter. *S. v. Beal, supra; Benton v. State,* 158 Ga., 41, 122 S. E., 775; *Phillips v. State,* 163 Ga., 12, 135 S. E., 421; *Washington v. State,* 137 Ga., 218, 73 S. E., 512; *S. v. Franklin,* 192 N. C., 723, 135 S. E., 859; *Hill v. Commonwealth,* 43 Va., 594; *Jones v. State,* 130 Ga., 274, 60 S. E., 840.

Obviously, the court, on appeal, cannot undertake to measure the degree of apprehension or the depth of the solemnity into which the declarant has been submerged and thus create an absolute standard for the introduction of such evidence. The court acquires many headaches in attempting to create hard and fast rules applicable to all circumstances, to draw lines impossible of fixation, where the matter should be left within the sound discretion of the lower court. In this connection we can find almost as many expressions of opinion as there are cases; but in most instances they are general expressions addressed to the philosophy back of the admission of such evidence, rather than intending to fix the exact degree of apprehension, only to emphasize the point that the declaration must be solemnized by a full sense of approaching dissolution.

In *S. v. Moody,* 3 N. C., 31, 2 Am. Dec., 616, it is said the declarations must be that of a dying man "or one so near his end that no hope of life remains." In *S. v. Baldwin,* 155 N. C., 494, 71 S. E., 212, it is simply stated that such declarations to be admitted must be "made in the expectancy and contemplation of impending death." In *S. v. Beal, supra,* it is said that the declarant must be so near death as to "lose use of all deceit." In *S. v. Wallace,* 203 N. C., 284, 165 S. E., 716, the condition of admission is said to be that the declarant must be "in actual danger of death, and must have full apprehension of his danger." *S. v. Mills,* 91 N. C., 589. "These declarations are received on the general principle that they are made in extremity—'when,' as said by *Eyre, C. B.,* 'the party is at the point of death, and when every hope of this world is gone; when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth. A situation so solemn, and so awful, is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice.' " See *Rex v. Woodcock,* 168 Eng. Reports, 352. In *S. v. Bagley,* 158 N. C., 608, 73 S. E., 995, the declaration was admitted when the deceased "fully realized not only that his death was sure, but that it was also near," citing *S. v. Quick,* 150 N. C., 820; Wigmore on Evidence, sec. 1430 *et seq.*

We think it may be assumed from the divergent expressions in these authorities that the court was not intending to state in each instance the minimum standard. That some latitude must be given to the trial court in this matter is a necessity of administration and is consonant with the rule applied here, in review, in *S. v. Beal, supra,* and *S. v. Stewart, supra,* that is, that we must confine that review to a consideration whether the evidence discloses facts sufficient to sustain the decision of the court below.

As to the time elapsing between the declaration and the death as affecting the admissibility of the declaration, it is said in *S. v. Watkins,* 159 N. C., 480, 75 S. E., 22, that to be admissible the dying declarations need not be made in immediate proximity of death, where there is an impending sense of dissolution.

In *S. v. Poll,* 8 N. C., 442, 9 Am. Dec., 655, the declaration of a sick person that he had been poisoned by certain individuals and despaired of recovery was admitted, although death did not immediately follow.

In *S. v. Craine,* 120 N. C., 601, 27 S. E., 72, the Court held that declarations made in expectation of impending death are not rendered inadmissible by the fact that deceased lived for five months after making them.

In *S. v. Hall,* 134 S. C., 361, 133 S. E., 24, a dying declaration of deceased, made shortly after the injury and under apprehension of death, was admitted, although death did not occur until thirty-three days later.

In *S. v. Stewart, supra,* some importance seems to be attached to the fact that the declarant did not die until 13 days after she made the statement. The reasoning of the Court upon that point may be found on page 370. This case can be reconciled with precedent only upon the theory that this suggestion is confined to the question of present actual danger.

Upon the whole of the matter, we think that the summary of the Court, *per Adams, J.,* laid down in *S. v. Collins, supra,* is a sufficient statement of the rule.

Examining this evidence, we do not find it necessary to weigh the principles discussed with the greatest nicety, since we think the court might well have inferred that the declarant had a reasonable apprehension of impending death, especially in view of the fact that the attending surgeon told him that he would not give ten cents for his life.

3. We encounter more difficulty when we come to consider the third proposition, which we have undertaken to discuss.

The defendant did not go upon the stand in his own behalf and the trial judge did not instruct the jury that his failure to testify in his own behalf should not be taken to his prejudice. C. S., 1799. There was no special request for such an instruction, but the defendant contends it should have been given by the judge, under the requirements of C. S., 564, without such request, and that the failure so to do constitutes reversible error.

In removing the disqualification of a person charged with crime to testify in his own behalf, the Legislature made the provision that his failure to do so should not be taken to his prejudice. The North Carolina law, along with those of a few other states, still retains this provision.

Many students of criminal judicial investigation, and the administration of criminal law, consider this provision as ill-conceived and obstructive to justice. The American Bar Association has recommended its removal from criminal procedure, and this has been followed by our own Bar Association, recommending its repeal. Bills looking to that end have been presented to the Legislature, but apparently have never gone beyond the judiciary committees.

The relation of the statute to the presumption of innocence accorded to one or trial for crime is discussed in *S. v. McLeod,* 198 N. C., 649, 653, 152 S. E., 895; *S. v. Spivey,* 198 N. C., 655, 658, 153 S. E., 255; *S. v. Tucker,* 190 N. C., 708, 130 S. E., 720. The question whether a full charge as to the presumption of innocence, and the necessity that the State should prove the guilt of the defendant beyond reasonable doubt before conviction, may not sufficiently cover the substance of the desired instruction, is not determined.

Defense counsel cite *S. v. Bynum,* 175 N. C., 777, 95 S. E., 101, and *S. v. Hardy,* 189 N. C., 799, 128 S. E., 152, as authority for the position that the judge must charge upon this point, in the absence of special request, under C. S., 564, requiring that the judge shall state the evidence plainly and explain the law arising thereon.

As to *S. v. Bynum, supra,* the suggestion that such an instruction was incumbent on the trial judge is a mere inference as to an attitude of mind, and did not amount even to a *dictum.* However, in *S. v. Hardy, supra,* after setting out a number of constitutional and statutory provisions protecting a defendant accused and on trial for a criminal offense, in which C. S., 1799, was listed, the Court, *per Justice Connor,* in the last paragraph of the opinion, made the expression which the defendant calls to his aid: "The charge to the jury in this case contains neither a 'statement in a plain and correct manner of the evidence,' nor 'an explanation of the law arising thereon.' C. S., 564. There were no requests for special instruction; counsel, however, were justified in assuming that the jury would be instructed as to the presumption of innocence of defendant; the rule as to burden of proof applicable; the tests to be applied in order to determine the credibility of the testimony of the State's witness, who, if believed by the jury, was an accomplice; the lack of presumption against defendant arising from his failure to exercise his right to testify in his own behalf, and that finally they were to pass upon and determine both the credibility of the testimony of the witnesses and the weight of the evidence."

An examination of the numerous propositions as to which the trial judge must give instruction, without special request, shows that the duty to so instruct has arisen in two ways: First, through the operation of C. S., 564, requiring a statement of the evidence and the application of the law thereto; and, second, through precedent establishing the duty because of its substantial importance to the rights of the defendant on trial. As to the proposition last stated, we find no precedent other than *S. v. Hardy, supra,* if it be a precedent; as to the first—and the defendant claims under the statute—it is difficult to see how the duty of such an instruction can be brought within the requirements of a statute which simply says that the trial judge "shall state in a plain and correct manner the evidence given in the case and declare and explain the law arising thereon." A reference to the record and the briefs in the *Hardy case, supra,* discloses that the omission to instruct the jury that the failure of defendant to go upon the stand was not to be taken to his prejudice is not brought up by the two exceptions taken to the judge's charge, nor was it adverted to in the briefs, and it was not, therefore, before the Court. It may be treated as *obiter dictum.* Treating the question raised,

therefore, as a matter of first impression, it is debatable whether the judge does not do the defendant a disfavor by emphasizing the failure of the defendant to go upon the stand and, thereby, deepening an impression which is perhaps hardly ever removed by an instruction which requires a sort of mechanical control of thinking in the face of a strong natural inference. *S. v. Bynum, supra; S. v. Spivey, supra.*

Upon these considerations, we think the matter had best be left to the sound judgment of the defending attorney whether he shall forego the instruction or specially ask for it.

On the trial of the case, we find

No error.

A. A. BUNN AND HENRY W. SATTERWHITE, EXECUTORS, v. MATTIE D. HARRIS.

(Filed 1 November, 1939.)

1. Fraudulent Conveyances § 12—Evidence of grantee's knowledge and want of consideration held insufficient to be submitted to the jury.

Defendant grantee, as a witness for plaintiffs, testified that at the time she took deed for the lands in question from her father she did not know of any indebtedness owed by him other than the mortgage indebtedness on the lands conveyed, that in consideration for the lands she paid her father a sum in cash, notes owed to her by her father, the payment of the mortgage indebtedness against the lands, and that she took care of her father for the last ten years of his life during which he was old and disabled. Plaintiffs also introduced the tax valuation placed on the lands by the assessors, and other evidence of value. *Held:* Evidence of the tax valuation was incompetent, and the other evidence of plaintiffs was insufficient under the scintilla rule to be submitted to the jury on the question of the grantee's knowledge of and participation in any fraudulent intent on the part of her grantor, or on the question of defendant grantee's failure to pay a valuable consideration for the lands conveyed.

2. Fraudulent Conveyances § 4—

When a conveyance is made upon a valuable consideration and the grantee has no knowledge of and does not participate in any fraudulent intent of the grantor, the conveyance is valid.

3. Evidence § 17—

A party may not directly impeach his own witness.

4. Fraudulent Conveyances § 11: Evidence § 33—

In an action to set aside certain deeds as being fraudulent as to creditors, evidence of the tax valuation of the lands in question is incompetent, since the valuation is fixed by assessors and therefore is *res inter alios acta.*

APPEAL by plaintiffs from *Bone, J.,* at May Term, 1939, of WARREN. Affirmed.

This is an action to set aside certain deeds made by W. E. B. Harris to his daughter, Mattie D. Harris, defendant in this action, in fraud of creditors. W. E. B. Harris was a resident of Warren County, N. C., and died in that county in April, 1936.

Among the assets of the estate of S. H. (Hunter) Satterwhite coming into the hands of the executors, plaintiffs in this action, was a note for $5,000, signed by R. A. Harris and W. H. Harris, and endorsed by L. J. Harris, L. R. Harris, and W. E. B. Harris. Said note bearing date of 24 September, 1925, and payable on demand after date with six per cent interest. That said note has been credited with the following payments: 20 February, 1928, $36.00; 1 January, 1929, $900.00.

The testator of plaintiffs lived in Vance County and the plaintiffs recovered judgment on said note in Vance County, on 8 February, 1932, for $5,943.74, with interest from 1 December, 1931, and costs. This judgment was docketed in Warren County, N. C. At the time the note was endorsed by W. E. B. Harris, he had considerable real estate in Warren County, same being heavily mortgaged. The land of W. E. B. Harris was purchased by defendant, Mattie D. Harris. She was sworn as a witness for plaintiffs and testified, in part:

"*The property I owned in 1926 was a note of my father's for $1,000 and I had some money.* I had a deed of trust as security for my father's note on 65 acres of land, my grandfather's old place. I really do not know how to estimate what money I had at that time; I had it loaned out to my father and brothers. . . . I am the daughter of Mr. W. E. B. Harris. *I did not have any knowledge of his debts in January and February, 1927;* I did not know he was in debt or not. Yes, *I knew he was in debt when I got that deed reciting certain debts.* It was right much of a surprise any more than the Land Bank. *I did not know until he told me that he had two indebtednesses. When he transferred me the property he told me there were two debts,* the Land Bank mortgage and the Phelps and Coleman notes, rather it was Mrs. Phelps and Mr. Coleman was her guardian. I don't remember the date I first knew my father was liable to Mr. Satterwhite on a note for my brother. My brother's wife, Mr. Satterwhite's daughter, came to my home one day, I do not remember when it was, and asked me would I endorse the note. I did not know it then only what she told me. I reckon she knew he endorsed it, or thought he endorsed it. I got the deed to the property before she came to my home and told me that, I got the deed for the property in 1927; I had the deed to the property but had not paid it off. . . . I think I borrowed the money from the Bank of Warren to furnish the men who cultivated the land that year. I had some money

to begin with and what I did not have I borrowed from the Bank of Warren and bought fertilizer, and traded on time and got through all right. I had some credit. I can't tell you what was the cost of operating a farm of that size with thirty acres of tobacco. It was different for different years, depending on the seasons, and as near as I can remember I made right good in 1927. . . . I did right well in 1928 and 1929, too. I did not have as much as $3,000 left those years after paying my indebtedness. I never kept my record of what I had left after paying the indebtedness of the crop for the current year. I knew just about what I done with the money; I knew I did not have to keep any record. I don't remember about 1930, but I made pretty good in 1932, and I think I have some of the sales over here. I did not know I did as well until the other year. . . . I don't think I had more than $500.00 or something like that when I paid my father the $400.00 in February, 1927. I listed for taxation in 1927, as you will see from the book, but I did not list anything prior to 1927. My father listed before then. As to whether I had any property except the $400.00 I paid my father and the $1,000 note, I had been growing a little piece of tobacco every year. One year it brought me $450.00, and another year a little over $700.00. I had a little crop all along and tried to beat my brothers. *I had a little bank account and if they wanted it, I let them have it, let them borrow it.* After 1927 my father stayed right on in the same home until he died. *He deeded the land to me in 1927 and died in 1936.* He did not give the same direction to the farm after he deeded it to me in 1927 that he did prior to that time. *He became disabled and did not have to do anything.* He rode the pony whenever he wanted to, but he did not direct the farm. If he wanted to go to a tobacco sale he went, just the same as he rode the pony if he wanted to do so. I looked after the selling of the tobacco. He looked after the selling in 1927 but the tobacco was put in the name of Harris and my tenants, and I sold some. Other tobacco than the little piece I had each year was sold in my name and everybody knew it was my tobacco. . . . I don't know how many acres of land I have bought since 1927. It is somewhere around 1,000 acres I have, and might be more. I have not figured it up, but I expect it is more. The biggest that it cost me was the Land Bank debt and the Coleman debt. About the new land I have bought, I paid $3,000 for the Lickskillet place, and bought a little piece down by the railroad that cost me some over $500.00. Then there was another little piece I got from Mr. Thornton. Most of the money I used to buy this other land was made on the farm I got from my father. I have made some on some of the other but not very much. The most of the money I have invested in land in the last ten years has been made from this farm. . . . The money that was paid the

Federal Land Bank was made on this farm, and the money paid to Mr. Coleman was made on this farm. I had $900.00 worth of lumber cut that came off of this farm, too. . . . I have not invested very much money in land and other agencies since 1927 beside what I have invested in my home place. *Beside the Land Bank and the Coleman note, I had to pay the Bank of Warren a deed of trust I did not know was there, but for the payment to the bank I got back a piece of land that had been pledged there by my father.* I own that deed of trust now. I have never had any of the papers canceled that I bought of the debts of my father; just have them like they were and still own them in that form. My object in doing that was because I did not know what would take place and thought I would just keep them. I have heard my father had some other debts but I did not know it. I thought it might be a good idea to have a connecting link between me; I did not worry about it. I don't know that the deed was put in this form so that creditors would let me and my father alone; but there were some others of the family and *I worked with my own hard labor and kept looking after him, and took care of this and felt like it was mine,* and therefore, would not have any disturbance over it. My father did not continue to give me the same assistance about the farm that he had in previous years. *I looked after it myself, and it was well known throughout the county.* . . . A lot of people in the community said I managed the farm better than it had been managed in years. My father had to rest during the middle of the day. He would ride over to his brother's and go to Macon, come back and sleep until lunch, and if he wanted to get exercise he would. He did not take any of his furnishings or living expenses out of the income from the farm. He had the income from a war risk insurance policy on his son to do anything he wanted to with. *I did not find out my father owed Mr. Satterwhite any money. I have never known he owed him any. I was told he endorsed a note.* Mrs. Harris, his daughter, told me he endorsed the note but I don't know what year. That is what I understood her to say, that my father and brother endorsed a note. I still say it was at least 1930 before I found out my father had endorsed this note to Mr. Satterwhite. My father never talked business but very little with me. *I did not ask my father to make this deed to me. He asked would I take it and told me about the two debts owing on it, and I told him to have a home for him in his old age I would try.* I don't know whether my father had property after deeding this to me, sufficient and available to pay his debts other than those I have mentioned or not. I don't know what he had. I was just trying to make my own debt. I know he had some land after he conveyed this to me, but I don't know how much. *I could not tell whether that land was sufficient to pay the Satterwhite debt or not. It*

was valued at more than enough when he bought it, and I reckon he put more money in it than enough to pay the debt. This land that I have reference to was sold because he never was able to finish paying for it; that is what I think. I don't remember whether he had any land that was not mortgaged after he conveyed this property to me. I did not find any property that he owned after he died that was sufficient to have an administrator appointed for."

On cross-examination: "I am the only daughter of W. E. B. Harris, deceased. *He was in his 81st year when he died, and he made me this conveyance when he was about 70 years old.* The first year I took charge of the farm my father gave me a little advice, but he did not have anything to do—no more than what he wanted. If he wanted to do some little thing he would, but I don't remember him doing anything that counted for anything. . . . *I do not remember what year my father bought the Brown land. He was supposed to pay around $20,000 for it. I am sure that was sold to pay the balance that was due on it.* I never have worked the interest that was due on the two mortgages on the land that I assumed. I have some checks that I paid until I paid the mortgage in full. I paid installments of $210.00 twice a year, and then paid $4,900 and some dollars; I never have worked them out. *I imagine they ran around $12,000 on the two places, with interest.* . . . *I imagine the $12,400 that I paid for the tract of land was more than it was worth.* The Land Bank loaned $6,000 on it, and they had the first mortgage. There was a debt of $1,000 on the 65-acre tract when my father deeded this tract to me; there was no interest due on it at the time. I reckon there had been some interest worked on up because nothing had been paid on it. I reckon the interest and principal was $1,200 or $1,250. *That was full value for the land and no one else would ever have paid that for it.* It is way back off the road. I have a separate deed to that place. The reason he deeded it to me was like I said, he owed me some money; I had a note or check. I took the deed for what he owed me, and my brothers owed me some money, too. I had let them have money that I did not need. *My father asked me if a deed to that place would satisfy me, and I took the deed in settlement of about $1,250 for the money that was owing me on the note. I think I paid full market value for all the property I got from my father, W. E. B. Harris. I would not like to pay it again.* . . . I did not know anything about the suit that the administrators of Mr. Satterwhite in Vance County had brought against my brother and father. I did not know anything about the note until Mrs. Harris told me. If my father ever owed Mr. Satterwhite a penny in his life I did not know it. . . . I paid the Land bank in semiannual installments until I paid the amount in full, the installments being $210.00 each. . . . Dur-

ing the time I was paying the installments to the Land Bank I was farming the land deeded to me by my father. I farmed the land and was paying the debts off. I can't remember the full amount that my income averaged for the ten years after this land was deeded to me, but I imagine it averaged in the neighborhood of $3,000 per year though I never have checked back. Out of that I paid the interest payments and the $4,900 on the Land Bank debt; and also whatever I paid on the Coleman mortgage, which may have been $4,900 or less, according to the checks I have here. The 65-acre tract never was deeded to me but the one time and before that I just held a note and deed of trust on it. . . . *My father told me in 1927 he was going to have the deed made to me for the note; he had it done himself.* Of course there was a note and never was nothing done to it, and nobody ever gave it to anyone. I did not have the note and deed of trust canceled; nobody was coming to claim it and if they did I would have the note to show. I did not know whether the deed was all right, or I would have to put the land up and sell it under the deed of trust. I knew the deed to the home place was all right, or I thought it was all right. I have kept the Land Bank mortgage and the Phelps mortgage uncanceled ever since. *I thought the land was not worth no more than that; those first mortgages were satisfactory to me.* It is true I paid off the mortgages from money made on the land, and they have not been canceled. . . . *Since I have had charge of the farm I have had to make right much improvement. The buildings had gotten right much dilapidated. I have added a room to the home place, put on a new top, and some new flooring.* The improvements I have made on the place came from the earnings from the farm."

T. B. Gardiner, a witness for plaintiff, on cross-examination, testified, in part: "In the year 1927, the year Miss Mattie Harris bought this land, she listed $7,495 in Six Pound Township and $2,775 in Judkins Township. *I know that the value is put upon land by the assessors;* about $10,000 is the value the assessors put upon the land she bought. The amounts listed for taxation do not show the amount of mortgages there was upon the land at the time Miss Harris bought it. . . . During the years 1933, 1934, 1935, 1936 and 1937 W. E. B. Harris did not list anything in Six Pound, Judkins, or Warrenton Townships."

W. E. Twitty estimated the land value at $50.00 an acre. On cross-examination he testified: "I have been all over Mr. Harris' land and just knew it was his land, but did not know the boundaries of the different tracts; I have hunted on the land and I thought I knew it to be his land, land I have always known as Mr. Harris' land. I do not know anything about the lines, but as I said, I have hunted on the land, and when riding along the road saw his home, garden and the improved property around the home."

A. A. Bunn, one of the plaintiffs, testified that he was an executor of the estate of S. H. Satterwhite; that he made no investigation from 1929 (the time of his qualification) to 1932, to find out whether the Harris note was good; that what information he got would be through Mr. Henry Satterwhite, his co-executor; that it is true that he did file a report in 1932, in which he said note was doubtful; that it is true that Warrenton is 20 miles from Henderson, and that as he had stated before in his testimony, he never made any investigation; that his co-executor, Henry Satterwhite, was his sole informant of whatever transactions had taken place with respect to the W. E. B. Harris property.

The plaintiffs offered no evidence to the effect that the plaintiffs' testator, S. H. Satterwhite, did not know at the time of his death in 1929, of the existence of these deeds from W. E. B. Harris to his daughter, Mattie D. Harris, the defendant in this action. *J. Henry Satterwhite, co-executor of S. H. Satterwhite, was present through the trial, seated behind and advising with the plaintiffs' counsel, but was not sworn or tendered as a witness by the plaintiffs.*

At the close of plaintiffs' evidence, on motion of defendant for judgment as in case of nonsuit, C. S., 567, the court below granted the motion. Plaintiffs excepted, assigned error, and appealed to the Supreme Court.

Julius Banzet and Frank Banzet, of Warrenton, N. C., and J. H. Bridgers and Jasper B. Hicks, of Henderson, N. C., for plaintiffs.

Yarborough & Yarborough and Kerr & Kerr for defendant.

CLARKSON, J. We think from the evidence in this action, the nonsuit was properly granted. There are several defenses, but we think it only necessary to consider one. In the complaint the plaintiff alleges that "Upon information and belief that the conveyance of real property and transfer of personal property was contrived and devised of fraud and that the fraud was well known to this defendant and that such transfers were without consideration, and the defendant took and accepted the conveyance and transfer with the intent and purpose of defrauding the late Hunter Satterwhite."

Defendant in her answer denies the allegations of the complaint, and says: "The said W. E. B. Harris did not make any gifts to or voluntary settlement upon the defendant of the property hereinbefore referred to, but, on the contrary, this defendant paid more than full value therefor, and the statement in said paragraph that a fraudulent act was committed by her said father and participated in by this defendant is wholly untrue."

In the case of *Aman v. Walker,* 165 N. C., 224 (227), the 4th principle adduced from the authorities is as follows: "If the conveyance is

upon a valuable consideration *and made with the actual intent to defraud creditors upon the part of the grantor alone, not participated in by the grantee* and of which intent he had no notice, it is valid."

The defendant was plaintiffs' witness; they vouched for her integrity and are "not at liberty directly to assail his reputation for truth and thus destroy his credit before the triers." *Smith, C. J.,* in *Strudwick v. Brodnax,* 83 N. C., 401 (402-03). Defendant testified: "I did not ask my father to make this deed to me. He asked would I take it and told me about the two debts owing on it, and I told him to have a home for him in his old age I would try." When the deed was made to her, she knew nothing about her father's endorsing the Satterwhite note with others. She testified: "I imagine the $12,400 that I paid for the tract of land was more than it was worth. . . . I think I paid full market value for all the property I got from my father, W. E. B. Harris. I would not like to pay it again." She knew nothing about the suit in Vance County brought against her father and others as endorsers; she lived in Warren County.

The tax list is hearsay evidence and incompetent. If competent, it has no sufficient probative force to go beyond the scintilla rule, nor has the other evidence in the case.

In *Hamilton v. R. R.,* 150 N. C., 193 (194), it is decided: "Under our revenue law the owner of land does not, in listing it for taxation, fix any value upon it. This is done by the assessors, 'either from actual view or from the best information that they can practically obtain, according to its true valuation in money.' Revisal, sec. 5203 (N. C. Code, 1935 [Michie], sec. 7971 [21]). We cannot see, therefore, how the fact that the witness 'listed the land for taxation has any tendency to show its value or his opinion in that respect. The valuation is, as said by the Court in *Ridley v. R. R.,* 124 N. C., 37, *res inter alios acta. R. R. v. Land Co.,* 137 N. C., 330. We are content to rest our decision upon what is said in these cases. The objection is not that tax lists are not public records, but in the valuation of the land for taxation the owner is not consulted—he takes no part. The valuation is but the opinion, upon oath, it is true, of the assessors, for the purpose of taxation. It is well understood that it is the custom of the assessors to fix a uniform rather than an actual valuation. In any aspect of the question, we concur with his Honor's ruling, both upon authority and the reason of the thing." *Peterson v. Power Co.,* 183 N. C., 243 (247); *American State Bank v. Geo. W. Butts et al.,* 111 Wash., 612, 191 Pac., 754; 17 A. L. R., p. 168.

The action is similar in many respects to that of *Bank v. Finch,* 202 N. C., 291 (296). A verdict must rest upon substantial evidence, not upon mere surmise, speculation, conjecture, or suspicion. The conveyance was for a valuable consideration. When made to defendant she

was unaware of this security debt of her father. To set aside this conveyance on the facts in this case would be unjust and inequitable. From the testimony, she paid full value for the property and supported her aged father for some 10 years. If her father had the actual intent to defraud his creditors, there is no evidence that this defendant had any notice or participated in the fraudulent intent.

The evidence shows that W. E. B. Harris was an old man, about 70 years of age, in declining health. He owned valuable plantations in Warren County, N. C., but they were heavily mortgaged. He had a daughter living with him, the defendant in this action. She had saved up a little money and at the suggestion of her father she paid him the sum of $400.00 and he made a deed to her for the property with the agreement that the two mortgages should be paid off by her. Another piece of land was sold her by her father for the debt on it. Another piece was heavily mortgaged and was sold to pay the balance due on it—this was known as the "Brown land." Defendant was able, by her heroic efforts, to manage the farms with such skill and ability that she took care of her father in his old age for 10 years, until he was 81 years old, when he died. She testified that she paid full value for all the land deeded to her by her father and the deeds were duly recorded. She knew nothing about his owing any debts when he voluntarily sold her the land, except the mortgages which she paid off, amounting to $12,400 and interest. After taking care of her father and sacrificing years and years of her life to pay the indebtedness on the farms so that they might have a home, she is suddenly confronted with an old endorsement debt of some 10 years standing, of which she had no knowledge or notice. It will be noted that the heirs at law are not trying to upset the deeds. The record indicates a remarkable achievement in industry by a woman —supporting her aged father and so successfully managing the farms during a period when the larger part of profits from agriculture were deflated in this State.

The value of the land assessed for taxes is hearsay evidence and incompetent—it has no probative force in a court of law, equity or justice. There was no sufficient evidence to support plaintiffs' claims. We might say, from the record, that defendant performed her full duty in that state of life in which it has pleased Almighty God to call her.

The judgment of the court below is

Affirmed.

ROBERT R. CLARK (FATHER); MAGGIE V. CLARK (WIDOW), BILLY RANDOLPH CLARK (MINOR SON) OF L. R. CLARK, DECEASED, EMPLOYEE, V. L. M. SHEFFIELD, SHERIFF; SPRAY CIVIC ASSOCIATION, INC., EMPLOYER, AND ÆTNA LIFE INSURANCE COMPANY, CARRIER.

(Filed 1 November, 1939.)

1. Master and Servant § 37—

The provisions of ch. 277, Public Laws of 1939, providing that deputies sheriff should be deemed employees of the county for the purpose of determining the rights of the parties under the Workmen's Compensation Act does not apply to accidents occurring prior to the enactment of the amendment.

2. Master and Servant § 38—

Intestate was killed while serving a warrant under authority of his appointment as deputy sheriff. The fatal injury was inflicted prior to the enactment of ch. 277, Public Laws of 1939. *Held:* Intestate was not an employee of the sheriff, and the sheriff cannot be held liable for the payment of the award rendered in favor of the deputy's dependents.

3. Same—Evidence held sufficient to support finding that intestate was an employee of defendant civic association.

The evidence tended to show that defendant civic association was incorporated to further the interests of the community, and that its charter specifically empowered it to employ deputies sheriff to act as police in the community under the provisions of law, that intestate was appointed deputy by the sheriff of the county, but was paid by the association, that the association obtained a compensation policy specifically covering intestate, and that intestate was killed while serving a warrant in the community in the performance of his duties. *Held:* The evidence is sufficient to support the finding of the Industrial Commission that at the time intestate was an employee of the civic association, and the association and its insurance carrier are liable for the payment of the award rendered in favor of intestate's dependents.

4. Master and Servant § 55d—

The findings of fact of the Industrial Commission are conclusive on the court when supported by any sufficient evidence.

APPEAL by defendants from *Alley, J.*, at June Term, 1939, of ROCKINGHAM. Affirmed as to Spray Civic Association, Inc. Reversed as to L. M. Sheffield, Sheriff.

This is a proceeding under the North Carolina Workmen's Compensation Act. The hearing Commissioner, J. Dewey Dorsett, found the following facts and made the conclusions of law, viz.:

"1. The parties to this cause are bound by the provisions of the Workmen's Compensation Act. The Ætna Life Insurance Company is the compensation carrier for the Spray Civic Association, Inc.

"2. L. R. Clark was employed by the Spray Civic Association, Inc., as a police officer. Technically and in law the deceased was a deputy sheriff receiving his commission from L. M. Sheffield, sheriff of Rockingham County. In actuality, however, he was nothing more or less than a police officer for the Spray Civic Association, Inc., and the said Spray Civic Association, Inc., paid to the deceased his salary for services rendered the said association as an officer of the law in the community of Spray, North Carolina.

"3. As an officer of the law, L. R. Clark suffered an injury by accident arising out of and in the course of his employment on March 10, 1938, from which he died.

"4. He leaves wholly dependent upon him for support his father, Robert R. Clark, his widow, Maggie V. Clark, and one son, Billy Randolph Clark. The son is under 18 years of age.

"5. The wages or salary paid by the Spray Civic Association, Inc., to L. R. Clark for services rendered in the capacity of a law enforcement officer was reported to the insurance carrier involved as a basis of the premium to be collected from the said Spray Civic Association, Inc., the employer in the instant case.

"6. The deceased was earning a salary of $1,200 per year.

"*Conclusions of Law:* Under the findings made the whole dependents found are entitled to compensation, share and share alike, at 60 per cent of the average weekly wage being earned by the deceased at the time of his death. The amount due the father of the deceased will be paid direct to the father as one of the whole dependents and the amount due the other two dependents, that is, the widow of the deceased and Billy Randolph Clark, minor son of the deceased, will be paid the widow for her use and the use and benefit of the said minor child. The receipts of the father and widow will acquit the employer. The dependents are also entitled to have funeral expenses, not to exceed $200.00, paid by the defendants; entitled to have all hospital and medical bills, if any incurred, paid by the defendants, when they have been approved by the Commission. Let an award issue accordingly. Let the defendants pay the costs. J. Dewey Dorsett, Commissioner."

The award was as follows: "Upon the finding that the parties are bound by the provisions of the Workmen's Compensation Act; that the Ætna Life Insurance Company is the carrier; that L. R. Clark, deceased, was an employee of the Spray Civic Association, Inc.; that L. R. Clark, deceased, suffered an injury by accident arising out of and in the course of his employment on March 10, 1938, from which he died; that he leaves wholly dependent upon him for support his father, Robert R. Clark, his widow, Maggie V. Clark, and one son, Billy Randolph Clark, a minor; that the deceased was earning a salary of $1,200 per year:

defendants will pay to Robert R. Clark and Maggie V. Clark, for the use and benefit of herself and minor child, Billy Randolph Clark, share and share alike, compensation at the rate of $13.85 for a period of 350 weeks. The amount due the father of the deceased will be paid direct to the father, and the amount due the other two dependents will be paid to the widow for her use and the use and benefit of the said minor child. Defendants will pay the hospital and medical bills, if any, when the same have been submitted to and approved by the Commission. Defendants will pay the funeral expenses not to exceed $200.00. Defendants will pay the costs. North Carolina Industrial Commission, by Buren Jurney, Chairman."

Upon review and hearing before the Full Commission, Notice of Formal Award was as follows: "Date: March 3, 1939. You, and each of you, are hereby notified that a hearing was had before the Full Commission, Raleigh, N. C., on December 5, 1938, in the above entitled case, and a decision thereupon was rendered by Commissioner Buren Jurney, Commissioner, for the Full Commission on March 3, 1939, in which an award was ordered and adjudged as follows: The Full Commission adopts as its own the Findings of Fact and Conclusions of Law in the opinion filed by Commissioner J. Dewey Dorsett in his opinion filed October 7, 1938, and directs that the award in this case be in all respects affirmed. Defendants will pay the costs. North Carolina Industrial Commission, by T. A. Wilson, Chairman. Attest: J. S. Massenburg, Secretary."

From the decision of the Full Commission, the defendants excepted, assigned error and appealed to the Superior Court. The judgment of the Superior Court is as follows: "This cause coming on to be heard before his Honor, Felix E. Alley, Judge presiding, upon appeal from the North Carolina Industrial Commission by the defendants, Spray Civic Association, Inc., and Ætna Life Insurance Company, pursuant to statute, and after a careful perusal and examination of the record and consideration of the arguments and briefs for both parties, the court finds that the findings of fact, conclusions of law and award of the North Carolina Industrial Commission are correct, and should be affirmed. It is, therefore, ordered, adjudged and decreed that said findings of fact, conclusions of law and award be in its entirety approved and affirmed. This 12 June, 1939. Felix E. Alley, Judge Presiding."

The defendants excepted and assigned error to the judgment and appealed to the Supreme Court. The law and other necessary facts will be set forth in the opinion.

J. Hampton Price and D. Floyd Osborne for plaintiffs.
Sapp & Sapp for defendants.

CLARKSON, J. The question involved is whether L. R. Clark received an "injury by accident arising out of and in the course of the employment" (N. C. Code, 1935 [Michie], sec. 8081 [i] f) as an employee of the Spray Civic Association, Inc. We think so.

The defendants say in their brief: "The Spray Civic Association, Inc., and L. M. Sheffield, as sheriff, were covered by a policy of insurance issued by the Ætna Life Insurance Company protecting each against any liability under the Compensation Act. This action was instituted by the dependents of L. R. Clark, contending that he was injured by accident arising out of and in the course of his employment either as deputy sheriff under the sheriff, L. M. Sheffield, or for the corporation, the Spray Civic Association, Inc., of Spray, N. C. The award of the Commissioner is based upon findings of fact indicating that the employment was by Spray Civic Association, Inc. However, both defendants are held liable for the payment of compensation, and the Full Commission and Superior Court affirmed the findings of fact and award."

Deputies of sheriffs are not employees of sheriffs, within the meaning of the Compensation Act. *Borders v. Cline,* 212 N. C., 472. Deputies of sheriffs are not employees of the county, nor of the sheriff, within the meaning of Compensation Act. *Styers v. Forsyth County,* 212 N. C., 558. The above decisions were rendered by a divided Court.

The General Assembly of 1939, ch. 277, passed "An Act to Amend the N. C. Workmen's Compensation Act as to Deputy Sheriffs:" "The term 'employee' shall include deputy sheriffs and all persons acting in the capacity of deputy sheriffs, whether appointed by the sheriff or by the governing body of the county and whether serving on a fee basis or on a salary basis, or whether deputy sheriffs serving upon a full-time basis or a part-time basis, and including deputy sheriffs appointed to serve in an emergency, but as to those so appointed, only during the continuation of the emergency. The sheriff shall furnish to the board of county commissioners a complete list of all deputy sheriffs named or appointed by him immediately after their appointment, and notify the board of commissioners of any changes made therein promptly after such changes are made." "And section two, subsection (c), of said act shall be amended by adding at the end of subsection (c) the following: 'The board of commissioners of each county of the State, for the purposes of this law, shall be considered as "employer" of all deputy sheriffs serving within such county, or persons serving or performing the duties of a deputy sheriff, whether such persons are appointed by the sheriff or by the board of commissioners, and whether serving on a fee basis or salary basis. Each county is authorized to insure its compensation liability for deputy sheriffs to the same extent it is authorized to insure other

compensation liability for employees thereof.'" There are a few counties exempted by the act.

The present action arose in 1938, prior to the above amendment of the Workmen's Compensation Act, therefore this amendment is not applicable here. From the decisions above quoted, before the amendment of 1939, we hold that the sheriff, L. M. Sheffield, is not liable.

We think the evidence sufficient to support the finding that L. R. Clark was employed by the Spray Civic Association, Inc., as a police officer. His salary was mostly paid by it. In the certificate of incorporation, among other things, is the following: "(3) That the objects for which this corporation is formed are to promote and encourage civic virtue among the people of the village of Spray to aid in the development of the industrial, educational, religious, charitable, literary and social interests of that community; to collect and diffuse information concerning the resources of Rockingham County, North Carolina, particularly that portion of it in and about Spray; to look after the streets, sidewalks and sanitation of the village of Spray and provide ways and means for their improvement; to provide parks and amusements for the people of Spray; *and to employ deputy sheriffs to act as police at Spray, under the provisions of existing laws.*"

In the record is the following: "The Ætna Casualty and Surety Company of Hartford, Conn.—DOES HEREBY AGREE with this Employer, named and described as such in the Declarations forming a part hereof, as respects personal injuries sustained by employees, including death at any time resulting therefrom as follows," etc. The Declarations attached to and forming a part of the policy: "Item 1. Name of this Employer L. M. Sheffield, Sheriff, and/or Spray Civic Association, Incorporated. P. O. Address Spray, Rockingham County, North Carolina. Item 3. Locations: . . . Spray, Leaksville and Draper and elsewhere in Rockingham County, North Carolina. . . . It is agreed that the coverage provided in the policy to which this endorsement is attached is limited to the duties performed by those deputies of L. M. Sheffield, Sheriff, whose salaries or fees are paid by the Spray Civic Association, Inc." The premium was paid to cover the policemen "whose salaries or fees are paid by the Spray Civic Association, Inc." In serving a warrant on one Bennett, in Spray, and in the performance of duty, L. R. Clark was killed by Bennett.

In *West v. Fertilizer Co.*, 201 N. C., 556, it is held: "The findings of fact of a member of the Industrial Commission in a hearing before him under the Workmen's Compensation Act, approved by the Full Commission on appeal, are conclusive upon the courts when supported by any sufficient evidence. Where there is evidence tending to show that the deceased received the injury that caused his death while on duty as a

night watchman in defendant's manufacturing plant, and that he had been robbed by his assailant when the injury was inflicted, is sufficient to sustain a finding by the Industrial Commission that the injury was received in the course of and arising out of the employment and the award for compensation by the Industrial Commission will be sustained." *Goodwin v. Bright,* 202 N. C., 481.

We see no just cause why the carrier should not pay this claim. When the contract was made and the carrier took the premium, it knew exactly its liability and distinctly agreed to compensate those whose salaries and fees were paid by the Spray Civic Association, Inc.

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

Affirmed as to Spray Civic Association, Inc.

Reversed as to L. M. Sheffield, Sheriff.

M. & J. FINANCE CORPORATION v. ERNEST RINEHARDT AND FRANCES RINEHARDT.

(Filed 1 November, 1939.)

1. Fraud § 1: Bills and Notes § 10d—

"Fraud in the treaty" is fraud relating to the terms of the instrument, and such fraud does not prevent recovery on a negotiable note in the hands of an innocent holder without notice of the fraud.

2. Same—

"Fraud in the *factum*" is fraud inducing or procuring the execution of the instrument, and such fraud vitiates the instrument and prevents recovery on a negotiable note affected thereby, even in the hands of an innocent holder without notice.

3. Same—Evidence held to disclose fraud in the factum.

Defendants' evidence tended to show that they were unable to read, that they had paid the full purchase price of a car bought from a dealer under a conditional sales contract, that the dealer obtained possession of the car for defendants after the car had been seized for transporting intoxicating liquor, and that defendants signed the second note and conditional sales contract, sued on by plaintiff as an innocent holder without notice, under representations of the dealer that the instrument was a receipt for the delivery of the car to defendants after its seizure. *Held:* Defendants' evidence tends to show fraud in the *factum* vitiating the instrument, even in the hands of an innocent holder without notice.

4. Fraud § 12: Trial § 37—Refusal to submit issue of fraud in the treaty held not error when such issue is not determinative of the rights of the parties.

Plaintiff contended that it was an innocent holder without notice of the negotiable note sued on. Defendant makers introduced evidence tending

to show that the execution of the note was procured by fraud. *Held:* The court's instruction defining fraud in the *factum* and fraud in the treaty and explaining the effect of each on the rights of the parties, but confining the jury's consideration to fraud in the *factum* under the issue of whether the execution of the note was procured by fraud, and the court's refusal to submit an issue relating to fraud in the treaty, are not error, since the rights of the parties depend upon the question of fraud in the *factum*, and the issue of fraud in the treaty is not determinative.

APPEAL by plaintiff from *Armstrong, J.*, at May Term, 1939, of CATAWBA. No error.

Plaintiff in this action brought suit against the defendants to recover $414.00 which it alleges was due upon a conditional sales contract, reserving the title to a certain Buick sedan, and note, originally executed to the J. T. Setzer Motor Company, and by that company transferred to the plaintiff, which claims to be holder in due course.

The defendants set up that the J. T. Setzer Motor Company obtained the contract and note through fraud after they had fully settled for the car and paid all that was due upon the purchase price contract, which they alleged was a totally different contract from that upon which the plaintiff sues. The fraud complained of allegedly consisted of a misrepresentation as to the character of the papers defendants were called upon to sign, the defendants claiming that they were unable to read and that J. T. Setzer, of the Motor Company, represented to them at the time of the procurement of the execution that the document was a receipt for the car.

The plaintiff exhibited the contract and note sued upon and offered evidence tending to show transfer to it, and that nothing had been paid upon it. Plaintiff admitted that there had been a prior contract of conditional sale, retaining title to this particular car, which had been paid. The contract was a title retaining purchase contract upon the same car bought from the Setzer Motor Company for an additional amount.

The defendants' evidence as to the fraud was substantially as follows: Ernest Rinehardt testified that his wife bought an automobile from the Setzer Motor Company some time in March, 1936, and paid for it at $25.00 per month, to Mr. Setzer; that it had been financed by the M. & J. Finance Corporation, and that he got behind with his payments and that Mr. Setzer came to him and said Mr. Danner was after him about the payments and for him to go up there and settle it with Mr. Danner.

That he had had some trouble in Lincoln County about some whiskey being slipped in his car and they took his car to Lincolnton; that he had gone to Hickory and told Mr. Danner about it, and Mr. Danner went after the car, making two trips, for which he paid him $17.00.

Being behind with the payments to the M. & J. Finance Corporation, in the amount of $30.50, he got Mr. Danner, of the Finance Company, to pay the $30.50. Afterwards he went to the Setzer Motor Company to see about the title, in company with his wife, and talked to Mr. Setzer, told Mr. Setzer he would like to get the title, and that he had paid off that bill of $30.50, and Mr. Setzer said he would get the title in a few days. "Mr. Setzer had a paper, just a naked white piece of paper like that lady has there, and he said: 'Rinehardt, you know I got your car from Lincolnton'—he sent for me two or three times to come by there, and at last I went by, and he said: 'All right, come in here a little bit'—nobody was in there but me and him and my wife. He said, 'You got your car back?' I said, 'Yes,' and he said, 'Sign this showing you got your car from Lincolnton,' and I said, 'What do I have to sign it for, I done had my car two or three weeks,' and I hung around there and hung around there and he kept walking around, and begging me to sign it. He said, 'Go ahead and sign it, there ain't nothing to it, if you don't sign it that will look like sticking a man in the back.'" He said if anything were to happen he would have something to show that I got my car. "Nobody read the paper to us at all. I just signed the paper one time. I thought it was what he said, to get the car from Lincolnton, and I said I guess that is what it is for, if anything should happen to show, you know." He testified that he would not have signed the paper had he known that it was a mortgage on his automobile; that he relied upon what Mr. Setzer told him and believed every word of it; that on that day he did not owe Mr. Setzer any note, accounts, or anything except the $30.50, which he paid on the 16th to Mr. Danner of the Finance Company, and that Mr. Danner on that day gave him his old mortgage and everything and told him he was going down there and get out of the crooked mess, and he came back and said Mr. Setzer would not take the $30.50. That on that day Mr. Danner did not tell him that he had another contract on his car, or mortgage, but that on the next day when he came home his wife showed him where "the M. and J. Finance Company were claiming they had another mortgage on the car" after defendant had paid the $30.50; that his wife said "Mr. Setzer is selling your car back to you again."

In rebuttal, J. T. Setzer, for plaintiff, testified substantially: That Ernest Rinehardt and his wife came into his place of business one afternoon and asked about a title to a certain automobile that they had purchased from the J. T. Setzer Motor Company, and which had been financed by the M. & J. Finance Company, the plaintiff. They said they were anticipating paying it off and that they wanted the title to that automobile. "I said, 'I can't let you have the title, because you owe a balance on that car to me in the form of a title retention note,

and if you want the use of the automobile to continue we will make out another contract to the M. and J. Finance Company, add that in it and the rest of your account and the balance you owe on the other automobile and you can finance it and you can pay it in monthly payments."

"Mr. Keever, Mr. Reece and Ernest Rinehardt and his wife were present and Ernest first objected to it and started out of the door and he said: 'Now, Mr. Setzer, how much did you say that would be?' We figured it up and it was 18 monthly payments at $23.00 per month, and he said, 'That is all right, we will sign that.' And he said, 'Now is that all we owe?' I said, 'That is all and when you pay that the automobile will be yours and there will be no more to it,' and he said, 'That's exactly what I want, I want it so there won't be anything else owing on the automobile,' and it seemed that he want away all right. He said, 'You have been so nice to me to loan me automobiles for my wife to go to Lenoir and get me during the time my automobile was out of repair and also when the people in Lincolnton—,' and thanked me for doing that and seemed to be as well pleased as any customer I ever dealt with and seemed to have had it exactly how he wanted it."

Witness denied that he had ever asked Ernest Rinehardt to sign a blank piece of paper, and declared that he signed no such paper, but that the title retention note was for a balance on the former purchase of an automobile. He stated that he did not know what kind of car it was, as it was sold during his absence and during the other manager's operation. He further testified as to the transfer of the paper to the M. and J. Finance Corporation.

On cross-examination, witness admitted that the first title retention contract sold to the M. & J. Finance Corporation had a warranty that there were no other notes or claims on the car except as set forth in the contract, but that they knew about these "side notes."

Carroll Reese testified that he was bookkeeper for the J. T. Setzer Motor Company; that he was present when the defendants signed the contract and note, and that he, as notary public, took their acknowledgment. He testified as to the manner in which the $414.00 was made up; that it consisted of various items upon the books against the defendant Rinehardt.

L. O. Keever also testified that he was present when defendants signed the contract and note and saw them sign; that he had been after Ernest for some time to "finance" the amount due; that on that day Rinehardt said he wanted to get the whole thing cleared up; that it had been the agreement that "when he traded the cars that he was to finance half of it and when he paid that to refinance this side note." He said he saw no blank piece of paper offered to defendants to sign. He further testi-

fied that after the papers were signed Ernest asked if this would pay everything he owed, including service of the car that he used while his own car was in Lincolnton, and Mr. Setzer told him yes, and that he was glad he could fix it that way.

The witness Danner, recalled, said he knew the Setzer Motor Company held the $247.00 retention note before he bought the $414.00 item—he had previously carried the note to Lincolnton to show that the money was due on the car.

The following issue was submitted to the jury: "Were the signatures to said paper writings, plaintiff's Exhibits B, C, D, E, and F, procured by the false and fraudulent representations of J. T. Setzer, as alleged in the answer?" The jury answered the issue "Yes."

(The exhibits represented the contract and note sued upon by the plaintiff.)

Thereupon, judgment for the defendants ensued, including an order that the contract described in the pleadings should be canceled upon the records as void and of no effect. From this, plaintiff appealed.

Eddy S. Merritt for plaintiff, appellant.
Theodore F. Cummings for defendants, appellees.

SEAWELL, J. In this case the plaintiff made numerous objections and exceptions to the admission and exclusion of evidence, which we have carefully examined and are unable to sustain.

The main contentions of the plaintiff relate to the instructions to the jury, the more serious of which contentions, as we gather from the oral argument and the brief, are addressed to the instructions about "fraud in the treaty" and "fraud in the *factum*," and the bearing of each, if found, upon the rights of parties. There can be no point in numbering these exceptions in this opinion, since they are not set out above in detail. We have given enough of the proceedings in the trial court, we think, to make the application of our remarks reasonably plain.

In the judge's effort to enlighten the jury as to the effect of fraud upon the rights of the parties, it was proper for him to describe the character and effect of such fraud, if any, as might be disclosed by the evidence—whether it tended to show a fraud practiced on the defendants in the terms of the agreement, or whether a fraud in the procurement of its execution, and we regard the instructions as addressed to this difference.

The distinction is still important in considering transactions under the Negotiable Instruments Law.

"Fraud in the treaty" concerns the terms of the instrument itself and not merely the act or fact of its execution and the procurement thereof.

Recovery may be had by an innocent holder of a negotiable instrument without notice, notwithstanding the fraud. *Finance Co. v. Mills,* 195 N. C., 337, 338, 142 S. E., 26; *Medlin v. Buford,* 115 N. C., 260, 20 S. E., 463.

"Fraud in the *factum*" concerns the making or the execution of the instrument. The following from *Furst v. Merritt,* 190 N. C., 397, 401, 130 S. E., 40, is apposite to the facts of this case: "As a general rule, it may be said that fraud in the *factum* arises from a want of identity or disparity between the instrument executed and the one intended to be executed, or from circumstances which go to the question as to whether the instrument, in fact, ever had any legal existence, as, for example, where a grantor intends to execute a certain deed, and another is surreptitiously substituted in the place of it (*Nicholls v. Holmes,* 46 N. C., 360), or where a blind or illiterate person executes a deed when it has been read falsely to him on his request to have it read (2 Blk. Com., 304; Manser's Case, 2 Coke's Rep., 3), or where some trick, artifice or imposition, other than false representation as to the meaning and content of the instrument itself, is practiced on the maker in effecting the execution of the instrument." See list of supporting authorities following this excerpt in the cited case; see, also, *Finance Co. v. Mills, supra.*

Upon the principle *fraus vitiat omnia* such a fraud, if found, would make the notes and contracts void in the hands of any holder, since they were void from the beginning, and would make a good defense in the present action.

The evidence, as we analyze it, tended to show "fraud in the *factum,*" rather than "fraud in the treaty," and the court was justified in instructing the jury to give their consideration to the latter.

The court is certainly not required to submit an alternative issue in order to give the jury the opportunity to label the fraud, or choose between the two; and the plaintiff was not harmed by the refusal of the judge to submit the issue of fraud in the treaty, notwithstanding his extensive reference thereto, since if it were found, either way—"yes" or "no"—*non constat,* that there was not also fraud in the *factum,* and nothing further appearing, the rights of the parties would have remained undetermined.

Upon these considerations, we find

No error.

J. P. ROSTAN v. MRS. KATHERINE HUGGINS.

(Filed 1 November, 1939.)

1. Quieting Title § 1: Mortgages § 30g—

The purchaser of land from one tenant in common after the land had been allotted to the tenant in a special proceeding for partition may maintain a suit to restrain foreclosure of a mortgage executed by the other tenant in common prior to partition when the mortgagee advertises and seeks to sell a one-half interest in the entire tract, since such foreclosure would constitute a cloud on the purchaser's title. Michie's N. C. Code, 1743.

2. Contracts § 8—

Pertinent public statutes enter into and form a part of a contract as if they were expressly referred to or incorporated in its terms, or at least contracts will be deemed to have been made in contemplation of the law.

3. Partition § 4—Mortgagee of one tenant in common is not a necessary party to special proceedings to partition the land.

One of the tenants in common owning a one-half undivided interest in the lands in question executed a mortgage on his undivided interest. Thereafter the lands were divided between the tenants in common in a special proceeding for partition in which the mortgagee was not made a party or given notice. *Held:* While the mortgagee was a proper party, she was not a necessary party to the partition proceedings, and upon partition her lien attached only to the land allotted to her mortgagor, since it will be deemed that the instrument under which she claims was executed in contemplation of the statutory right to partition, Michie's N. C. Code, 3215, 3219, and she is bound thereby, even though she was not a party to and had no notice of the partition proceedings.

APPEAL by defendant from *Warlick, J.*, at Chambers, 2 August, 1939. From BURKE. Affirmed.

The facts set forth in the complaint, and admitted by the demurrer, are briefly as follows: The plaintiff purchased a tract of land from the heirs at law of Corinna Berry Crees on 19 December, 1936, which tract of land had been allotted to the said Corinna Berry Crees in a special partition proceeding on 10 November, 1932. Prior to the institution of the partition proceeding between the two tenants in common, Corinna Berry Crees and Wilson W. Berry, the co-tenant, Wilson W. Berry, on 16 May, 1929, made, executed and delivered to the defendant a mortgage deed purporting to convey a one-half undivided interest in the common property of six and one-half acres and nine poles. The mortgagee (defendant) was not made a party to the special proceeding for partition. The commissioners appointed in the partition proceedings allotted to the predecessor in title, Corinna Berry Crees, the tract

of land described in section 2 of the complaint, and allotted to the defendant's mortgagor, Wilson W. Berry, approximately two and one-half acres. Defendant, under the terms of her mortgage, advertised for sale a one-half undivided interest in the six and one-half acres and nine poles tract, of which tract the plaintiff had purchased four acres, and the defendant was restrained from selling said undivided interest for the reason that it would operate as a cloud upon the title of the plaintiff.

The court below rendered the following judgment: "The above entitled caused coming on to be heard, before his Honor, Wilson Warlick, Judge of the 16th Judicial District of North Carolina, at Chambers in the city of Newton, and being heard, and it appearing to the court that a temporary restraining order was signed by his Honor, S. J. Ervin, Jr., Special Judge of the Superior Court of North Carolina, on the 15th day of July, 1939, returnable before the undersigned at 2 o'clock p.m., on the 5th day of August, 1939, in the city of Newton, and that by consent of plaintiff and defendant the time for hearing was advanced to 4 o'clock p.m., on this date, to wit: August 2, 1939, and the parties being represented by counsel and the defendant having filed demurrer to the complaint and moved to dismiss the action and to dissolve the restraining order, and the court being of the opinion that the demurrer is not well taken and should be overruled: It is, therefore, ordered, adjudged and decreed that the demurrer of the defendant be, and the same is, hereby overruled, and the restraining order heretofore issued aforementioned is continued to the hearing and the defendant is allowed thirty days hereafter to file answer. This 2nd day of August, 1939. Wilson Warlick, Judge of the 16th Judicial District of North Carolina."

To the signing of the foregoing order and judgment overruling the demurrer and continuing the restraining order to the hearing, the defendant excepted, assigned error and appealed to the Supreme Court. Other necessary facts will be set forth in the opinion.

Ervin & Butler for plaintiff.
M. M. Redden for defendant.

CLARKSON, J. The prayer of plaintiff is for a restraining order and permanent injunction to remove a cloud on the title of certain lands of plaintiff. The demurrer of defendant to the complaint, in part, is as follows: "The defendant demurs to the complaint of the plaintiff for that said complaint has not alleged sufficient facts to constitute a cause of action against the defendant, in that it appears upon the face of the complaint: That at the time of the partition proceedings alleged in the complaint the defendant was the owner of a valid and outstanding mortgage deed, executed by a tenant in common, conveying an undivided

interest in said property, and that the defendant, as mortgagee, had no notice of, or was not made a party to, the partition proceedings, and that said mortgage deed was duly recorded in Burke County prior to the institution of said proceedings," etc.

The court below overruled the demurrer and continued the restraining order to the hearing. In this we can see no error. We think the action will lie.

N. C. Code, 1935 (Michie), sec. 1743, in part, is as follows: *"Titles quieted.* An action may be brought by any person against another who claims an estate or interest in real property adverse to him for the purpose of determining such adverse claims," etc. *Vick v. Winslow,* 209 N. C., 540 (542).

Corinna Berry Crees and Wilson W. Berry owned a small tract of land, six and one-half acres and nine poles, as tenants in common. In a special proceeding for partition, Corinna Berry Crees and husband, Henry Crees, against Wilson W. Berry, on 10 November, 1932, four acres of the tract were allotted to Corinna Berry Crees. Plaintiff obtained this land through a deed made by Russell Berry, commissioner in a special proceeding by the heirs of Corinna Berry Crees, dated 19 December, 1936. On 16 May, 1929, Wilson W. Berry made, executed and delivered to the defendant a mortgage deed purporting to convey a one-half undivided interest in the common property of six and one-half acres and nine poles.

The main question involved in this controversy: Is the mortgagee of one tenant in common a necessary party to a proceeding for partition among tenants in common when the mortgage in question is executed by one tenant in common for his individual indebtedness upon an undivided interest in the common property? We think not.

When the defendant took her mortgage for a one-half interest in the common property, 16 May, 1929, the following statutes were in effect:

N. C. Code, *supra,* sec. 3215: "One or more persons claiming real estate as joint tenants or tenants in common may have partition by petition to the Superior Court."

Sec. 3219, in part: "The Superior Court shall appoint three disinterested commissioners to divide and apportion such real estate, or so much thereof as the court may deem best, among the several tenants in common or joint tenants."

A partition was had between the tenants in common whose land is involved in this controversy.

It is well settled that pertinent public statutes enter into and form a part of a contract as if they were expressly referred to or incorporated in its terms. At least such contracts must be understood to have been made in contemplation of the law. *Bateman v. Sterrett,* 201 N. C., 59

(62); *Spain v. Hines,* 214 N. C., 432 (437). Tenants in common are allowed to partition their lands and the statute was in effect when defendant took her mortgage. Her rights were subordinate to the statute and her mortgage attached to the land of her mortgagor, tenant in common after it was regularly allotted under the statute. She is bound by a special proceeding for division of lands by partition among tenants in common when not a party to the proceeding and had no notice thereof.

In *Barber v. Barber,* 195 N. C., 711 (712), we find: "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."

In the *Barber case, supra,* it is further held: "The right of a tenant in common to have the lands sold for a division, C. S., 3215, cannot be defeated by a trust creating an interest in the lands by another of the tenants." See *Jenkins v. Strickland,* 214 N. C., 441; *Gibbs v. Higgins,* 215 N. C., 201; *Trust Co. v. Watkins,* 215 N. C., 292.

"A mortgagee of an undivided half of a parcel of land does not become a tenant in common with the owner of the other half until his title has become absolute by a complete foreclosure. Before that time the mortgage is only a lien, and the estate is to be dealt with as belonging to the mortgagor. For the same reason, until foreclosure is complete, the mortgagees to whom possession has been surrendered by the mortgagor cannot maintain a petition for a partition. A mortgage of an undivided interest in a specified parcel of land is invalid as against the cotenants of the mortgagor. They may obtain a partition of the land without regard to the mortgage; and if it cannot be conveniently divided between all of the codefendants, a sum of money may be awarded to the mortgagor for his share of the property." Thompson on Real Property, Vol. 2, sec. 1772.

The general principle of law is stated in 47 C. J., "Partition," sec. 260: "While there is some authority to the contrary, the better view is that, in the absence of some positive statutory requirement, mortgagees of undivided interests in land sought to be partitioned are not necessary parties," etc. Sec. 261: "It has very generally been held that, in the absence of statute providing otherwise, one holding a lien by mortgage of the entire premises sought to be partitioned is not a necessary party, since his rights are not affected by the partition," etc.

In 20 R. C. L., part sec. 41 (p. 758), we find: "If an encumbrance or lien exists against any of the co-tenants, the effect of the partition is to transfer it to the lot set off to him to be held in severalty. Hence, an

encumbrancer, in the absence of some statute making him so, is not a necessary party to a suit for partition."

In *Holley v. White,* 172 N. C., 77, it is held: In proceedings to sell lands for partition among tenants in common, judgment creditors of the individual tenants, and their mortgagees, having liens on the lands to the extent of their interests, are proper parties to the proceedings; and where such lienors have been made parties thereto, and the trial judge has dismissed the action as to them, it is reversible error. The distinction between proper and necessary parties was there pointed out by *Brown, J.* At p. 78, it is said: "It is true, we decided in *Jordan v. Faulkner,* 168 N. C., 466, that judgment creditors of a tenant in common are not necessary parties to a partition proceeding, but we have nowhere held that they are not proper parties. There is a recognized distinction. If they are not parties, the purchaser buys subject to such liens. The fact that a tenant in common is entitled to a homestead against the judgment cannot prevent a sale for partition. *Kelly v. McLeod,* 165 N. C., 385. His share of the proceeds of the sale will be reserved and his homestead right therein protected by a proper decree. . . . The case is, therefore, no authority for the position that mortgagees and other lienors may not be made parties. It may be very advisable to do so in the inception of the proceeding, so the purchaser may acquire an unencumbered title. Such course undoubtedly tends to enhance the price of the land. Intending purchasers will likely bid more for property when they know they are getting a perfect title freed from all encumbrances, the amount of which they probably do not know. The better practice undoubtedly is to make all mortgagees and lienors parties to foreclosure and other proceedings wherein land is to be exposed to a judicial sale. . . . (p. 79.) While it is not necessary to make such lienors defendants in this proceeding, the plaintiff had a right to do so, and the court erred in dismissing the proceeding as to them."

Although mortgagees are proper parties, they are not necessary parties. The instant case does not involve a determination as to whether mortgagees are proper parties in a partition proceeding.

In *East Coast Cedar Co. v. People's Bank of Buffalo, N. Y.,* 111 F., 446, 450, 49 C. C. A., 422, it was stated: "Lien creditors, if any exist, were not parties to this suit, nor were they necessary parties," citing *French v. Gapen,* 105 U. S., 509, 26 L. Ed., 951.

In *Gammon v. Johnson,* 126 N. C., 64 (65), is the following: "In general all encumbrancers, whether prior or subsequent encumbrancers, as well as the mortgagor, should be parties to a proceeding for foreclosure, and judgment creditors as well as mortgagees. *Hinson v. Adrian,* 86 N. C., 61; *LeDuc v. Brandt,* 110 N. C., 289." *Jones v. Williams,* 155 N. C., 179 (185); *Beaufort County v. Mayo,* 207 N. C., 211.

The above is the well settled law in this State in regard to foreclosure proceedings. Partition is on a different footing. It may be wise in an action for partition to make all lienors parties. If so made, the proceeding cannot be dismissed and they become proper but not necessary parties.

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

Affirmed.

FRANCIS A. CODY v. GEORGE I. HOVEY.

(Filed 1 November, 1939.)

1. Appeal and Error § 2—Appeal will lie from order overruling demurrer to the answer which admits cause alleged and sets up an affirmative defense.

While a demurrer to the answer is equivalent in some respects to a motion for judgment on the pleadings, and the refusal of a motion for judgment on the pleadings is not a final judgment from which an appeal will lie, when the answer admits the allegations of the complaint and sets up new matter constituting an affirmative defense, a demurrer to the answer goes to the merits of the controversy, and an appeal will lie from an order overruling the demurrer. C. S., 525.

2. Contracts § 7d—

C. S., 2144, amended by ch. 236, Public Laws of 1931, does not render void a contract for the purchase and sale of stocks on margin when actual delivery of the stocks is made to the purchaser or to his agent, and the stocks are paid for in whole or in part.

3. Same: Judgments § 40—Allegations held insufficient to show that contract upon which judgment of another state was based was an illegal gaming contract.

In this action on a judgment rendered against defendant in another state, defendant alleged that the judgment was based upon a contract for the purchase and sale of stocks on margin, that the stocks were delivered to and retained by the broker and sold as plaintiff and the broker determined that there had been sufficient profit or loss on each transaction, and that the contract was a gaming contract and that action on the judgment based thereon could not be maintained in the courts of this State. *Held:* The allegations are insufficient to show that the contract was void as a gaming contract under the provisions of C. S., 2144, as amended, the allegation that no delivery was intended being nullified by the allegation of delivery to defendant's broker, and the allegation that the contract was a gaming contract being a mere conclusion of law, and plaintiff's demurrer to this defense set up in the answer should have been sustained.

4. Pleadings § 20—

A demurrer admits the allegations of fact but not the conclusions of law of the pleader.

5. Pleadings § 23—

When the allegations of the answer are insufficient to constitute an affirmative defense, the trial court should sustain plaintiff's demurrer to such defense with leave to defendant to move to amend. C. S., 515.

6. Same—

When plaintiff's demurrer to defendant's counterclaim is properly sustained, plaintiff's exception to the order of the court permitting defendant to amend is untenable. C. S., 515.

7. Appeal and Error § 2: Pleadings § 28—

The denial of plaintiff's motion for judgment on the pleadings is not a final judgment from which an appeal will lie.

8. Judgments §§ 22f, 40—

Allegation that the judgment of another state upon which action is instituted in this State was obtained through false testimony is an allegation that the judgment was obtained by extrinsic fraud, which does not constitute a basis for attacking the validity of the judgment in plaintiff's action thereon.

9. Appeal and Error § 2—

Defendant's appeal from the denial of his motion to dismiss on the ground that the cause alleged was based on a void gaming contract is premature, the denial of the motion not being appealable.

10. Appeal and Error § 20—

When both plaintiff and defendant appeal, it is not required that there be two transcripts of the record, one transcript being sufficient for both appeals. Rule of Practice in the Supreme Court, No. 19 (2).

APPEAL by plaintiff and defendant from *Armstrong, J.*, at May Term, 1939, of CALDWELL.

This was an action upon a judgment rendered by a court in the State of New York against the defendant in the sum of more than a million dollars. The complaint alleged that the New York court had jurisdiction of the person of the defendant by proper service, and of the subject matter; that the defendant answered and appeared in that court, and the action was tried before a jury resulting in verdict and judgment for plaintiff; that upon appeal by defendant to the appellate division of the New York Supreme Court the judgment was affirmed; that no part of the judgment has been paid.

The defendant in this action, in the Superior Court of Caldwell County, filed answer admitting all the allegations of the complaint, but alleged as a defense, (1) that the judgment was procured by fraud by reason of the false testimony of a witness, and (2) that the transaction upon which the judgment in suit was based was a gambling transaction, on margin, prohibited by the North Carolina statute, C. S., 2144, and that the jurisdiction of the North Carolina courts was not available for

the enforcement of such a judgment. The defendant further set up a counterclaim for abuse of process incident to the institution of this suit.

The plaintiff demurred to the several defenses set up in the answer, and to the counterclaim, and moved for judgment on the pleadings. The court below sustained the demurrer to the defense of fraud in the procurement of the judgment, and overruled the demurrer as to the defense under C. S., 2144. The court also sustained the demurrer to the counterclaim, and denied plaintiff's motion for judgment on the pleadings. From the order embodying these rulings, both plaintiff and defendant appealed.

Gover & Covington for plaintiff.
Pritchett, Strickland & Farthing for defendant.

PLAINTIFF'S APPEAL.

DEVIN, J. Ordinarily, an appeal from the denial of a preliminary motion for judgment on the pleadings will be dismissed as premature and involving no substantial right (*Johnson v. Ins. Co.,* 215 N. C., 120), and a demurrer to the sufficiency of the answer is in some respects equivalent to a motion by plaintiff for judgment on the pleadings, but where the defendant admits all the allegations of the complaint and sets up an affirmative defense based on new matter alleged in his further answer, a demurrer on the part of the plaintiff challenges the sufficiency of the only pleading which raises an issue and goes to the heart of the controversy, and affords a direct approach to a determination of the action. Hence, an appeal from a judgment overruling or sustaining plaintiff's demurrer merits the consideration of the Court. C. S., 525. As was said by *Clark, C. J.,* in *Shelby v. R. R.,* 147 N. C., 537, 61 S. E., 377: "It is true that when a demurrer to the whole cause of action, or to the whole defense, is either overruled or sustained, an appeal lies." *Alston v. Hill,* 165 N. C., 255, 81 S. E., 291; *Chambers v. R. R.,* 172 N. C., 555, 90 S. E., 590; *Pridgen v. Pridgen,* 190 N. C., 102, 129 S. E., 419; *Real Estate Co. v. Fowler,* 191 N. C., 616, 132 S. E., 575; McIntosh, sec. 475.

The plaintiff's principal assignment of error relates to the overruling of his demurrer to the following defense contained in the answer: "That the transaction upon which said judgment was obtained was a gambling and speculative futures transaction, and a transaction wherein the plaintiff purchased certain stocks through Herman W. Booth, upon margin without any contract or intention that said stocks were ever to be actually delivered, and without any agreement that the said plaintiff could demand an actual delivery of said stocks, but that same were purchased on a margin for wholly speculative purposes, as is well shown by the

evidence taken in the trial of this cause in the State of New York, and that said stocks and bonds remained with the said Herman W. Booth at all times, and were never actually delivered by the said Herman W. Booth to the plaintiff herein, but were held and sold from time to time as plaintiff and Herman W. Booth ascertained they had a profit in said stocks, or that they concluded that they had sustained sufficient loss as they desired on account of the fluctuations of the said New York Stock Exchange."

The statute, C. S., 2144, declares null and void contracts for the purchase and sale of certain articles, including stocks and bonds, when it is not intended that the articles or things should be actually delivered, but it is understood that money shall be paid depending upon the fluctuations of the market price, and no real transaction is contemplated, and provides that no action shall be maintained to enforce such contract or on account of any money paid or advanced in connection with such contract. The statute makes the further provision: "Nor shall the courts of this State have any jurisdiction to entertain any suit or action brought upon a judgment based upon any such contract." This statute was amended by ch. 236, Public Laws of 1931, by adding the proviso that the section should not apply to contracts for the purchase or sale for future delivery of any of the articles mentioned where such purchase or sale was made on any exchange on which such articles were regularly bought and sold, and where the rules of the exchange permitted either party to the contract to require delivery. The amendment also repealed sections 2145 and 2146 of the Consolidated Statutes relating to the *prima facie* effect of margins and the burden of proof in cases coming under section 2144. This statute was recently considered by this Court in *Fenner v. Tucker,* 213 N. C., 419, 196 S. E., 357. It will be noted that the contract construed in that case antedated the enactment of ch. 236, Public Laws of 1931.

The North Carolina statutes relating to gambling contracts and futures were not intended to affect transactions where the property, though purchased for speculative purposes, was delivered to the purchaser or his agent, and paid for in whole or in part. Ordinary transactions whereby men purchase real estate, a carload of mules, or a stock of goods, in the hope of selling at a profit, are not to be distinguished from the purchase and sale of bales of cotton or shares of stock when delivery is made or intended to be made in the regular course of business dealing.

It is apparent that the transaction as alleged in the answer does not come within the prohibition of the statute. The defendant's connection, if any, with the transaction is not set out. The allegation is that plaintiff purchased stocks through one Booth, upon margin, for speculative

purposes, and, while he alleges there was no intention to deliver, as a matter of fact he alleges the stocks were delivered to and held by Booth, and were thereafter sold as the plaintiff and Booth determined they had sufficient profit or loss in the transaction, reference being made to the New York Stock Exchange. What part the defendant Hovey had in these transactions in nowise appears. The averments are insufficient to show that these were sham transactions such as are declared void by the statute, or to bring the defendant within its terms so as to protect him from suit. It will not do for the defendant to say that they were gambling transactions unless the facts stated show that they were. The demurrer admits the allegations of fact but not the conclusions of the pleader. *Leonard v. Maxwell, ante,* 89.

The court below should have sustained the demurrer to the defendant's further defense under C. S., 2144, with right to move for leave to amend in accordance with the provisions of C. S., 515. *White v. Charlotte,* 207 N. C., 721, 178 S. E., 219; *McKeel v. Latham,* 202 N. C., 318, 162 S. E., 747; *Morris v. Cleve,* 197 N. C., 253, 148 S. E., 253. Whether the defendant may be able to allege sufficient facts to bring himself and the transactions referred to within the scope of the statute so as to require withdrawal of the jurisdiction of the courts of the State from an action to enforce a judgment based on prohibited transactions, and whether the North Carolina statute contravenes the full faith and credit clause of the Constitution of the United States (Art. IV, sec. 1), is not presently presented.

The demurrer to defendant's counterclaim for damages alleged to have been occasioned by the institution and prosecution of this action was properly sustained. *Carpenter v. Hanes,* 167 N. C., 551, 83 S. E., 577. Plaintiff, however, excepts to so much of the order as allows the defendant to file an amendment setting forth his counterclaim, but we find no error in this ruling of the court below. C. S., 515. *Morris v. Cleve, supra.* The plaintiff's assignment of error on account of the denial of his motion for judgment on the pleadings cannot be sustained in view of what has been said relative to his demurrer to the answer. *Johnson v. Ins. Co.,* 215 N. C., 120.

On plaintiff's appeal we conclude that so much of the order appealed from as overrules plaintiff's demurrer to that portion of the answer interposing defense under C. S., 2144, must be reversed.

DEFENDANT'S APPEAL.

Defendant appeals from so much of the order of the court below as sustains the demurrer to his further defense predicated on the ground of fraud in the procurement of the judgment in the New York court.

This defense, however, is based entirely on the allegation of false testimony given by a witness in the trial, and this has been held not to constitute extrinsic fraud upon which a successful attack upon the judgment can be based. This question was fully considered by this Court in the recent case of *Horne v. Edwards,* 215 N. C., 622, and decided adversely to the defendant here. The same rule applies in New York. *Jacobowitz v. Herson,* 268 N. Y., 130.

Defendant's motion to dismiss plaintiff's action was properly denied, and his exception to the ruling of the court on that ground would not constitute basis for appeal. *Johnson v. Ins. Co., supra; Bargain House v. Jefferson,* 180 N. C., 32, 103 S. E., 922. On the defendant's appeal the ruling of the court below must be affirmed.

The motion to tax defendant with the cost of an additional transcript of the record on his appeal would not require consideration, in view of the disposition of the two appeals in this case, but for the fact that under the practice formerly prevailing it was deemed proper that a transcript of the record should be sent up by each appellant, as was held in *Pope v. Lumber Co.,* 162 N. C., 208, 78 S. E., 65. See *Johnson v. Lumber Co., ante,* 123. However, the rule now in force (Rule 19 [2]) obviates the necessity of more than one transcript in one action, regardless of the number of appeals. We quote the Rule as follows: "When there are two or more appeals in one action, it shall not be necessary to have more than one transcript, but the statements of cases on appeal shall be settled as now required by law, and shall appear separately in the transcript. The judge of the Superior Court shall determine the part of the costs of making the transcript to be paid by each party, subject to the right to recover such costs in the final judgment as now provided by law." Rule 19 (2), 200 N. C., 824.

On plaintiff's appeal, reversed.

On defendant's appeal, affirmed.

MRS. MAMIE V. GREER v. S. W. HAYES AND WIFE, LEILA B. HAYES.

(Filed 1 November, 1939.)

1. Boundaries § 1—

It is the province of the court to instruct the jury what the true dividing line between the lands of the parties is, and the province of the jury to locate the line in accordance with the instructions of the court.

2. Same—

When there is only one established corner, the courses and distances described in plaintiff's deed control, commencing at the established corner as located by the jury.

3. Same—

Nothing else appearing, the calls in a deed must be followed as of the date thereof, and it is only when it appears on the face of the deed or from other evidence that such calls and distances relate to a former survey made with reference to the magnetic rather than the true meridian, that variations in the magnetic pole will be computed as of the date of the former survey.

4. Boundaries § 11—Instruction held for error in failing to charge jury under what circumstances plaintiff would be entitled to have variations in magnetic pole computed as of date of former deed.

Plaintiff contended that the boundary between the lands of the parties should be run according to the courses and distances as described in her deed, with allowance for variations in the magnetic pole as from the date of former deeds, plaintiff claiming that the calls and distances as described in her deed were substantially the same as the combined descriptions in two former deeds. There was no evidence warranting the inference that the calls and distances in plaintiff's deed were copied from or had reference to the former deeds. *Held:* An instruction that when a boundary is sought to be established according to the calls and distances as described in former deeds, allowance should be made for variations in the magnetic pole as of the date of the former deeds, without instructions upon the evidence as to when plaintiff could claim under the courses and distances as contained in the former deeds and when variations in the magnetic pole could be computed as of the date of the former deeds, is reversible error.

5. Boundaries § 10—Instruction that burden was on defendants to establish line as contended for by them held error.

In a processioning proceeding to establish the true dividing line between the lands of the parties, it is error for the court to instruct the jury that the burden is on defendants to establish the line as claimed by them, since the burden of proof never shifts to defendants. The submission of a single issue as to the location of the true dividing line, rather than the submission of separate issues as to the location of the dividing line as contended by the respective parties, approved.

APPEAL by defendant from *Ervin, Special Judge,* at February Term, 1939, of CALDWELL. New trial.

This is a processioning proceeding instituted before the clerk under C. S., 361 *et seq.*, to fix and determine the true boundary line between the lands of the plaintiff and the lands of the defendants.

It is alleged and admitted that the plaintiff and defendants own contiguous tracts of land adjacent to and on the west side of Lenoir in Caldwell County. The location of the true boundary line is in dispute and this action was instituted to have the same fixed and determined.

The plaintiff alleges that the true line begins at a large oak on the bank of Lower Creek and runs north 17 degrees west 22 poles to a stake in Kent's line; thence north 3¾ degrees west 109 poles and 17 links to a stake, R. J. Ervin's corner. The defendants do not deny the calls and distances in the line alleged by the plaintiff but do assert that the begin-

ning point, as alleged by the plaintiff, is 35 feet north 48 east of the correct beginning point.

The plaintiff offered in evidence a deed dated 6 March, 1901, from E. F. Shell, S. M. Clarke, *et al.*, to W. L. Greer, and traced her title by *mesne* conveyances to this deed. In the Shell deed and in the deed to the plaintiff the line is set out as alleged by plaintiff, and in the deed to the plaintiff there is added to the description the following: "being the first tract described in the deed from S. M. Clarke *et al.* to W. L. Greer by deed dated March 6, 1901, and recorded, etc."

On the question of the location of the true boundary line the court submitted two issues as follows:

"1. Is the dividing line between the lands for which the plaintiff, Mrs. Mamie V. Greer, holds title of record and the lands for which the defendants, S. W. Hayes and Mrs. Leila B. Hayes, hold title of record, located as the red line marked on the map as A. B. and C., as alleged by the plaintiff?

"3. Is the dividing line between the lands for which the plaintiff, Mrs. Mamie V. Greer, holds title of record, and the lands for which the defendants, F. W. Hayes and Mrs. Leila B. Hayes, hold title of record, located as the white line marked on the map as 1, 2 and 3, as alleged by the defendants?"

The jury answered the first issue "Yes" and the second issue "No." The other issues related to the claim of ownership by adverse possession and were answered adversely to the defendants.

There was judgment on the verdict and the defendants excepted and appealed.

Pritchett, Strickland & Farthing for plaintiff, appellee.
Hal B. Adams for defendants, appellants.

BARNHILL, J. Title of the parties to the respective tracts claimed was admitted. The beginning point of the disputed line as called for in the plaintiff's deed is, "a large oak on Lower Creek." The beginning point as called for in the defendants' deed is "a point in the center of the Lower Creek opposite a Spanish oak, Greer's corner." At the conclusion of the evidence it was admitted that the "large oak" and the "Spanish oak, Greer's corner," are calls for the identical natural object, the controversy in respect thereto being as to the correct location on the ground of such natural object or beginning point. Thus, the controversy on the trial narrowed itself, principally, to a contest over the location of the beginning point.

The beginning point having been fixed by the jury, what the dividing line is, is a question of law; where the line is, is a question of fact.

Geddie v. Williams, 189 N. C., 333, and cases there cited; *Lee v. Barefoot,* 196 N. C., 107, 144 S. E., 547. It was the duty of the court to tell the jury what constituted the true boundary line starting from the beginning point, as it might be located by the jury, and it was the duty of the jury to find and locate it. It is the province of the court to declare the first and that of the jury to ascertain the second. *Von Herff v. Richardson,* 192 N. C., 595, 35 S. E., 533.

On this aspect of the controversy the court instructed the jury as follows: "The court further instructs you that unless other calls are controlling that calls for course and distance must be strictly complied with and that when one undertakes to locate the boundaries of a line by course and distance called for in a deed of former date that one in running such line should follow the magnetic courses called for, making necessary allowances for the variations which accrued between the time of the execution of the deed or the time of the establishing of the course and distance in the deed and the time of the running of the lines."

While the terminus of the second call in the disputed line is to R. J. Ervin's corner, apparently there was no effort to locate this "natural monument" as an aid in determining the location of the true boundary line. As the only other natural object established or attempted to be established was the beginning point, resort must be had to the courses and distances called for in the plaintiff's deed, commencing at the established corner, as found by the jury, and they must prevail. *Muse v. Caddell,* 126 N. C., 265. Nothing else appearing, the calls in the deed must be followed as of the date thereof. Where it clearly appears upon the face of the deed, or where the evidence shows, that a line as established on a prior date was adopted and was copied in the deed according to the courses and distances thereof, it is necessary to take into consideration the variations of the magnetic needle in locating the same. *McCourry v. McCourry,* 180 N. C., 508, 105 S. E., 166. Likewise, whenever it can be proved that there was a line actually run by a surveyor, was marked and a corner made, the party claiming under the patent or deed shall hold accordingly. *Bowen v. Lumber Co.,* 153 N. C., 366, 69 S. E., 258. If it appears that the original line of survey was run on the ground according to the magnetic meridian and not according to the true meridian and it appears that the call of the deed relates to the line as it existed on the date the line was originally established or surveyed, the inquiry is as to the true location of the line as it was on that date. *Geddie v. Williams, supra,* and cases there cited; 4 R. C. L., 112; *Rodman v. Gaylord,* 52 N. C., 262.

Plaintiff offered in evidence a deed from S. P. Dula to Azor Shell, dated 30 August, 1862, containing in the description the following courses: "to the mouth of Tanyard Branch, Hayes' corner; thence north

17 degrees west with Harper's line 22 poles to a stake in the bend of said branch, said Harper's corner; thence north 3¾ degrees west with said Harper's line 8 poles to a stake." She also offered in evidence deed from S. P. Dula to Azor Shell, dated 30 August, 1862, in which the calls in part are as follows: "Beginning on a persimmon corner, the northeast corner of said Shell's tract in Harper's line; thence north 3¾ degrees west with said line 101 poles and 17 links to a stake in said line or rock." The plaintiff contends that the recited calls in these two deeds, when fitted together, constitute the same calls and approximately the same distance as the courses and distances of the disputed line and that the disputed line should be fixed and established by the calls of those deeds making allowance for variation of the magnetic needle since 1862.

The surveyor testified that in running the line he allowed "the proper variations according to the Dula Deeds." He further testified "the only way I used the Dula deed was to determine the age. When I ran by her deed I came 50 feet below where she contends. I did not make any investigation as to where R. J. Ervin's corner was. In surveying I left out one call of the deed. If I had run that call it would have taken me about 200 feet away from the creek. I did not run the lines of the Dula deed. This little dotted line beginning at the letter A (the corner as contended by plaintiff) represents a fence and a ditch on one side of it. It has been cultivated up to here."

Thus, it appears that the vice in the charge as given lies in the fact that while it makes reference to the location of a boundary by the courses and distances called for in a former deed, the court did not explain to the jury when and under what conditions this could be done. Nor did it explain to the jury the rights of the plaintiff in that respect on the evidence in this case. Likewise, it makes reference to the allowance of proper variations of the magnetic needle. When and under what conditions the variations are to be allowed is not explained. The jury was permitted to determine, without any guide, to what former deed reference should be had in determining the true boundary line.

On this record that the charge was given without the further explanations was harmful to the defendants is apparent. There is nothing to warrant an inference that the calls of the line were copied from or had reference to the Dula deed, or to justify the conclusion that the line is to be ascertained by such calls as of the date of that deed. And yet the jury fixed the line of the Dula deed run by the surveyor, by making the proper allowances for the variations of the magnetic needle since the date thereof, as the line in controversy, so that the line as established runs north 13 degrees 30 minutes west 22 poles; thence north no degrees 15 minutes west 109 poles and 17 links, rather than north 17 degrees west 22 poles; thence north 3¾ degrees west 109 poles and 17 links as called

for in plaintiff's deed—a variation of 3½ degrees. The line as thus established deprives the defendants of their street frontage and gives to the plaintiff lands defendants had heretofore cultivated, the yards to the houses they had built on the land and a part of one of the houses. Whereas, if the line is surveyed from the beginning corner contended for by the plaintiff according to the calls of her deed as established in the Shell-Clarke deed of 1901, it will extend, approximately at least, along the fence and ditch up to which the defendants have heretofore cultivated.

On the third issue the court instructed the jury that the burden of proof was on the defendants. In this there was error. In this type of case the burden never shifts to the defendant. If the plaintiff is unable to show by the greater weight of the evidence the location of the true dividing line at a point more favorable to her than the line as contended for by the defendants, the jury, as a matter of law, should answer the issue as to the true dividing line in accord with the contentions of the defendants. *Boone v. Collins,* 202 N. C., 12, 161 S. E., 543, and cases there cited.

The better practice is to submit one issue, in substance as follows: What is the true dividing line between the lands of the plaintiff and the lands of the defendants? This will simplify the inquiry and the charge as to the law thereon and facilitate the determination of the controversy.

For the reasons stated there must be a

New trial.

J. A. JACKSON v. ELDRIDGE JERNIGAN.

(Filed 1 November, 1939.)

1. Boundaries § 6: Injunctions § 6a—Injunction will not lie as ancillary remedy in processioning proceeding pending final determination.

When defendant in a processioning proceeding puts title in issue, the cause should be transferred to the civil issue docket for trial, but when he does not do so the proceeding does not involve title or right to possession, but solely the location of the true dividing line, C. S., 363, and therefore injunctive relief will not lie at the instance of one party to enjoin the other from retaining possession of the disputed strip, pending the final determination of the proceeding, even in the Superior Court on appeal, since the restraint sought is not germane to the subject of the action. C. S., 843, 844. *Semble:* Nor would injunction lie in an independent suit, since defendant's entry into possession under the clerk's judgment in the processioning proceeding is more like an ouster than a continuing trespass.

2. Injunctions § 6a—

Injunction will not lie to prevent damage by trespass when it appears that the damage has already been done, since injunction will not lie to redress a consummated wrong, or to establish a cause of action.

APPEAL by defendant from *Stevens, J.*, at Chambers, 20 May, 1939. From SAMPSON. Reversed.

The plaintiff brought this action and caused injunction to be issued against defendant under the following circumstances:

Prior to the institution of the action a special proceeding had been brought by the defendant in this case to have the line dividing their lands determined under C. S., 363. Survey of the lands was made as provided by law, and on 3 May, 1938, a judgment was rendered in favor of the petitioner in that proceeding, the present defendant Jernigan, determining the boundary in a manner which included the strip of land now in controversy.

On 20 January, 1939, on motion of Jackson to have the order set aside upon newly discovered evidence, the court, in its discretion, set aside the judgment of 3 May, 1938, and ordered a new survey at the cost of Jackson. A delay ensued, which is the matter of controversy between the parties, and the survey under this order was not made, but Jackson took possession of the strip of land according to his contention and proceeded to cultivate it.

Thereafter, on 22 March, 1939, on application of the petitioner, Jernigan, but without notice to Jackson, the clerk set aside his more recent order of 20 January, 1939, and reaffirmed and redeclared his judgment of 3 May, 1938, under which judgment the lands in dispute fell again to Jernigan. The plaintiff in this case caused an appeal to be made to the Superior Court. The line was run, however, as established by the court in this judgment, and on 22 March, 1939, the defendant Jernigan entered upon the strip of land and began to cultivate the same.

Thereupon, the plaintiff brought this action, setting up his claim to certain lands by description, allegedly including the disputed strip, and setting up the various steps which had been taken in the processioning proceeding in which, amongst other pertinent allegations, he complains:

"15. That since the last order was signed by the clerk and irrespective of the fact that the plaintiff gave notice of appeal therefrom, which appeal is now pending, the defendant Jernigan has entered upon said lands, has plowed up the cotton previously planted by the plaintiff and is attempting to confiscate said lands and cultivate them himself without due process of law.

"16. That if the defendant is permitted to proceed with the cultivation of said lands before the true boundary line is established by a court of competent jurisdiction, this plaintiff will be irreparably damaged."

The defendant demurred to the complaint and application for injunction as not stating any grounds for equitable relief of this nature, pointing out the pendency of the processioning proceeding, the various steps of which he sets up in detail. The judge overruled the demurrer and defendant appealed.

J. R. Young for plaintiff, appellee.
R. L. Godwin for defendant, appellant.

SEAWELL, J. Plaintiff brought this proceeding for injunction as an auxiliary remedy for the protection of his property and possessory rights pending the final determination of the processioning proceeding brought by the defendant to establish the dividing line between the parties. C. S., 361 *et seq.* The matter was heard below and argued here on that theory, and it is fully adopted in the complaint or application upon which the injunction was granted. The plaintiff argues that since the clerk of the Superior Court, before whom the special proceeding was pending, has no authority to issue the writ, and since protection should not be wholly denied, auxiliary injunctive relief must be given by a judge of the Superior Court, citing *Hunt v. Sneed,* 64 N. C., 176, where that procedure was recognized as proper in some instances.

But it may be said in the case at bar if the clerk has no authority to issue the writ, neither do the matters committed to his jurisdiction by the cited statute call for it. The property rights alleged to be invaded or endangered—the title to the land and its peaceable possession—are not involved as yet in the proceeding, which concerns only the establishment of a dividing line. In such a situation injunction will not lie. *Wilson v. Alleghany Co.,* 124 N. C., 7, 32 S. E., 326.

True, if the proceeding runs its course and results in a final judgment establishing the line, the property rights of both parties will be affected by the judgment, and will be determined or foreclosed, since the line is established as of the date of the proceeding as a true line between the parties and not as a mere interpretation of the instruments of title; but such rights are foreclosed only because they have not been pleaded and thus drawn into the controversy.

Our statutes relating to injunction have, in some instances, modified the conditions under which the writ may issue, and, in others, have given it specialized application contrary to former equity practice. C. S., 843, 844. It is, of course, a proper remedy for relief against continuing trespass, either where perpetual injunction is sought in an independent action or where the injunction is ancillary to an action in which the title to land or the right to its possession is at issue; and its function in such cases is to protect the subject of the action against destruction or wrong-

ful injury until the legal controversy has been settled. But the broad provision of C. S., 843—the general statute relating to the issuance of the writ—still do not permit injunction to issue when the restraint sought is not germane to the subject of the action—that is, when it is not in protection of some right being litigated therein.

Ordinarily, a processioning proceeding involves neither the title to land nor its possession. *Cole v. Seawell,* 152 N. C., 349, 67 S. E., 753. It is devised for the speedy and inexpensive settlement of disputes over dividing lines, and it depends for its efficacy on the indisposition of either party to bring the title into the controversy. *Parker v. Taylor,* 133 N. C., 103, 45 S. E., 473. The respondent has the right to do this, upon proper allegation, and the petitioner may reply in kind. This is apt to be the case when the location of the line, here or there, involves a gain or loss of important territory. When allegations are made raising an issue as to the title, the proceeding loses its character as a special proceeding and is converted into an action to try or to clear the title to the land, and is put upon the civil issue docket in the Superior Court, there to be heard as other such actions. *Woody v. Fountain,* 143 N. C., 66, 55 S. E., 425; C. S., 758.

When the proceeding has thus emerged from the chrysalis stage into the full-winged imago, we apprehend that all the rules and conditions regulating the highly protective ancillary remedy of injunction would be in force; but, even under such circumstances, these do not ordinarily include dispossession of disputed premises, or, for that matter, restraint from their cultivation. The writ cannot be used as an instrument to try the title to land or settle a dispute as to its possession.

In the case at bar, the processioning proceeding has not gone beyond its original phase, and all matters concerning it are still within the limited purview of the processioning statute, without allegation, controversy, or issue outside of the dispute about the location of the line. Upon that question alone, there is nothing upon which the right to the writ may attach. *Wilson v. Alleghany Co., supra.*

It was the privilege of the respondent to raise the issue as to the title in the special proceeding, and we think he was required to do so as a basis for any equitable relief he might demand in that proceeding.

We need not pass upon the question whether the plaintiff might maintain an independent action for the relief sought, regardless of the pendency of the special proceeding. As stated, the plaintiff has not regarded the present proceeding for injunctive relief as being of that character, but even if we were permitted to regard the proceeding independently of the processioning proceeding, we do not think from that point of view the factual situation set up in the complaint justifies the issue of the writ. It has more the appearance of an ouster than a con-

tinuing trespass, and against this injunction will not lie. *Lyerly v. Wheeler,* 45 N. C., 267. Apparently, each party went into possession according as he fell on the one side or the other of the shifting line of court decision, and the last to occupy the small area involved was the defendant. Whatever his original act of destruction of plaintiff's crop, that is now an accomplished fact against which injunction will not prevail.

Preventive injunction is asked for, and it cannot be used to "redress a consummated wrong" or to undo what has been done. 32 C. J., p. 22; *Lacassagne v. Chapuis,* 144 U. S., 119, 36 L. Ed., 368; *Clark v. Donaldson,* 104 Ill., 639.

For these reasons, the judgment overruling the demurrer is

Reversed.

NORA THOMPSON AND RAY E. THOMPSON v. AVERY COUNTY, AND THE BOARD OF EDUCATION OF AVERY COUNTY.

(Filed 1 November, 1939.)

1. Judgments § 20—

The lien of a docketed judgment attaches only against such estate in lands as the judgment debtor has at the time of the docketing of the judgment or thereafter acquires while the judgment subsists.

2. Deeds § 17a—

A covenant against encumbrances is a personal covenant and does not run with the land, and relates to things in existence at the time it is made, and therefore when there is a judgment lien subsisting against the covenantor, the covenant is broken and a right of action arises in the covenantee immediately upon delivery of the deed.

3. Deeds §§ 13a, 17a—

When the life tenant executes deed with full covenants, and thereafter the life tenant and the remainderman execute deed to the same grantee with like covenants, the second deed conveys only the remainder, even though it purports to convey the life estate also, and its covenant against encumbrances relates solely to encumbrances against the remainder.

4. Deeds § 17a—

Ordinarily, the measure of damages for breach of covenant against encumbrances, when the covenantee pays off the encumbrances, is the fair and reasonable amount paid out in discharging the encumbrances, not exceeding the purchase price of the land.

5. Estates § 9h—

When a life tenant and the remainderman sell the lands, the life tenant is entitled to the present cash value of her life estate in the purchase price, computed according to her life expectancy at the date of the execu-

tion of the deed, C. S., 1790, 1791, as amended by Public Laws of 1927, ch. 215, and the remainderman is entitled to the balance of the purchase price.

6. Deeds § 17a—Cause remanded for determination of value of life estate in order to compute damages for life tenant's breach of covenant against encumbrances.

A life tenant executed deed with full covenants, and thereafter the life tenant and the remainderman executed deed to the same grantee with like covenants. There were outstanding docketed judgments against the life tenant alone, which the covenantee paid and discharged. *Held:* The covenantee is entitled to recover on the covenant against encumbrances only against the life tenant, and damages for breach of the covenant is the amount reasonably expended by the covenantee in discharging the liens not exceeding the amount paid the life tenant for her life estate, and therefore the cause is remanded for facts determinative of the value of her life estate, the remainderman being entitled to the balance of the purchase price after deducting the value of the life estate, except that the remainderman having disclaimed any part of the purchase price paid the life tenant upon delivery of the first deed, he may not recover more than the balance of the purchase price after deducting such amount.

APPEAL by plaintiffs from *Ervin, Special Judge,* at July Civil Term, 1939, of AVERY.

Civil action for recovery of balance of purchase price of land for a schoolhouse site. Defendants aver breach of covenant against encumbrances and plead as counterclaim amounts expended in discharge of judgment liens.

The pleadings disclose these uncontroverted facts:

1. On 16 November, 1935, plaintiff Nora Thompson agreed to sell to defendants at the price of $1,400 a certain tract of land for a schoolhouse site for Riverside School in Avery County, and pursuant thereto and on said date said plaintiff executed and delivered to defendant, Board of Education of Avery County, a deed conveying said land with covenants of seizin, of right to convey, against encumbrances, and of warranty, but the defendants then paid only $500 of the purchase price.

2. Thereafter the defendants caused investigation to be made of the title to the lands embraced in said deed from Nora Thompson to the Board of Education of Avery County, and learned that she did not own a fee simple title to said land, that she was seized of only a life estate therein with remainder in her son, plaintiff Ray E. Thompson; and that there were docketed of record three valid judgments against her.

3. Upon ascertaining the facts set forth in the last preceding paragraph, the defendants caused to be prepared another deed, also dated 16 November, 1935, from plaintiffs Nora Thompson and Ray E. Thompson to the Board of Education of Avery County, for the recited consideration of $1,400, conveying the same lands as described in the deed

from Nora Thompson previously executed and delivered as aforesaid, with covenants of seizin, of right to convey, against encumbrances, and of warranty. This deed was signed by both Nora Thompson and Ray E. Thompson, and acknowledged on 25 November, 1935, and delivered to the Board of Education of Avery County.

4. Defendants then refused, upon demand by plaintiffs therefor, to pay the balance of $900 of the purchase price, until and unless plaintiffs should pay in full the said three judgments and discharge the liens thereof against the life estate of Nora Thompson in and to the lands in question. Executions were issued upon each of these judgments, and upon failure of plaintiffs to pay, defendants, on 17 December, 1936, paid to the sheriff of Avery County the sum of $782.65 in satisfaction of the liens of said judgments, and prior to the institution of this action tendered to counsel for plaintiffs the sum of $117.35, with accrued interest, as balance of the purchase price of the lands after deducting the $500 paid to Nora Thompson and the amount so paid in discharge of the judgment liens.

In the complaint plaintiff Nora Thompson makes no claim to any part of the $900 balance of the purchase price unless the court should be of opinion as a matter of law that her estate was of greater value than $500, the amount paid to her; and plaintiff Ray E. Thompson makes no claim to any part of the $500.

From the admissions in the pleadings and of counsel in open court, the judge below, being of opinion that there is presented no issue of fact, but only a question of law, entered judgment in favor of the plaintiffs for the sum of $117.35, with interest, as balance of the purchase price, and against plaintiffs for the costs of the action.

In the judgment findings of fact appear only with respect to the second deed. Though defendants offered in evidence the records of both deeds, duly registered, no reference is made to the first deed. There is no finding of fact as to the age of the plaintiff Nora Thompson on the date of the execution of the deed by her to the Board of Education, nor as to the then value of her life estate in and to the lands in question.

The plaintiffs appeal from the judgment rendered, and assign error.

R. W. Wall for plaintiffs, appellants.
Charles Hughes for defendants, appellees.

WINBORNE, J. The principal question is: Where the owner of a life estate only in certain land, against which there are existing judgment liens, has, pursuant to contract and in consideration of a certain purchase price, executed and delivered to another as grantee a deed conveying the fee in the land with covenants of seizin, of right to convey,

against encumbrances and of warranty, and later joins the owner of remainder in the execution and delivery of a like deed to the same grantee, describing the same land, with like covenants and for the same purchase price, is the grantor, remainderman, liable to grantee for breach of covenant against encumbrances for the amount expended by the grantee in discharging the judgment liens against the life estate? The court below ruled that he is. In this ruling we think there is error.

A judgment, directing the payment of money, upon being docketed, becomes "a lien on the real property in the county where the same is docketed of every person against whom any such judgment is rendered." C. S., 614. The lien extends to and embraces only such estate as the judgment debtor has at the time of the docketing thereof, or thereafter acquires while the judgment subsists. *Bristol v. Hallyburton,* 93 N. C., 384; *Bruce v. Nicholson,* 109 N. C., 202, 13 S. E., 790.

A covenant against encumbrances is generally regarded as relating to things in existence at the time it is made. It is a personal covenant and does not run with the land. Hence, if a judgment lien exists, the covenant against encumbrances is broken immediately upon the delivery of the deed and a right of action for damages arises in favor of the covenantee. *Cover v. McAden,* 183 N. C., 641, 112 S. E., 817; *Lockhart v. Parker,* 189 N. C., 138, 126 S. E., 313.

Applying these principles to the case in hand, it is pertinent to bear in mind the facts that Nora Thompson was seized of a life estate only, and Ray E. Thompson was seized only of the remainder in and to the lands in question, and that the judgments were against Nora Thompson and not against Ray E. Thompson. Hence, the lien of the judgments extended only to the life estate of Nora Thompson, and not to the remainder. These judgments being docketed in Avery County at the time of the delivery of the deed from Nora Thompson to the Board of Education, the covenant therein against encumbrances was instantly broken, and a cause of action arose immediately against her and in favor of the Board of Education for damage for such breach.

But a different situation exists in relation to the second deed:

When the Board of Education accepted deed from Nora Thompson it became seized of her estate in the land. Therefore, as the title thereto was then vested in the Board of Education, no part of the life estate was conveyed by the second deed. The inclusion of her name in it and the execution of it by her were mere matters of surplusage.

While not limited in expression to the conveyance of the remainder, of which Ray E. Thompson was seized, the second deed had the effect of conveying only such remainder, which was unencumbered, and with respect to which the covenant against encumbrances is not broken. There is no reference in the deed to the encumbrances against the life

estate. This being the case, to assume that the parties intended the covenants to extend to an estate of which the covenantee was then seized is not appealing to reason.

We, therefore, hold that the existence of the judgment against Nora Thompson at the time of the execution and delivery of the second deed does not constitute a breach of the covenants against encumbrance therein set forth. Consequently, defendants, as against Ray E. Thompson, may not successfully assert claim for any amount expended by them in removing or discharging the liens of said judgments.

The general rule as to the measure of damages for breach of covenant against encumbrances, where the encumbrance has been removed or paid off by the covenantee, is the fair and reasonable amount paid out by the covenantee in removing or discharging the encumbrances, provided it does not exceed the purchase price paid by the covenantee for the land. 14 Am. Jurisprudence, 582, 599, and 602; Rawls on Covenants of Title, p. 275, ch. IX, secs. 192, 193.

In accordance with this rule, defendants are entitled to recover of Nora Thompson the fair and reasonable amount paid out by them in removing or discharging the liens of said judgments against her, which is admitted to be $782.65; provided, that amount does not exceed the purchase price paid, or agreed to be paid, to her for her life estate in the said lands.

It is then necessary to determine what is the purchase price of the life estate of Nora Thompson, based on total purchase price of $1,400 for the fee. She would be entitled to the present cash value of her life estate in the purchase price, to be calculated and based upon the expectancy of her continued life from the age attained at the date of her deed, 16 November, 1936, in accordance with the provisions of the statutes—C. S., 1790, and C. S., 1791, as amended by Public Laws 1927, ch. 215. Plaintiff Ray E. Thompson is entitled to the balance of the purchase price, that is, the difference between the total purchase price and the value of the life estate of Nora Thompson so calculated and deducted as of 16 November, 1936, with interest on such difference from that date. But Ray E. Thompson, having disclaimed any part of the $500 paid by defendants to Nora Thompson, is not entitled to recover of defendants as principal of purchase price more than $900.

There being no finding of fact as to attained age of Nora Thompson on date of her deed, 16 November, 1936, the case will be remanded for the ascertainment of this fact, upon which judgment will be entered in accordance with this decision.

Reversed.

MRS. GERTRUDE MOONEY v. V. T. MULL.

(Filed 1 November, 1939.)

1. Malicious Prosecution § 1—

The essential elements of a cause of action for malicious prosecution are the institution or the procurement of the institution of a criminal prosecution by defendant against plaintiff, without probable cause, with malice, and the termination of the prosecution in favor of plaintiff.

2. Malicious Prosecution § 7b—Plaintiff's guilt of the crime for which she was prosecuted is germane to question of probable cause.

When, in an action for malicious prosecution, defendant elects to challenge plaintiff's allegation of want of probable cause in fact, all the evidence tending to show plaintiff's guilt of the crime for which she was prosecuted is competent upon the question of probable cause, and an instruction confining the jury's consideration to the evidence of guilt within the knowledge of defendant at the time of instituting the prosecution is error.

3. Same—

When, in an action for malicious prosecution, plaintiff's innocence is conceded or not challenged, evidence of innocence would not be competent to show want of probable cause, since in such event probable cause must be determined accordant with the facts and circumstances within the knowledge of defendant at the time of instituting the prosecution.

4. Malicious Prosecution § 7a—

The absence of facts and circumstances tending to show plaintiff's guilt within the knowledge of defendant at the time of instituting the prosecution, to the exclusion of facts later coming within his knowledge tending to show guilt, is competent upon the question of malice.

5. Malicious Prosecution § 11—

Compensatory damages recoverable in an action for malicious prosecution are those proven by plaintiff, and a charge correctly stating the rule for the admeasurement of damages, followed by an instruction that the amount thereof rested largely in the discretion of the jury because of the difficulty of ascertaining the pecuniary equivalent of mental suffering and humiliation, is error.

APPEAL by defendant from *Armstrong, J.*, at June Term, 1939, of BURKE. New trial.

This is a civil action to recover damages for malicious prosecution.

The defendant applied to a magistrate for a warrant against Lawrence Deal and Annie Brown, charging them with the crime of fornication and adultery. At the same time he applied for a search warrant against E. M. Aiken. The warrant was issued against Aiken in which the name of the plaintiff did not appear. Later the defendant signed another warrant against Aiken at the request of the magistrate. The record does not disclose the exact nature of this warrant, but, apparently, it is

the warrant under which plaintiff was tried. At the preliminary hearing the plaintiff's name was inserted therein after the affidavit was signed by the defendant.

A preliminary hearing was held against the plaintiff and said Aiken on the charge of fornication and adultery and probable cause was found. At the trial in the county court the plaintiff and her codefendant in the warrant were acquitted. Thereupon the plaintiff instituted this action to recover damages for the alleged malicious prosecution. There was verdict and judgment for the plaintiff and defendant appealed.

Bagby & Swift and C. E. Cowan for plaintiff, appellee.
Mull & Patton for defendant, appellant.

BARNHILL, J. To establish her cause of action the plaintiff must prove: (1) That the defendant instituted or procured the institution of a criminal prosecution against her; (2) that the prosecution was without probable cause; (3) that it was with malice; and (4) that it has terminated in favor of the plaintiff herein.

The court charged the jury in part as follows: "You are not trying a fornication and adultery suit but as to whether the facts and circumstances within the knowledge of the defendant at the time he instituted or caused to be instituted, if you find he did institute or cause to be instituted, a criminal proceeding before a justice of the peace such as to lead a man of ordinary caution and prudence to believe or entertain an honest strong suspicion that the defendants were guilty of fornication and adultery."

When the plaintiff instituted this action she tendered the issue of her innocence, notwithstanding her acquittal in the original prosecution, and must fail in her action if that innocence can be disproved, whether the prosecutor acted with malicious motives or not, and whether or not he knew of the facts establishing the plaintiff's guilt. Evidence tending to prove the actual guilt of the plaintiff is therefore always admissible in favor of the defendant. 18 R. C. L., 57. If a criminal is fortunate enough to escape conviction he should rest content with his good luck and not belabor one who suspected his guilt and acted accordingly. To limit the inquiry on the issue of want of probable cause to the facts and circumstances within the knowledge of the defendant herein at the time of the issuance of the warrant, as was done in the charge, deprives him of the benefit of all evidence which may have come to his knowledge after the prosecution and denies him the right to present facts which might conceivably, in many cases, tend to prove conclusively the actual guilt of the plaintiff in a malicious prosecution action.

The plaintiff has alleged that there was no probable cause for her prosecution. When there is evidence tending to show guilt this issue is

to be determined as of the date of the trial and the defendant is entitled to protect himself by any additional facts tending to show that the plaintiff was guilty though he might not have known them when he began the prosecution. *Thurber v. Loan Assn.*, 118 N. C., 129; *Johnson v. Chambers*, 32 N. C., 287; 18 R. C. L., 57. To hold otherwise would make it possible for a guilty person, who through some fortuitous circumstances has been acquitted, to vex his prosecutor with a suit for malicious prosecution merely because the prosecutor was not advertent to all the incriminating facts at the time he instituted the prosecution, and to recover damages for a prosecution that was justified upon all the facts.

We are not inadvertent to a number of former decisions in which it is stated that the question of probable cause depends upon the facts and circumstances which were known to the prosecutor in the criminal action at the time he instituted the prosecution. Such statements have reference to the converse proposition. Where the innocence of the plaintiff is conceded, or is not challenged, evidence of innocence may not serve to impeach or contradict the facts and circumstances within the knowledge of the defendant at the time he instituted the prosecution, though evidence of innocence and proof of absence of incriminating circumstances are competent and proper to aid the jury in determining whether the prosecutor at the time of the institution of the prosecution had such information as would justify his action under the law.

So that in the trial of a civil action for malicious prosecution the defendant may elect to attempt to challenge plaintiff's allegation of want of probable cause in fact, in which event probable cause is to be determined from all the evidence. Or, he may rest upon his good faith in the prosecution on the facts and circumstances within his knowledge at the time of the issuance of the warrant, in which event, the nonexistence of probable cause for the prosecution depends upon proof that the facts and circumstances within the knowledge of the defendant at the time he instituted the prosecution were not such as to lead a man of ordinary caution and prudence to believe or entertain an honest strong suspicion that the plaintiff in the criminal action was guilty of the crime charged. *Smith v. Deaver*, 49 N. C., 513; *Wilkinson v. Wilkinson*, 159 N. C., 265, 74 S. E., 740; *Motsinger v. Sink*, 168 N. C., 548, 84 S. E., 847. The defendant in this cause elected to rely upon testimony he asserts tends to show plaintiff's actual guilt. Under these circumstances he was entitled to the benefit of all evidence pertinent on that question.

Although the defendant may protect himself in this action by any additional facts which may have come to his knowledge since the prosecution, evidence that he instituted the prosecution when he did not know of facts and circumstances sufficient to constitute probable cause is evi-

dence of malice. Consequently, evidence of the want of probable cause within the knowledge of the defendant at the time he instituted the prosecution is always competent. *Humphries v. Edwards,* 164 N. C., 154, 80 S. E., 165; *Bowen v. Pollard,* 173 N. C., 129, 91 S. E., 711.

On the issue of damages the court correctly stated the rule under which the jury should arrive at the amount, if any, they should award the plaintiff. In addition thereto, however, it charged the jury: "That the damages that the plaintiff may recover in a malicious prosecution suit, if any, are usually by the very nature of the wrong, incapable of actual measurement and must rest largely in the discretion of the jury. The court charges you that there is no precise measure of damages in a case of this sort; it is difficult to ascertain the exact equivalent in money for bodily or mental or physical suffering or humiliation or disgrace and mental pain, and that such damages, if any, must rest largely in the discretion of the jury."

Damages are awarded in the discretion of the jury only on an issue of punitive damages. If the plaintiff is to recover the jury must ascertain the amount of the recovery from the evidence under the rule the court first correctly stated. If she is unable to establish any right to compensatory damages by reason of the nature of the suit, that is her misfortune. The jury must not be permitted to award actual damages on a discretionary basis.

For the reasons stated there must be a

New trial.

ROSAMOND J. MEADOWS v. E. H. MEADOWS, JR., WADE MEADOWS, MARY MEADOWS STRATTON AND HER HUSBAND, GEO. W. STRATTON, DEVISEES AND LEGATEES AT LAW OF E. H. MEADOWS, DECEASED, AND E. H. MEADOWS, JR., AND WADE MEADOWS, EXECUTORS AND TRUSTEES UNDER THE WILL OF E. H. MEADOWS, DECEASED.

(Filed 1 November, 1939.)

1. Estates § 9d: Executors and Administrators § 21—Held: Amount of unpaid taxes was properly allowed as offset against sum due life tenant from estate.

The owner of lands deeded his wife a life estate therein and devised the remainder to his heirs. After his death his widow dissented from the will and obtained a consent judgment against the estate. The widow forfeited her life estate by permitting the land to be sold for taxes, C. S., 7982. The sole remaining assets of the estate at the time of the institution of this action were remainders in certain lands and certain personalty in the hands of the widow, and all other debts except costs of adminis-

tration had been paid. *Held:* Upon forfeiture of the life estate the lands passed to the remaindermen encumbered by the lien for taxes, and the remaindermen are damaged in the amount of the lien, and for their protection and to prevent the life tenant from profiting by her own default, the executors are entitled to offset the balance due her under the consent judgment with the amount of the lien for taxes.

2. Executors and Administrators § 15g—Return of personalty belonging to estate held not condition precedent to widow's right to enforce judgment for year's allowance.

Plaintiff widow obtained judgment for her yearly allowance, and instituted this action to compel the executors to pay the balance due thereon. The executors contended that they were entitled to withhold balance due thereon until the widow delivered to them certain personalty of the estate in accordance with an arbitration and award agreement between the parties, although they had not made demand therefor prior to the institution of the action. It further appeared that plaintiff made written offer of delivery during the trial. *Held:* Under the facts, the executors were not entitled to make the return of the property a condition precedent to the enforcement of plaintiff's judgment, the executors having a remedy to obtain possession of the personalty by court order if plaintiff failed or refuse to surrender same to be sold to make assets for a final settlement of the estate.

3. Reference § 12—

When there is evidence supporting the court's modification of a finding of the referee, the modification is not subject to review.

APPEAL by plaintiff from *Williams, J.*, at January-February Term, 1939, of CRAVEN. Modified and affirmed.

This action was instituted in 1930 to require the executors and trustees of the estate of E. H. Meadows (who died in 1921) to pay plaintiff, his widow, the balance on her year's allowance, as fixed by the judgment of the court, in the sum of seven hundred and fifty dollars and interest, and also for the recovery of the further sum of fifteen hundred and fifty dollars and interest, balance due her by said estate under the terms of a consent judgment entered by Superior Court Judge Horton in October, 1923. Defendants admitted plaintiff was entitled to said amounts under the terms of the Horton judgment, but alleged plaintiff had forfeited her life estate in a house and lot in New Bern, designated as 91 Broad Street, for permitting same to be sold for taxes, which taxes amounted to more than $5,000; that defendants, executors and trustees, as remaindermen, were entitled to offset against plaintiff's claims the amount of the taxes on this property; that the balance of year's allowance could only be paid out of the personalty which had been exhausted, and that by virtue of an arbitration and award, plaintiff was required to deliver to the executors and trustees certain personal property, which she has failed to do.

At February Term, 1932, Cranmer, Judge presiding, submitted issues to the jury as to the indebtedness of defendants, executors and trustees, to the plaintiff on her claims and as to the amount thereof, which issues were answered by the jury in favor of plaintiff, as claimed. Thereupon Judge Cranmer rendered judgment on the verdict and referred the other matters set up in the pleadings to a referee under the statute. The referee, in August, 1935, reported his findings of fact and conclusions of law, to which the defendants filed numerous exceptions. At January-February Term, 1939, these exceptions were passed on by the court below and the findings of fact were either sustained or modified, and the conclusions of law were affirmed in part, and in some respects overruled. From judgment rendered in accord with the rulings of the court below on the exceptions to the referee's report, plaintiff appealed.

John H. Small and William Dunn for plaintiff.
W. B. R. Guion for defendants.

DEVIN, J. The litigation over the matters set up in the pleadings has been long drawn out, and the record has become voluminous, but the questions presented for decision by the appeal are not many, and, in order to determine them, it will be necessary to consider only such portions of the record and evidence as are pertinent to the issues involved in the appeal.

The appellant in her brief accurately states the two questions involved in the appeal substantially as follows: (1) Where a life tenant, whose estate has been forfeited for failure to pay taxes on the property, has a judgment for debt against the remaindermen, may the latter be allowed to offset the unpaid taxes against the judgment? (2) Should payment of the balance on the widow's year's allowance be withheld for failure of the widow to deliver certain personal property in her possession belonging to the estate?

1. In 1916, E. H. Meadows conveyed by deed to the plaintiff, his wife, a life estate in the house and lot in New Bern designated as 91 Broad Street, and died in 1921, leaving a will from which the plaintiff was allowed to dissent (*In re Will of E. H. Meadows,* 185 N. C., 99). The ultimate remaindermen after the termination of plaintiff's life estate are the defendants. In 1923, in a proper proceeding in the Superior Court, Horton, Judge presiding, entered a judgment by consent in the Matter of the Will of E. H. Meadows, to which proceeding all interested in the estate were made parties, including the plaintiff and defendants in this action. Therein it was adjudged that the plaintiff, the widow, be allowed the sum of twenty-five hundred dollars for her year's provision and in lieu of all dower rights. Of this amount so required to be paid her by the executors and trustees, it is admitted that a balance of seven

hundred and fifty dollars remains unpaid. It was further provided in the Horton judgment that the executors and trustees should pay plaintiff for her entire interest in the estate in the sum of $8,400 in installments, of which $1,550 and interest remain due and unpaid. This last sum was adjudged to constitute a lien and charge on the reversion in the house and lot at 91 Broad Street, "subject only to the present indebtedness of said E. H. Meadows." The debts of the estate, other than the above and costs of administration, have been satisfied. The estate of E. H. Meadows at the time of his death was of considerable value, but, due to the vicissitudes of changing economic conditions and other causes, there only remains a small amount of household goods, now in the possession of plaintiff, and the remainder interest in the house and lot, 91 Broad Street, and the remainder interest in another house and lot on the same street. The plaintiff, still residing at 91 Broad Street, is insolvent and the taxes on the property have not been paid for many years, and the property has been sold for nonpayment of taxes and not redeemed, and tax sale certificates have been issued to the county and city. The plaintiff's life estate was adjudged forfeited.

It is not controverted that plaintiff has forfeited her life estate in the house and lot, 91 Broad Street, by permitting the property to be sold for taxes and failing to redeem, though the defendants, remaindermen, have not paid the taxes or redeemed the property. C. S., 7982; *Bryan v. Bryan,* 206 N. C., 464, 174 S. E., 269.

It was the duty of the plaintiff, the life tenant, to pay the taxes on the property, and she is primarily liable therefor, and the remaindermen have right of action against her if they pay the taxes, or suffer loss by reason of her failure so to do. C. S., 7982; *Smith v. Miller,* 158 N. C., 99, 73 S. E., 118.

It follows that upon the termination of plaintiff's life estate, the property would pass to the remaindermen encumbered by a lien for unpaid taxes to the amount of more than $5,000, which the life tenant was under obligation to pay, and the removal of this encumbrance by the defendants, by payment, or by the sale of the property to foreclose the tax sale certificates, would entail loss to the remaindermen to the amount of such unpaid taxes. Hence the remaindermen would have the right to offset against plaintiff's debt of $1,550 and interest (though declared a lien on the reversion) the amount of the encumbrance suffered by plaintiff to be imposed upon the property; otherwise the plaintiff would be permitted to reap advantage from her own fault. *Smith v. Miller, supra; Bryan v. Bryan, supra.* The court below ruled correctly on this point.

2. Plaintiff's claim for the unpaid balance on her year's allowance of $750.00 and interest, in accord with the provisions of the Horton judg-

ment, has been established by verdict and judgment, and plaintiff is entitled to enforce payment thereof by any remedy available to a creditor of the estate, and this debt is not affected by plaintiff's failure to pay the taxes on the property nor subject to offset by reason thereof. The court below, however, held that plaintiff was not entitled to enforce payment of this sum until she should have delivered certain personal property decided by an arbitration and award between her and the executors to belong to the estate. This personal property, consisting of the furniture, silver and glassware which had been put in the residence since 1 January, 1916, and described in the award, was adjudged to belong to the estate. No demand was made on plaintiff for this property until the institution of this action, and it appears that during the hearing before the referee a written offer of delivery was made. Should the plaintiff fail to deliver or refuse to permit the executors and trustees to obtain possession of this property, they would be entitled to the aid of the court to gain possession of the property for the purpose of selling same in the course of the long delayed settlement of the estate. Under the facts disclosed by the record, we do not think the court below should have made delivery of the personal property a condition antecedent to the enforcement of plaintiff's judgment for the balance of her year's allowance, unpaid since 1925. In that respect the judgment of the court below is modified.

Appellant noted exceptions to rulings of the court below in amending certain of the referee's findings of fact, but the changes made by the court in considering the referee's findings are supported by evidence, and hence are not subject to review by this Court in accord with the established rule. *Dent v. Mica Co.*, 212 N. C., 241, 193 S. E., 165; *Threadgill v. Faust*, 213 N. C., 226, 195 S. E., 798.

Except as herein modified, the judgment below is

Affirmed.

MRS. BESSIE DUNLAP BLALOCK AND MRS. ETHEL D. BENNETT, EXECUTRICES FOR THE ESTATE OF MARK SQUIRES, DECEASED, v. W. G. WHISNANT.

(Filed 1 November, 1939.)

1. Evidence §§ 29, 34—Original record properly identified is competent without certification.

A typewritten original statement of case on appeal as agreed to by counsel of the parties is competent when properly identified, and plaintiff may introduce testimony of a witness contained therein upon the subsequent trial of the cause, the witness having died subsequent to the

hearing of the motion from the denial of which the appeal was taken, the provisions of C. S., 1779, 1780, requiring certification of public records not being applicable to original records.

2. Trial § 22b—

Upon demurrer to the evidence, the evidence must be considered in the light most favorable to plaintiff.

3. Attorney and Client § 10—

Evidence *held* sufficient to be submitted to the jury in this action to recover the reasonable value of professional services rendered.

APPEAL by plaintiffs from *Armstrong, J.*, at May Term, 1939, of CALDWELL.

Civil action to recover on alleged contract for professional services.

This action was instituted by Mark Squires, now deceased. The present plaintiffs are the executrices of his will. The complaint alleges, in substance: That about 1 August, 1926, defendant employed plaintiff as attorney to represent him on his appeal to the Supreme Court of Tennessee from judgment of criminal court of Washington County, Tennessee, sentencing him to five years in the penitentiary; that for the services to be rendered, plaintiff was to be paid "whatever was reasonably just and adequate"; that in consequence thereof "plaintiff laid out and expended considerable sums in procuring authorities, traveling expenses, preparation of briefs, and the like, and attended the sitting of the said Supreme Court in the city of Knoxville in the fall of 1926 and argued his said appeal"; that on 20 November, 1926, the Supreme Court rendered judgment quashing the indictment against defendant and restoring him to his liberty—289 S. W., 492; that plaintiff's services were reasonably worth the sum of one thousand ($1,000) dollars, but defendant has wholly failed and neglected to pay plaintiff anything whatever on account thereof until 30 January, 1938, when defendant paid him the sum of fifteen dollars on account.

Defendant, in answer filed, denies the contract of employment, the value of services, and payment thereon, but makes certain admissions, a portion of which plaintiffs offered in evidence as hereinafter set forth. As further defense, defendant pleads the three-year, C. S., 441, and the ten-year, C. S., 445, statutes of limitation, "and all other statutes of limitation known to God or man," in bar of plaintiff's alleged cause of action.

On the trial below plaintiffs offered in evidence parts of the answer of the defendant: (1) Admission that at the time of filing of the answer, plaintiff, Mark Squires, was an attorney at law, resident of Caldwell County, North Carolina; (2) that "this defendant admits that on or about 1 August, 1926, he stood convicted of crime in the criminal court

of Washington County, Tennessee, and that he had been sentenced to serve a term of five years in the state penitentiary of Tennessee, and had given notice of appeal by and through his then counsel"; and (3) that "this defendant admits that the appeal to the Supreme Court of Tennessee was successful."

Plaintiffs introduced deposition of R. H. Cate, who, referring to reported case of *G. W. Whisnant v. State,* 154 Tenn., 77, argued at Knoxville, September, 1926, Term of Supreme Court of Tennessee, opinion filed 20 November, 1926, testified that he went with the plaintiff, Mark Squires, to the courtroom of said Supreme Court and was present when Mark Squires alone for appellant argued the case on appeal.

Plaintiffs further offered testimony tending to show payment by defendant to Mark Squires in the sum of $15.00 on 29 or 30 January, 1938.

As witness for plaintiff, L. H. Wall, practicing attorney in Caldwell County, testified that he attended a hearing in this action before *Rousseau, J.,* at Boone, and later signed and served on attorneys for defendant case on appeal; that they served countercase; that he discussed it with them and agreed on the case; that Exhibit B, a typewritten document "is the agreed case on appeal"; that the testimony of Mark Squires given on said hearing appears therein; that Exhibit A, a printed record, is copy of the case on appeal as agreed by counsel; and that Mark Squires died on 11 September, 1938.

Thereupon, plaintiff offered to introduce in evidence testimony of Mark Squires so appearing in Exhibit B. Upon objection by defendant same was excluded. Exception. The testimony excluded was given in hearing of appeal from order of clerk of the Superior Court refusing to grant plaintiff's motion in this action for judgment by default and inquiry. See *Blalock v. Whisnant,* 214 N. C., 834, 199 S. E., 292.

In the testimony offered, the witness swore that in application for extension of time to file complaint it is set forth that "the purpose of the action is to recover the sum of $1,000 for legal services rendered defendant in keeping him out of the Tennessee penitentiary, which sum defendant promised to pay and which contract he wholly breached. That this is set forth in the complaint." Then referring to Mr. Strickland, who signed the application, but did not sign the complaint, the witness said: "I told him what my cause of action was, and told him what I thought the services were worth. . . . I went to Siler City where the defendant was and got in communication with him, and received $15 from the defendant, and when I came back I told Mr. Strickland I had received the $15 . . ." Witness further testified that the complaint alleges a payment just like he told Mr. Strickland—that it is alleged in paragraph six. Then the witness read paragraph six of the complaint, which

is as follows: "Plaintiff's services to defendant as before alleged were reasonably worth the sum of one thousand ($1,000) dollars, but defendant has wholly failed and neglected to pay plaintiff anything whatsoever because of or on account of his said services until 30 January, 1938, when defendant paid plaintiff the sum of $15 on account."

Reference to certified transcript of record on appeal to this Court at Fall Term, 1938, discloses that Mark Squires testified on direct examination by his counsel and under cross-examination by counsel for defendant.

At the close of evidence for plaintiff, upon motion of defendant, the court sustained demurrer thereto, C. S., 567, and entered judgment as of nonsuit. Plaintiffs appeal to Supreme Court, and assign error.

L. H. Wall and W. A. Self for plaintiffs, appellants.
Pritchett, Strickland & Farthing for defendant, appellee.

WINBORNE, J. Two questions arise on this appeal:

1. Did the court err in excluding as evidence the testimony of Mark Squires, now deceased, given in former hearing in this action before judge of Superior Court when considering motion for judgment by default and inquiry?

2. Is the evidence of plaintiffs sufficient to take the case to the jury.

Both questions must be answered in the affirmative.

1. The ruling of the court in excluding the testimony of Mark Squires, since deceased, appears to be based on insufficiency of proof of the record in which it is incorporated, rather than its incompetency. The question is controlled by the decision in *Chemical Co. v. Kirven,* 130 N. C., 161, 41 S. E., 1. There the testimony of a deceased witness on former trial as contained in the statement of case on appeal made out by defendant's counsel and signed by counsel for both plaintiff and defendant was held to be competent. Here the witness Wall described the details of arriving at statement of case on appeal, and says Exhibit B "is the agreed case on appeal." Exhibit A is a copy. However, defendant contends in brief filed in this Court that the proper proof of the case on appeal containing transcript of the testimony is by certificate as required by the statute, C. S., 1779, and C. S., 1780. This contention probably applies to Exhibit A, but not to Exhibit B, as these statutes relate only to copies of public records. The contents of a public record may be proven in any court by the original record itself. *State v. Voight,* 90 N. C., 741; *Iron Co. v. Abernathy,* 94 N. C., 545. See, also, *Riley v. Carter,* 165 N. C., 334, 81 S. E., 414, where the Court said: "While certified copies of records are admitted in evidence, the originals are not thereby made incompetent."

2. The evidence, viewed in the light most favorable to plaintiffs, as we must do when considering demurrer to the evidence, C. S., 567, is sufficient to take the case to the jury. The probative force of it is a matter for the jury in determining the issues raised by the pleadings. As the case goes back for a new trial, we refrain from a discussion of the evidence.

For errors here indicated, let there be a

New trial.

HENDERSON COUNTY v. ELLISON A. SMYTH, E. A. SMYTH, III, AND BALFOUR MILLS, INC., A CORPORATION.

(Filed 1 November, 1939.)

1. Constitutional Law § 4b: Courts § 1a: Taxation § 25—

The power to levy taxes is the exclusive province of the legislative branch of the government, N. C. Constitution, Art. V, and the Superior Court has no jurisdiction of an action the nature and purpose of which is to discover, to list and assess for taxation, property which has escaped taxation.

2. Courts § 1c—

An action should be dismissed on defendant's motion even before complaint is filed, when it appears upon the face of the proceedings had after issuance of summons that the court has no jurisdiction of the action.

APPEAL by defendants from *Rousseau, J.*, at May-June Term, 1939, of HENDERSON.

Civil action instituted in Superior Court of Henderson County by the issuance of a summons on 7 June, 1939. Cotemporaneously, the clerk of the Superior Court, in an order extending the time for filing complaint, finds that the nature and purpose of the action is "for recovering judgment on account of the failure of defendants, and especially Ellison A. Smyth, to list and pay taxes over a long period of years on a large amount of cash, notes, solvent credits and other personal property."

On the same day, upon motion of plaintiff, Rousseau, Judge of Superior Court, holding the courts of the 18th Judicial District in Henderson County, upon facts found from the motion, *inter alia* "that this action is brought in the name of the sovereign county of Henderson against defendants on account of the failure of defendant Ellison A. Smyth to list certain solvent securities, credits, moneys, notes, and other personal property," and "for the purpose of collecting . . . taxes contended to be due on said personalty to the plaintiff," ordered that the defend-

ants, E. A. Smyth and E. A. Smyth, III, be examined, individually and as officers of the corporate defendant, before a commissioner then appointed by the court; and that they produce for the inspection and examination of plaintiff's counsel all books and records of the corporation, showing the amount of its indebtedness to defendant E. A. Smyth since 1 June, 1925, to the present date, and more especially commanding and requiring them to have and produce certain annual audits of said corporate defendant as of 31 December, 1925, and as of 31 December of each and every year since to and including the year 1938. This order was served on defendant on 7 June, 1939, by the sheriff of Henderson County.

Thereupon, on 8 June, 1939, the defendants excepted to the said order issued on 7 June, 1939, and moved that it be set aside and vacated, and that the action be dismissed for that it appears upon the face of the proceedings that the Superior Court does not have jurisdiction of the subject matter of the action, in that the purpose of the action is to recover judgment for failure of defendants to list for taxation and to pay taxes on solvent credits and personal property in the year 1925 and subsequent years.

Defendants filed affidavits in support of the motion. Upon hearing, the court denied the motion and refused to dismiss the action, and set a time for the examination of defendants in accordance with said former order.

Defendants, and each of them, except and appeal to the Supreme Court, and assign error.

M. M. Redden and R. L. Whitmire for plaintiff, appellee.
Smathers & Meekins for defendants, appellants.

WINBORNE, J. On this appeal two questions are presented for decision:

(1) Has the Superior Court jurisdiction of the subject matter of an action, the nature and purpose of which is to discover, to list and to assess for taxation property which has escaped taxation? (2) If not, may the action be dismissed after issuance of summons and before filing of complaint, when lack of jurisdiction is then apparent upon the face of the proceedings? The first is answered "No," and the second "Yes."

1. A defect of jurisdiction exists where a Superior Court of general jurisdiction acts upon a subject which under the Constitution or laws of the State is "reserved to the exclusive consideration of a different judicial or political tribunal." In such cases the exercise of power is usurpation. *Burroughs v. McNeill,* 22 N. C., 297.

The Constitution of North Carolina vests the power to levy taxes exclusively in the legislative branch of the government. N. C. Const., Art. V. The decisions uniformly so hold. *Russell v. Ayer,* 120 N. C., 180, 27 S. E., 133; *Lumber Co. v. Smith,* 146 N. C., 199, 59 S. E., 653; *Pullen v. Corp. Com.,* 152 N. C., 548, 68 S. E., 155; *Person v. Watts,* 184 N. C., 499, 115 S. E., 336; *Person v. Doughton,* 186 N. C., 723, 120 S. E., 481; *Bank v. Doughton,* 189 N. C., 50, 126 S. E., 176; *Belk Bros. v. Maxwell,* 215 N. C., 10, 200 S. E., 915.

In *Person v. Doughton, supra,* it is said: "The judiciary is without power to levy assessments or to devise a scheme of taxation. . . . This is a legislative and not a judicial function."

Applying these principles to the present case, it is apparent that the courts have no jurisdiction over an action which has for its purpose the discovery, listing and assessing property for taxation. For this purpose, under the Constitution, it is within the exclusive power of the Legislature to provide the method and prescribe the procedure.

Plaintiff, through allegations of a conspiracy to defraud the sovereignty, as set forth in motion for order for examination of defendants, seeks to maintain jurisdiction in the Superior Court. This position is untenable.

2. The jurisdiction of a court over the subject matter of an action depends upon the authority granted to it by the Constitution and laws of the sovereignty, and is fundamental. McIntosh, P. & P., 7; *Stafford v. Gallops,* 123 N. C., 19, 31 S. E., 265. Objection to such jurisdiction may be made at any time during the progress of the action. This principle is enunciated in a long line of decisions in this State: *Burroughs v. McNeill, supra; Branch v. Houston,* 44 N. C., 85; *Israel v. Ivey,* 61 N. C., 551; *S. v. Benthall,* 82 N. C., 664; *Noville v. Dew,* 94 N. C., 43; *Rogers v. Jenkins,* 98 N. C., 129, 3 S. E., 821; *S. v. Miller,* 100 N. C., 543, 5 S. E., 925; *Short v. Gill,* 126 N. C., 803, 36 S. E., 336; *Realty Co. v. Corpening,* 147 N. C., 613, 61 S. E., 528; *Provision Co. v. Daves,* 190 N. C., 7, 128 S. E., 593; *Dees v. Apple,* 207 N. C., 763, 178 S. E., 557; *Howard v. Coach Co.,* 211 N. C., 329, 190 S. E., 478.

In *Burroughs v. McNeill, supra,* it is stated: "The instant that the court perceives that it is exercising, or is about to exercise, a forbidden or ungranted power, it ought to stay its action, and, if it does not, such action is, in law, a nullity."

To like effect, in *Branch v. Houstin, supra, Pearson, J.,* said: "If there be a defect, *e.g.,* a total want of jurisdiction apparent upon the face of the proceedings, the court will of its own motion, 'stay, quash, or dismiss' the suit. This is necessary to prevent the Court from being forced into an act of usurpation, and compelled to give a void judgment. . . . So, *ex necessitate,* the Court may, on plea, suggestion, motion,

or *ex mero motu,* where the defect of jurisdiction is apparent, stop the proceeding. Tidd, 516-960."

The motion of defendants to set aside the order for examination of defendants, and to dismiss the action for lack of jurisdiction of the subject matter, should have been allowed. To that end the case is remanded.

Reversed.

STATE v. L. F. COX.

(Filed 1 November, 1939.)

1. **Criminal Law § 72: Courts § 2a—**

An appeal from a county court to the Superior Court vests jurisdiction in the Superior Court, and subsequent proceedings in the county court pending the appeal are void.

2. **Criminal Law § 83: Courts § 2a—**

The Superior Court, on appeal, may remand a cause back to the county court by consent upon satisfactory cause shown, and the remand reinstates the cause on the county court docket and gives it jurisdiction.

3. **Criminal Law § 68a—**

The right of the State to appeal is statutory, C. S., 4649, which right may not be enlarged by the Superior Court, and when the Superior Court remands a cause to the county court with provision that the State may appeal from any judgment thereafter rendered by the county court, the provision giving the State the right to appeal is void.

4. **Courts § 2a—Proper remand to county court ends Superior Court's jurisdiction and it may review subsequent proceedings only upon proper appeal.**

When the Superior Court remands a prosecution back to the county court its jurisdiction is ended and it can review subsequent proceedings in the county court only upon proper appeal, and in the absence of an appeal by the defendant from the subsequent judgment of the county court entered upon his plea of *nolo contendere,* an appeal by the State not authorized by statute gives the Superior Court no jurisdiction, and the cause remains in the county court for the enforcement of the judgment entered upon defendant's plea.

APPEAL by defendant from *Bobbitt, J.,* at May Term, 1939, of ROWAN. Reversed.

This is a criminal prosecution tried upon warrant charging the defendant with the unlawful possession of certain gambling devices, to wit, slot machines and tip books.

The court below adjudged that all proceedings in the county court and all proceedings in the Superior Court subsequent to the docketing of defendant's appeal from the original judgment of the Rowan County

court were void and entered judgment affirming the original judgment of the Rowan County court and dismissing the defendant's appeal. The defendant excepted and appealed.

Attorney-General McMullan and Assistant Attorneys-General Bruton and Patton for the State, appellee.

Walter Murphy, W. C. Coughenour, and Walter Woodson for defendant, appellant.

BARNHILL, J. The pertinent facts are fully set forth in the opinion on the former appeal in this cause. *S. v. Cox,* 215 N. C., 458. After defendant's former appeal was dismissed by this Court, *S. v. Cox, supra,* the court below, at the May Term, 1939, after finding the preliminary facts outlining the history of the case, entered judgment as follows: "The court is of the opinion that the purported judgment of the Rowan County court, entered September 2, 1938, after the defendant's appeal from the said judgment of July 29, 1938, has been docketed in the Superior Court of Rowan County, and that the order of the Superior Court of Rowan County entered at September Term, 1938, remanding the case in the Rowan County court, and that the subsequent proceedings in the Rowan County court and its purported judgment of November 17, 1938, and that the State's purported appeal from said purported judgment, are void; and the court is further of the opinion that this cause has been and is now before this Court upon the defendant's said appeal from the judgment entered by the Rowan County court on July 29, 1938, upon the defendant's plea of *nolo contendere,* not for trial *de novo,* but to view and determine the questions as to whether the facts charged and admitted by the plea of *nolo contendere* constitute an offense under the Constitution and laws of North Carolina and as to whether the judgment of the Rowan County court entered July 29, 1938, is void, in whole or in part, as being beyond the power and jurisdiction of the Rowan County court. (See *S. v. Warren,* 113 N. C., 683.)

"The Court, upon consideration of the defendant's appeal from the judgment of the Rowan County court entered July 29, 1938, is of the opinion that the facts charged in the warrant and admitted by the plea of *nolo contendere,* support and warrant in law said judgment of July 29, 1938, entered by the Rowan County court.

"It is, therefore, ordered, adjudged and decreed the judgment of the Rowan County court dated July 29, 1938, be, and is, affirmed, and that the defendant's appeal therefrom be, and is, dismissed." By his appeal the defendant challenges the correctness of this judgment.

When the defendant appealed from the original judgment of the county court and the appeal was docketed in the Superior Court the

Rowan County court was without jurisdiction to proceed further therein. The appeal vested jurisdiction in the Superior Court. Therefore, the judgment entered by the county court, 2 September, 1938, attempting to modify the original judgment was void. *S. v. Goff,* 205 N. C., 545, 172 S. E., 407, and cases there cited.

The appeal having been docketed in the Superior Court, the judge presiding, at term, had authority, upon satisfactory cause shown, and by consent, to remand the case to Rowan County court for clarifying judgment or other proceedings. Thus, the order entered at the September Term, 1938, remanding the case to the county court was a valid exercise of jurisdiction by the judge of the Superior Court. The order had the effect of reinstating the case on the county court docket and revested that court with jurisdiction of the cause. The judgment thereafter entered by the judge thereof, on 17 November, 1938, upon a plea of *nolo contendere* by the defendant, was valid. From this judgment the defendant did not appeal.

The provision in the order of remand entered at the September Term, 1938, granting the State the right to appeal was void. The right of the State to appeal is controlled by statute. C. S., 4649. *S. v. Nichols,* 215 N. C., 80. The judge of the Superior Court may not enlarge this right. When the order of remand was entered the jurisdiction of the Superior Court ended.

As the defendant did not appeal from the county court judgment entered 17 November, 1938, the cause never again properly reached the Superior Court. The attempted appeal by the State was ineffective to restore its jurisdiction. This conclusion is unaffected by the judgment entered in the Superior Court at the November Term, 1938, in which the judge presiding attempted to revoke and strike from the record the order of remand. The judge was without power to revoke the order at a subsequent term without the consent of the defendant.

The correctness of the provision in the judgment entered at the May Term, 1939, to the effect that the appeal from the county court on defendant's plea of *nolo contendere* placed the cause on the Superior Court docket for review and determination of the question as to whether the facts charged and admitted by the plea of *nolo contendere* constituted an offense under the Constitution and laws of North Carolina and not for trial *de novo* is not presented for determination on this record. However, it might be well to note that this conclusion is contrary to the former decisions of this court. See *S. v. McKnight,* 210 N. C., 57, and cases there cited.

The judgment entered at the May Term, 1939, of the Superior Court was void for the want of jurisdiction, as the attempted appeal by the

State did not reinstate the cause in the Superior Court. The Superior Court acquired no jurisdictional control over the cause by virtue of that appeal.

The defendant's motion made at the May Term, 1939, to dismiss the appeal of the State and remand the cause to the county court to the end that he might comply with the last and final judgment of that court should have been allowed.

This criminal action is now properly in the Rowan County court and the judge of that court may enforce the judgment there entered.

Reversed.

IN THE MATTER OF JOHN T. DRY, EX PARTE.

(Filed 1 November, 1939.)

1. Insane Persons § 4—

A proceeding to have declared sane and competent a person theretofore declared incompetent is a summary proceeding not requiring service of notice on the guardian nor service of summons on the incompetent under C. S., 483 (3), it being necessary only that the incompetent be given notice.

2. Same—

A guardian of an incompetent may not appeal from the finding of the jury or the order of the clerk entered thereon declaring such person sane and competent in proceedings under C. S., 2287, the guardian having no interest adverse to such declaration and there being no right of appeal given him by statute.

APPEAL by T. B. Mauney, guardian, from *Bobbitt, J.*, at February Term, 1939, of CABARRUS. Appeal dismissed.

R. L. Brown, Jr., for appellant.
Hartsell & Hartsell for appellee.

DEVIN, J. A petition to have John T. Dry, a resident of Cabarrus County, adjudged of sound mind and competent to manage his own affairs, was filed on his behalf by his brother, under the provisions of C. S., 2287. Pursuant to the procedure prescribed by that statute, a jury, which had been duly summoned and sworn, found John T. Dry competent, and returned report to that effect. The report was approved and filed by the clerk. Thereupon T. B. Mauney, who had previously been appointed guardian of John T. Dry by the clerk of the Superior

Court of Stanly County, appeared specially and moved to dismiss the proceeding on the ground that no notice of the petition had been served on him. The clerk denied the motion, and upon appeal to the judge of the Superior Court, the ruling of the clerk was affirmed and the proceedings were held to have been properly conducted in accordance with the statute, and the guardian appealed to this Court.

The statute under which these proceedings for the adjudication of the competency of John T. Dry were conducted does not require that the guardian be served with notice. Only the non-sane person is mentioned in the statute as one to whom notice must be given. The proceeding is summary, and the provisions of C. S., 483 (3), prescribing the method of service of summons in a civil action against an insane person, do not apply. There was nothing in the order appealed from relative to the guardianship such as would affect any substantial right of the appellant. He had no interest adverse to the proceedings for John T. Dry's restoration to competency. No provision is made in the statute for an appeal from the finding of the jury or from the order of the clerk pursuant to such finding. *In re Sylivant,* 212 N. C., 343, 193 S. E., 422. The case of *Sims v. Sims,* 121 N. C., 297, 28 S. E., 407, is not in point, since that case was decided before the enactment of the statute prescribing the procedure for restoration to competency of a non-sane person.

The denial of the motion of the guardian to dismiss the proceeding did not present an appealable matter. The judgment of the court below is affirmed and the

Appeal dismissed.

EDITH FERGUSON REES v. JEFFERSON STANDARD LIFE INSURANCE COMPANY.

(Filed 1 November, 1939.)

1. Insurance § 30a—

The nonpayment of a premium when due, or within the period of grace thereafter, in the absence of some extension or waiver, automatically avoids a policy of insurance.

2. Insurance § 30d—Evidence held not to show disability waiving payment of premiums under the terms of the policy.

The provisions of a disability clause that payment of premiums should be waived upon due proof furnished insurer during the lifetime of insured of disability existing for six or more consecutive months, cannot be held a waiver of premiums when it appears that insured died less than six months after the inception of the disability claimed and that proof thereof was not furnished the company during the lifetime of insured.

3. Appeal and Error § 39d—

The exclusion of the death certificate of insured, offered for the purpose of showing the cause of death, *held* not reversible error, it not appearing whether the cause of death was stated therein as a fact or as an opinion, the certified copy of such record being *prima facie* evidence of the facts stated therein but not conclusions or opinions expressed therein, C. S., 7111, and it further appearing that the cause of death was not perforce material.

APPEAL by plaintiff from *Bobbitt, J.*, at July Term, 1939, of LINCOLN.

Civil action to recover on a policy of life insurance.

Upon receipt in advance of the first quarterly premium of $14.48, the defendant, on 14 January, 1938, issued to Henry E. Rees a $2,000 life insurance policy, payable to his wife, the plaintiff herein, as beneficiary.

The parties have agreed that the second quarterly premium due 14 April, 1938, was not paid; and that neither the insured nor anyone on his behalf ever furnished any notice or due proof of disability prior to insured's death on 1 September, 1938, at the age of 39 years.

It is stipulated in the policy that "premiums or installments thereof" will be waived, if the company shall be furnished in the lifetime of the insured, prior to his reaching the age of 60, and during the period of disability, "with due proof that the insured has become totally disabled by bodily injuries or disease occurring or commencing subsequent to the issuance of this policy and while the policy is in full force and effect and that he has been continuously and wholly prevented thereby for six or more consecutive months from engaging in any occupation or employment whatsoever for remuneration or profit."

It is in evidence that the insured was totally unable to work, or to carry on any business, from 8 April, 1938, until his death on 1 September following. It is further in evidence that the insured did work as a pharmacist continuously from November, 1937, until the latter part (after the middle) of March, 1938.

From judgment of nonsuit entered at the close of plaintiff's evidence, she appeals, assigning errors.

M. T. Leatherman, G. T. Carswell, and Joe W. Ervin for plaintiff, appellant.

Smith, Wharton & Hudgins and Kemp B. Nixon for defendant, appellee.

STACY, C. J. It is generally understood that the nonpayment of a premium when due, or within the period of grace thereafter, in the absence of some extension or waiver, automatically avoids a policy of insurance. *Allen v. Ins. Co.*, 215 N. C., 70, 1 (2d) S. E., 94. The

parties seem to have assumed that the policy in suit was, by its terms, forfeited by the nonpayment of the quarterly premium due 14 April, 1938, unless waived, as the case has been presented solely upon the question of waiver.

It is in evidence that the insured was totally unable to work, or to carry on any business, from 8 April, 1938, until his death on 1 September, following. However, this disability was not continuous for "six or more consecutive months" and due proof thereof furnished the company "during the lifetime of the insured," as required by the terms of the policy as a condition precedent to the waiver of premiums. *Wyche v. Ins. Co.,* 207 N. C., 45, 175 S. E., 697. From 8 April to 1 September of the same year is less than six months. "It is not deemed relevant to discuss the meaning of the six months' clause or for what reason it was inserted in the contract. It is there in plain English"—*Brogden, J.,* in *Hundley v. Ins. Co.,* 205 N. C., 780, 172 S. E., 361.

Exception is also taken to the exclusion of the death certificate of the insured, offered for the purpose of showing that he died of "cancer of the esophagus." Copy of the certificate is not in the record, and it does not appear whether the cause of death was stated therein as a fact or as an opinion. The statute, C. S., 7111, provides that a properly certified copy of such record shall be admissible in all courts and places as *prima facie* evidence of the *facts* therein stated. It does not provide that opinions or conclusions expressed therein shall be *prima facie* proof of the fact to be determined upon the trial of such issue. *Ins. Co. v. Brockman,* 3 S. E. (2d), (Va.) 480. Moreover, the cause of insured's death was not perforce material to the inquiry.

The judgment of nonsuit would seem to be correct.

Affirmed.

IRIS RAY, BY HER NEXT FRIEND, CHAMP RAY, v. EDITH ROBINSON, ADMINISTRATRIX.

(Filed 1 November, 1939.)

1. Quasi Contracts § 1—

The law will imply a promise to pay the reasonable value of personal services rendered by one person to or for another which are knowingly and voluntarily received by him, in the absence of some express or implied gratuity.

2. Quasi Contracts § 2—

Evidence that plaintiff went to the home of defendant principally to perform services for defendant's mother with expectation of pay, and

that plaintiff did perform such services until the death of defendant's mother, *is held* sufficient to be submitted to the jury in plaintiff's action to recover the reasonable value of the services rendered.

APPEAL by defendant from *Ervin, Special Judge,* at January Special Term, 1939, of YANCEY.

Civil action to recover for personal services.

The record discloses that on 24 April, 1934, Iris Ray, a minor, went to the home of John L. Young as a servant in the house principally to wait upon his mother, Mrs. Lodema Young, who was quite old and infirm, and there worked with expectation of pay until the death of Mrs. Young on 4 December, 1937.

This action is to recover for the reasonable value of the services rendered. Plaintiff's father, in open court, waived any right of recovery on his part for plaintiff's services. The complaint was accordingly amended and the jury found, upon issues duly submitted, that plaintiff was entitled to recover $1,065, and that plaintiff's father aforetime had consented for her to receive the compensation therefor.

From judgment on the verdict, the defendant appeals, assigning errors.

Huskins & Wilson for plaintiff, appellee.
Anglin & Randolph for defendant, appellant.

STACY, C. J. Upon issues of fact, determinable alone by the jury, the plaintiff has been allowed to recover accordant with settled principles of law. *Winkler v. Killian,* 141 N. C., 575, 54 S. E., 540; *Bank v. McCullers,* 201 N. C., 412, 160 S. E., 497; *Landreth v. Morris,* 214 N. C., 619, 200 S. E., 378.

It is established by a number of decisions, that in the absence of some express or implied gratuity, usually arising out of family relationship or mutual interdependence, services rendered by one person to or for another, which are knowingly and voluntarily received, are presumed to be given and accepted in expectation of being paid for, and the law will imply a promise to pay what they are reasonably worth. *Winkler v. Killian, supra; Callahan v. Wood,* 118 N. C., 752, 24 S. E., 542. Here, there is no presumption of gratuity, *Stallings v. Ellis,* 136 N. C., 69, 48 S. E., 548, but rather facts and circumstances from which the inference may be drawn that payment was intended on the one hand and expected on the other. *Brown v. Williams,* 196 N. C., 247, 145 S. E., 233. Upon this principle the case has been tried, and the record is apparently free from error.

As no reversible error has been made to appear, the verdict and judgment will be upheld. See *Price v. Askins,* 212 N. C., 583, 194 S. E., 284, and cases there cited.

No error.

CITIZENS BANK & TRUST COMPANY, AS GUARDIAN OF JANE ANNE LENTZ, A MINOR, ARBIE JESSIE EARNHARDT, AS THE MOTHER OF JANE ANNE LENTZ, AND JANE ANNE LENTZ, A MINOR, v. REID MOTOR COMPANY, EMPLOYER, AND TRAVELERS INSURANCE COMPANY, CARRIER.

(Filed 8 November, 1939.)

1. Evidence § 22—

The right to cross-examine a witness with respect to the subject matter of his examination-in-chief is absolute and not a mere privilege, and when a witness refuses to answer questions on cross-examination the adverse party is entitled to have his entire examination-in-chief stricken from the record.

2. Evidence § 29—

The record of a witness' testimony in a criminal prosecution is incompetent in a subsequent civil action, since it is required not only that the question being investigated be the same, but also that the party against whom the evidence is admitted should have had an opportunity to cross-examine the witness.

3. Master and Servant § 52b—

It is error for the Industrial Commission to consider testimony of a witness given upon his examination-in-chief when the adverse party moves to strike out such testimony for the refusal of the witness to answer questions on cross-examination.

4. Same—

The record testimony of a witness given in a criminal prosecution is incompetent in a hearing before the Industrial Commission, even though the same question is involved, defendants having had no opportunity to cross-examine the witness in the criminal prosecution.

5. Master and Servant § 55d—

Where it appears that the finding of fact of the Industrial Commission is based exclusively on incompetent evidence, such finding is not conclusive and must be set aside and the cause remanded.

APPEAL by defendants from *Bobbitt, J.*, at February Term, 1939, of CABARRUS.

Proceeding for award of compensation under the North Carolina Workmen's Compensation Act on account of the death of Roy H. Lentz.

The claim was first heard before Commissioner Dorsett of the North Carolina Industrial Commission, who awarded compensation, which was affirmed on appeal to the Full Commission.

On 24 May, 1938, Roy H. Lentz, an employee of the Reid Motor Company, was shot and killed by one Jack Freeze, a commission salesman of the same company. Defendants deny liability for that they contend that the injury and death of Roy H. Lentz was not caused by

accident arising out of and in the course of his employment within the meaning of the North Carolina Workmen's Compensation Act.

On the hearing before Commissioner Dorsett, the claimant called Jack Freeze as a witness. After testifying for a short time and upon examination by counsel for claimant and by the court, the witness refused to answer questions. Thereupon, he was tendered to defendants for cross-examination. After answering a few immaterial questions by counsel for defendants, "the witness then refused to answer any further questions, and at this point the court found as a fact that the witness, Jack Freeze, refused to answer any further questions to be propounded to him. Commissioner Dorsett of his own motion ordered that the transcript of the record testimony of Jack Freeze in the criminal proceeding in the case of 'State of North Carolina *v.* Jack Freeze,' tried in the Superior Court of Cabarrus County, North Carolina, be made an official part of the record." Defendants objected, and then and there moved the Commissioner to strike from the record all of the testimony of Jack Freeze for that:

"1. After Jack Freeze, a witness introduced by the claimants, had been sworn and testified at the hearing before Commissioner Dorsett, this day held in Concord, North Carolina, and after the said witness had been offered to the defendants and their attorney for cross-examination, and before the defendants could complete their cross-examination of the said witness, the said witness, Jack Freeze, refused to answer the questions to be propounded for and in behalf of the defendants.

"2. Commissioner Dorsett announced that he would consider the testimony of Jack Freeze given at the time of the criminal trial in the Superior Court of Cabarrus County, entitled, 'State of North Carolina *v.* Jack Freeze,' wherein the said Jack Freeze was convicted of second degree murder in connection with the death of Roy H. Lentz; that the Reid Motor Company and the Travelers Insurance Company were not parties to the aforesaid criminal case of 'State of North Carolina *v.* Jack Freeze,' had no opportunity to cross-examine the said Jack Freeze; and that all of his testimony, that is, the testimony given at the original trial and the testimony given before Commissioner Dorsett, should be stricken from the record and not considered by the Industrial Commission."

The motion was not allowed.

From the evidence in the case, the Commissioner finds as a fact that the deceased, Roy H. Lentz, "suffered an injury and accident which arose out of and in the course of his employment, which resulted in his death when he was fatally wounded by a fellow employee," and concluded as a matter of law, in part, as follows: "There is in the record some testimony from this killer. After testifying for a short while, he

refused to answer any further questions, saying he was being retried again for his life. There was no way to force this witness to testify. There is enough evidence, however, from him in the record to justify the finding that the accident suffered by the injured employee causing his death arose out of and in the course of said employee's employment by the Reid Motor Company." The Superior Court affirmed the award of the Commission.

Thereupon, defendant appeals to the Supreme Court, and assigns error.

E. Johnston Irvin, Robert H. Irvin, and Hartsell & Hartsell for plaintiffs, appellees.

Guthrie, Pierce & Blakeney for defendants, appellants.

WINBORNE, J. Appellants appropriately assign as error: (1) The refusal of the court to strike from the record all of the testimony of the witness Jack Freeze, given on the hearing below, when he declined to submit to further cross-examination; and (2) the admission in evidence of the transcript of testimony of Jack Freeze given in a criminal action against him, to which the defendants were not parties. Decisions of the courts generally support the basic principle upon which these assignments rest.

1. A party has the right to an opportunity to fairly and fully cross-examine a witness who has testified for the adverse party. This right, with respect to the subject of his examination-in-chief, is absolute and not merely a privilege. A denial of it is "prejudicial and fatal error." *Mining Co. v. Mining Co.*, 129 Fed., 668, 70 C. S., 611; *S. v. Hightower*, 187 N. C., 300, 121 S. E., 616; *Milling Co. v. Highway Com.*, 190 N. C., 692, 130 S. E., 724; *S. v. Beal*, 199 N. C., 278, 154 S. E., 604; *S. v. Nelson*, 200 N. C., 69, 156 S. E., 154.

Where the opposing party, without fault on his part, is deprived of the opportunity of a cross-examination, it is generally held that he is entitled to have the direct testimony stricken from the record. "This doctrine rests on the common law rule that no evidence should be admitted but what was or might be under the examination of both parties and that *ex parte* statements are too uncertain and unreliable to be considered in the investigation of controverted facts." 28 R. C. L., 600. Witnesses, sec. 189.

While the question has not been the subject of decision in this State, courts of other states uniformly hold that where a witness refuses to answer pertinent questions on cross-examination, his testimony on direct examination should be stricken out. 70 C. J., 618. *Thomas v. Dower*, 162 Wash., 54, 297 P., 1094; *Millikan v. Booth* (Okla., 1896), 46 P., 489; *Cumberland R. Co. v. Girdner*, 174 Ky., 761, 192 S. W., 873;

McElhanon v. State (Ga.), 26 S. E., 501; *Martin v. Elden,* 32 Ohio St. Rep., 282; *Lowery v. Ry. Co.,* 248 Ill. App., 306; *Gallagher v. Gallagher,* 87 N. Y. S., 343, 92 App. Div., 138, 15 N. Y. Ann. Cas., 35; *Beardsworth v. Whitehead,* 122 N. Y. S., 31, 137 App. Div., 306.

Where cross-examination is prevented by illness or death of witness, after direct examination, the same rule applies. *Wray v. State* (Ga.), 45 So., 697; *Sperry v. Moore* (Mich.), 4 N. W., 13.

2. The admissibility in evidence of testimony taken in another action depends not only upon the identity of the question being investigated, but upon the opportunity of the party against whom the evidence is offered, to cross-examine. *Hartis v. R. R.,* 162 N. C., 236, 78 S. E., 164; *McLean v. Scheiber,* 212 N. C., 544, 193 S. E., 708; *Milne v. Sanders* (Tenn.), 228 S. W., 702.

In the *Milne case, supra,* a proceeding under Workmen's Compensation Act, the Supreme Court of Tennessee, through *McKinney, J.,* speaking to the question, said: "We are of opinion that the court properly excluded the transcript of the record in the criminal action. The plaintiffs in the present case were not parties to the criminal case, had no opportunity to cross-examine witnesses in the latter case, nor to introduce evidence to rebut that offered by the State."

Applying these principles to the case in hand, when the witness Jack Freeze refused to submit to further cross-examination after a few immaterial questions were asked, the failure of the court to strike out the testimony given by him on examination-in-chief is error. Likewise, the transcript of testimony of Freeze in criminal action is incompetent and inadmissible, and should have been excluded.

It appears on the face of the record that the findings of the Industrial Commission are based upon the testimony of Jack Freeze. The hearing Commissioner says, "There is enough evidence, however, *from him* in the record to justify the finding that the accident suffered by the injured employee causing his death arose out of and in the course of the said employee's employment by the Reid Motor Company." Findings of fact of the Industrial Commission, when supported by competent evidence, are binding on Superior and Supreme Courts. Decisions of this Court, in so holding, are uniform. But when it appears specifically that findings of fact are founded upon incompetent evidence, such findings are not conclusive, and must be set aside. The proceeding will be remanded to the Industrial Commission for further consideration in accordance with usual course and practice.

Reversed and remanded.

NELLIE VIRGINIA HOLLAND v. MRS. M. M. STRADER AND W. O. MAYES.

(Filed 8 November, 1939.)

1. Automobiles § 18g—Evidence of defendant's negligence in stopping without giving statutory warning held sufficient to take case to the jury.

Evidence that defendant stopped his car suddenly without giving the warning signal required by statute, and that the car in which plaintiff was riding as a guest, traveling on the highway in the same direction behind defendant's car, collided with the rear of defendant's car, causing the injury in suit, *is held* sufficient to be submitted to the jury on the issue of defendant's negligence, notwithstanding defendant's evidence that the cars were in a long line of traffic going to a football game and that the negligence of the driver of the car in which plaintiff was riding in failing to keep a proper lookout and control over the car, and in following too closely behind defendant's car, was the sole proximate cause of the injury, the conflicting contentions raising a question of fact for the determination of the jury. Sec. 116, ch. 407, Public Laws 1937.

2. Automobiles § 9c—

The violation of a statute imposing regulations upon the operation of motor vehicles in the interest of public safety constitutes negligence *per se*, but such violation must be the proximate cause of injury in order to impose liability.

3. Automobiles § 18a—

Whether the violation of a safety statute is a proximate cause of injury is ordinarily a question of fact for the determination of the jury.

4. Automobiles § 13—

The violation of the statute requiring a motorist desiring to stop on the highway to first ascertain if he can stop in safety, and, where the movement of another vehicle may be thereby affected, to give the statutory signal for stopping, is negligence *per se*.

5. Automobiles § 18h—

An instruction that if the jury should find by the greater weight of the evidence that the defendant failed to observed the statutory requirements in stopping on the highway, the violation of the statute would constitute negligence, and that if they further found by the greater weight of the evidence that such negligence was the proximate cause of plaintiff's injury, they should answer the issue of negligence in the affirmative, is without error.

APPEAL by defendants from *Gwyn, J.*, at August Term, 1939, of IREDELL. No error.

This was an action for damages for a personal injury resulting from an automobile collision alleged to have been caused by the negligence of defendants. Plaintiff's evidence tended to show that on 29 October,

1938, plaintiff was a passenger in an automobile, belonging to and driven by her sister, en route to Chapel Hill to witness a football game; that approaching Chapel Hill from the west there were a number of automobiles being driven in same direction; that the automobile of defendant Strader, then being operated by defendant Mayes, was immediately in front of the car in which plaintiff was riding, at a distance of two or three car lengths, both cars traveling thirty or forty miles per hour; that defendants' car stopped suddenly without warning and without any signal being given of intention so to do, and that the car in which plaintiff was riding, in spite of application of brakes and attempt to turn aside, collided with defendants' car, causing injury to plaintiff. The defendants' evidence tended to show that there was a continuous line of cars extending for miles east and west of the point of collision with only a short space between cars; that along this line the cars were frequently stopping and starting due to the congestion and slackening of the line of cars in front; that at the point of collision there was a sudden stop of cars in front of defendants which caused the driver also to stop, and plaintiff's car struck the left rear end of defendants' car; that the collision would have been avoided if the driver of the car in which plaintiff was riding had kept proper lookout and her car under control; that the driver of the car in which plaintiff was riding was either following too closely, or had time, after seeing the cars in front stopping, within which to apply brakes and stop. The defendants contended that the negligence of the driver of the car in which plaintiff was riding was the sole proximate cause of the injury.

Upon appropriate issues submitted to the jury, there was verdict for plaintiff, and from judgment thereon the defendants appealed.

Hoyle C. Ripple and Scott & Collier for plaintiff.
Adams, Dearman & Winberry for defendants.

DEVIN, J. The appellants assign as error the denial by the court below of their motion for judgment of nonsuit, but in this we find no error. The plaintiff's evidence, taken in the light most favorable to her, affords substantial basis for submission of the case to the jury, and supports the verdict. True, according to defendants' evidence, a different aspect of the circumstances was presented tending to relieve the defendants of liability for plaintiff's injury, but the decision was a matter within the exclusive province of the jury. *Smith v. Coach Co.*, 214 N. C., 314.

Defendants excepted to the judge's charge, in that, after reading to the jury section 116 of the Motor Vehicle Act of 1937 (ch. 407, Public Laws 1937), he instructed the jury, if they found by the greater weight

of the evidence that the defendants violated this statute, that would constitute negligence, and if they further found by the same degree of proof that such negligence was the proximate cause of plaintiff's injury, to answer the issue of negligence in her favor. The section referred to requires the driver of a motor vehicle, before stopping on the highway, to see that such movement can be made in safety, and, where the movement of another vehicle may be thereby affected, to give a signal plainly visible to the driver of the other vehicle, indicating his intention to stop, by extending hand and arm from and beyond the left side of his vehicle, hand and arm pointed downward. The violation of this provision is made a misdemeanor by section 137 of the act.

According to the uniform decisions of this Court, the violation of a statute imposing a rule of conduct in the operation of a motor vehicle and enacted in the interest of safety has been held to constitute negligence *per se,* but before the person claiming damages for injury sustained can be permitted to recover he must show a causal connection between the injury received and the disregard of the statutory mandate. This has been the established rule in North Carolina since *Ledbetter v. English,* 166 N. C., 125, 81 S. E., 1066. In *Taylor v. Stewart,* 172 N. C., 203, 90 S. E., 134, a new trial was awarded for the failure of the trial judge in that case to so instruct the jury. *Pearson v. Luther,* 212 N. C., 412, 193 S. E., 739; *Turner v. Lipe,* 210 N. C., 627, 188 S. E., 108; *James v. Coach Co.,* 207 N. C., 742, 178 S. E., 607; *Norfleet v. Hall,* 204 N. C., 573, 169 S. E., 143; *Murphy v. Coach Co.,* 200 N. C., 92, 156 S. E., 243; *Hendrix v. R. R.,* 198 N. C., 142, 150 S. E., 873; *Albritton v. Hill,* 190 N. C., 429, 130 S. E., 5; *Graham v. Charlotte,* 186 N. C., 649, 120 S. E., 466.

In *Stovall v. Ragland,* 211 N. C., 536, 190 S. E., 899, cited by appellants, there was judgment of nonsuit below on the ground that the plaintiff in that case was guilty of contributory negligence in failing to give proper signal before turning to the left. This Court, in reversing the nonsuit, held that there was evidence that the defendant had violated two sections of the automobile law, and that "the violation of these statutes, or either of them, was negligence," and that plaintiff's failure to give the signal, after having looked in both directions and having observed no other vehicle approaching from either direction, would not, under the circumstances, justify the court in withdrawing the case from the jury, the question of proximate cause being one for the jury.

The violation of a statute imposing a duty on the driver of a motor vehicle for the protection of persons and property from injury necessarily connotes a breach of duty constituting negligence, but it does not import liability unless the violation of the statute be shown by proper

proof to have been the proximate cause of the injury. What is the proximate cause of the injury is usually a matter to be determined by the jury.

The other exceptions are to those portions of the judge's charge wherein he was arraying the contentions of the parties. The attention of the court not having been called to these matters at the time, the exceptions thereto are therefore deemed to have been waived. They came too late when noted for the first time after the verdict. *Noland Co. v. Jones,* 211 N. C., 462, 190 S. E., 720; *S. v. Herndon,* 211 N. C., 123, 189 S. E., 173; *S. v. Sinodis,* 189 N. C., 565, 127 S. E., 601.

We conclude that in the trial there was

No error.

J. S. MAY v. TIDEWATER POWER COMPANY.

(Filed 8 November, 1939.)

1. Pleadings § 20—

Upon demurrer, the complaint will be liberally construed and the facts alleged therein will be taken as true, and the pleader given every reasonable intendment and presumption thereon, but the court cannot interpolate an essential allegation.

2. Master and Servant § 7a—Mere discharge of employee in public place does not give employee cause of action in tort for wrongful discharge.

In an action in tort for wrongful discharge, an employee must allege an independent cause of action not arising out of contract and unconnected with the mere termination of the employment, and allegations that plaintiff employee was called to a public place and discharged so that the fact of his discharge became known publicly, without allegation of assault or of force constituting a trespass to his person or property, is insufficient to state a cause of action in tort, there being no contention that the manner of the discharge amounted to slander.

3. Same—

Mere allegations that plaintiff employee was illegally and wrongfully discharged cannot be held to state a cause of action for breach of contract of employment in the absence of allegations showing the execution and terms of the contract of employment and the breach of such terms by the employer.

4. Same—

When a contract of employment does not stipulate any term of employment or period of payment, the contract is terminable at the will of either party.

APPEAL by defendant from *Frizzelle, J.,* at June Civil Term, 1939, of LENOIR.

Civil action for recovery of damages resulting from wrongful discharge of plaintiff, heard upon demurrer.

The complaint alleges, in part:

"4. That this plaintiff was employed by the defendant in May, 1931, and was in its employment until he was discharged as hereinafter mentioned on March 24, 1938. During practically all of his period of employment by the defendant, the plaintiff served as branch manager of the defendant at its Kinston, North Carolina, office and plant.

"5. That on March 24, 1938, the defendant illegally, ruthlessly, wantonly and wrongfully discharged the plaintiff and made said discharge unnecessarily in a public place and in a public manner on the public street of the city of Kinston, and at an hour of the day when the street was frequented by passersby, many of whom, as the plaintiff is advised and believes, and so alleges, heard the discharge of this plaintiff as it was being made. That in order to make the discharge in the manner hereinbefore specified the defendant actually called this plaintiff from his office and from the office building occupied by the defendant in the city of Kinston, to the public street, and there in the manner aforesaid effected the discharge of this plaintiff from the service of the defendant. That at the time and on this public street this plaintiff protested against the conduct of the defendant and demanded that he first be given an auditing of his accounts and that he be permitted to turn over the office and the property of the defendant in an appropriate and orderly way, all of which was refused.

"6. That no complaint had ever been made by the defendant to this plaintiff as to purpose to discharge him at all, nor had any complaint been made to the plaintiff by the defendant to the effect that his services were unsatisfactory. At the time of the discharge in the manner hereinbefore mentioned, this plaintiff requested that information concerning the reasons therefor be given him, all of which was refused by the defendant.

"7. That the discharge of the plaintiff in the manner as hereinbefore mentioned became quickly known through the passersby and was immediately and continuously and generally discussed by the people of the city of Kinston and in the vicinity thereof where this plaintiff has spent his entire life and was well and favorably known. That great speculation and gossip was indulged in by the people as to what conduct by the plaintiff caused such peremptory and public discharge of this plaintiff by the defendant.

"8. That the service of this plaintiff during all the time of his employment by the defendant had been diligent, efficient and faithful to the defendant.

"9. That by the conduct of the defendant as hereinbefore mentioned, this plaintiff has been greatly damaged in the sum of $25,000."

The plaintiff prays judgment in the sum of $15,000 actual damages, and for $10,000 punitive damages.

Defendant demurs to the complaint for that it does not state facts sufficient to constitute a cause of action in that: the "alleged cause of action is predicated upon allegations that the defendant, employer, discharged the plaintiff, employee, under circumstances whereby the fact of discharge became known publicly, the plaintiff in his complaint seeking to recover damages for this alleged tort; whereas, as a matter of law, an action in tort does not lie against an employer for discharging an employee under the circumstances set forth and alleged in the complaint."

The court below being of opinion that a cause of action is stated, entered order overruling the demurrer, for which defendant appeals to the Supreme Court and assigns error.

Allen & Allen, John G. Dawson, and L. E. Maxwell for plaintiff, appellee.

Charles F. Rouse for defendant, appellant.

WINBORNE, J. Careful consideration of the allegations in the complaint lead to the conclusion that the demurrer should be sustained.

If we consider this an action in tort for wrongful discharge, which we think it is, the liability must grow out of the violation of some legal duty by the defendant, not arising out of contract, and "the complaint should state facts sufficient to show such legal duty and its violation resulting in injury to plaintiff." McIntosh P. & P., 394.

"A wrongful discharge from employment becomes the basis of an action in tort when accompanied by a wrongful act which amounts to a technical trespass with actual or constructive force. A malicious motive disconnected with the infringement of a legal right cannot be the subject of a civil action," *Adams, J.*, in *Elmore v. R. R.*, 191 N. C., 182, 13 S. E., 633, citing *Richardson v. R. R.*, 126 N. C., 100, 35 S. E., 235; *S. v. Van Pelt*, 136 N. C., 634, 49 S. E., 163; *Bell v. Danzer*, 187 N. C., 224, 121 S. E., 448. See, also, *Biggers v. Matthews*, 147 N. C., 299, 61 S. E., 55.

In the sense there used, trespass to the person "involves the idea of force or the direct character of an injury, remediable at common law by the action of trespass *vi et armis*."

In this connection there is no allegation of assault, of force, of trespass to his person or property, or any other act which "disjointed from the mere termination of the employment constitutes an independent

cause of action." *Elmore v. R. R., supra.* Plaintiff does not contend that the action is for slander.

Applying these principles to the facts alleged, admitted for the purpose as we must do in testing a demurrer, *Ballinger v. Thomas,* 195 N. C., 517, 142 S. E., 761; *Ins. Co. v. McCraw,* 215 N. C., 105, 1 S. E. (2d), 369, and cases cited, the allegations appear to be insufficient to meet the requirements.

It is contended by counsel for plaintiff in brief filed as well as in oral argument that, while a mere reading of the complaint may be suggestive of the conclusion that the action is in tort, they do not concede that all contractual relations as between the parties are excluded from consideration under the allegations of the complaint. They argue that the allegation that plaintiff had been in constant employment of defendant from May, 1931, to March, 1938, nearly seven years, is adequate to admit of showing that as a reason for his continued employment, there were renewed annual agreements between the parties that the relation should continue for another year.

Giving to the allegations the most liberal construction and the benefit of every reasonable intendment and presumption, we are unable to follow through on this argument. To do so would require the interpolation of allegation.

They further argue that in the allegation that plaintiff was illegally and wrongfully discharged, the words "illegally discharged" and "wrongfully discharged" may be applied with equal force to the breach of contract of employment as to a tortious discharge from employment. Conceding this to be true, as used here, it is apparent that the words are in connection with and as incidental to allegations in tort. There are no allegations of "the making of the contract, showing the terms which fix the plaintiff's right and defendant's liability" which are essential in an action on express contract. McIntosh P. & P., 394.

When in contracts for personal service no time is fixed and no stipulated period of payment made, the contract is terminable at the will of either party, and no cause of action results therefrom. *Edwards v. R. R.,* 121 N. C., 490, 28 S. E., 137; *Richardson v. R. R., supra; King v. R. R.,* 140 N. C., 433, 53 S. E., 237; *Soloman v. Sewerage Co.,* 142 N. C., 439, 55 S. E., 300; *Currier v. Lumber Co.,* 150 N. C., 694, 64 S. E., 763; *Elmore v. R. R., supra.*

The judgment below is

Reversed.

D. L. RAYMER, ADMINISTRATOR C. T. A. OF THE ESTATE OF W. D. MCLELLAND, DECEASED, ET AL. v. CARRIE ELLIOTT McLELLAND, INDIVIDUALLY, AND CARRIE ELLIOTT McLELLAND, EXECUTRIX OF THE ESTATE OF W. D. McLELLAND, ET AL.

(Filed 8 November, 1939.)

1. Partition § 6—

A proceeding for partition is equitable in its nature and upon appeal the Superior Court in its equitable jurisdiction has power to make such orders as are necessary to do justice between the parties.

2. Same: Executors and Administrators § 13a—In proceedings to sell land to make assets and for partition, devisee may be permitted to pay pro rata part of debts and take lands relieved from obligations of the estate.

Testator devised all of his property, with the exceptions of certain specific legacies, to his wife. A caveat filed by testator's heirs at law was compromised by consent judgment allotting one-half the lands to the widow under the will and one-half the lands to the heirs at law, after the payment of all debts, legacies and cost of administration. This proceeding was instituted to sell lands to make assets to pay the debts of the estate and for partition under the provision of the consent judgment. *Held:* Upon appeal, the Superior Court in its equitable jurisdiction has the power to hear and determine the widow's prayer that she be permitted to pay one-half the valid debts of the estate and charges of administration and thereupon have the lands allotted to her under the consent judgment relieved of any further obligations of the estate, and that the other one-half be allotted to the heirs at law subject to one-half the debts of the estate and costs of administration, the relief prayed for being merely to effectuate the spirit and purpose of the consent judgment.

3. Executors and Administrators § 13a—

The rights of creditors are not adversely affected by an order exonerating lands devised to a devisee from liability for debts of the estate upon payment by the devisee of her pro rata part of the debts when it is admitted that if the other lands of the estate do not bring an amount sufficient to pay all debts the lands of such devisee should then be liable for the balance.

4. Conversion § 1: Executors and Administrators § 24—

The compromise of a caveat proceeding by a consent judgment allotting one-half the lands to testator's widow, his sole devisee, under the will, and the other one-half to testator's heirs at law, subject to the debts and costs of administration, does not affect a conversion of the real estate, and the agreement of all the parties is not necessary to the exoneration of the widow's lands from the obligations of the estate upon her payment of one-half the debts and costs of administration.

5. Executors and Administrators § 13a—

When an administrator buys realty at a foreclosure sale in order to protect mortgage notes belonging to the estate, such lands must be treated

as personalty in settling the estate and must be first sold to make assets for the payment of debts before other lands of the estate are sold for this purpose.

APPEAL by defendant from *Bobbitt, J.*, at May Term, 1939, of IREDELL. Error.

Special proceeding to sell land to make assets for the payment of debts and for partition.

One W. D. McLelland died possessed of land and personal property in Iredell County and leaving a last will and testament in which, except for four specific legacies in the sum of $1,000 each to certain of his collateral heirs, he devised all of his property to his widow, the defendant Carrie Elliott McLelland. Thereafter the collateral heirs, there being no children, filed a caveat. Pending the trial of the caveat the parties agreed upon a distribution of the property and caveators withdrew the caveat and consented to the probate of the will in solemn form. A consent judgment in execution of the compromise settlement was thereupon entered by the judge presiding.

Under the terms of the consent judgment it was provided that after the payment of all debts, legacies and proper costs of administration, the collateral heirs, plaintiffs herein, shall have and receive one-half of the personal property of the estate of the said W. D. McLelland and one-half of all the real estate of the said W. D. McLelland in fee simple, and that the other one-half of said personal property and the other one-half of said real estate shall be held and retained by the defendant Carrie Elliott McLelland under the will. It then provided for the appointment of commissioners to make division of the real property in which division it was stipulated that there should be allotted to the defendant, at a value to be placed thereon by said commissioners, the W. D. McLelland home place and certain adjoining lands and such other lands as might be necessary to make up her full one-half share of the real estate.

The judgment further provided:

"And it is hereby further ordered and decreed that under and by virtue of the provisions of section 607 of the Consolidated Statutes, this judgment shall act as a transfer and conveyance to the said heirs at law of the said W. D. McLelland of their rights, title and interest to the personal property and real estate of the said W. D. McLelland allotted to said heirs at law by this judgment, subject to the payment of the debts of the estate as hereinbefore set forth."

In her answer to the petition herein the defendant alleged the facts, pleads the consent judgment and prays: "That one-half of the land in value belonging to the estate of W. D. McLelland be allotted to her and that she be permitted to pay one-half of the valid debts and charges of

administration and thereupon the lands allotted to her under the consent judgment be relieved of any further liability for the obligations and costs of administration"; and that the other one-half be allotted to the heirs at law, subject to the payment of one-half of the valid obligations and costs and charges of administration.

When the cause came on to be heard, the court, being of the opinion that it was without authority and power at law or in equity in the absence of the consent of all the interested parties to grant the defendant's prayer for relief, declined to enter judgment thereon. The cause was thereupon remanded to the clerk for further proceedings in accord with the petition. The defendant excepted and appealed.

Lewis & Lewis for plaintiff, appellee.
J. H. Burke, Stahle Linn, and Jack Joyner for defendant, appellant.

BARNHILL, J. This appeal presents but one question for determination. Was the court below without power and authority to grant the relief prayed by the defendant in her answer?

Partitions and sales for partition are equitable in their nature. *Weeks v. McPhail,* 128 N. C., 130, 39 S. E., 732; *Seaman v. Seaman,* 129 N. C., 293, 40 S. E., 41; *Trust Co. v. Watkins,* 215 N. C., 292. 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. *Trust Co. v. Watkins, supra.*

Under the proper interpretation of the consent judgment the plaintiffs were allotted one-half of the real property in value subject to one-half of the debts and costs of administration. The defendant was allotted the other one-half, including specifically the home place and certain contiguous property to which she would have been entitled under the will or at law, subject to one-half of the debts and costs of administration. She now asks that the spirit and purpose of this consent judgment be complied with and offers to pay the one-half of the debts and costs of administration assessed against her real property in exoneration thereof. All that she asks is that the plaintiffs do likewise, or that their share be sold to pay that portion of the debts and costs of administration for which it is primarily liable. She concedes that if the one-half of the real property allotted to the plaintiffs does not bring a sufficient amount to pay the charges against it, then that her share is liable for the balance.

We can see no reason why the court below, in the exercise of its equity jurisdiction, does not have full jurisdiction, power and authority to grant the relief prayed by the defendant. Otherwise, the plaintiffs will be permitted to sell the one-half of the real estate allotted to them for the

payment of all, rather than one-half, the debts, and then to resort to the defendant's real property for their one-half share.

The rights of the creditors are not adversely affected. If the relief defendant seeks is granted the payment of their claim is still assured. Therefore, *Hinton v. Whitehurst,* 73 N. C., 157, is not in point. Likewise, the contention of the plaintiffs that the consent judgment effected an equitable conversion of the real property and that there can be no reconversion except by consent of all the interested parties, under the decision of *Seagle v. Harris,* 214 N. C., 339, is without merit.

Upon the defendant's answer and prayer for equitable relief the court below should review the rights of the litigants and make such order as is necessary to do justice between the parties. In any event, Tracts Nos. 2 and 3, as described in the petition, should be first sold and the proceeds thereof applied to the payment of the debts in ascertaining the amount for which the defendant's real property is primarily liable. These tracts were purchased at foreclosure sales to protect mortgage notes held by the administrator. In adjusting the equities between the parties they should be treated as personal property.

Error.

STATE v. RAYMOND WILLIAMS AND HENRY WILLIAMS.

(Filed 8 November, 1939.)

1. **Criminal Law § 35—**

When the evidence establishes a conspiracy or establishes facts from which a conspiracy can be inferred, the acts and declarations of each conspirator, done or uttered in furtherance of the common, illegal design, are competent and admissible in evidence against all of the conspirators.

2. **Criminal Law § 8b—**

Where two or more persons aid and abet each other in the commission of a crime, all being present, all are principals and equally guilty.

3. **Homicide § 25—**

Evidence that defendants entered into a conspiracy to rob deceased, and that in effecting their purpose one of them hit deceased with an axe, inflicting fatal injury, the other appealing defendant being present and aiding and abetting, *is held* amply sufficient to be submitted to the jury and to sustain their verdict of guilty of murder in the first degree as to each of the appealing defendants.

APPEAL by defendants, Raymond Williams and Henry Williams, from *Williams, J.,* at August Term, 1939, of SAMPSON.

Criminal prosecution tried upon one indictment charging the defendants, Raymond Williams, Henry Williams and Lee Simpson, with con-

spiracy to murder Nathan Reif, and upon a second indictment charging the defendant Raymond Williams with the murder of Nathan Reif, and upon a third indictment charging the defendant Henry Williams with the murder of Nathan Reif.

By consent, the cases were consolidated and tried together, each indictment being considered as a separate count in a single bill.

Verdict: "The jury for their verdict say that the defendants, Raymond Williams and Henry Williams, are guilty of murder in the first degree."

It is stated in the case on appeal that the defendant Lee Simpson was convicted of murder in the second degree, sentenced to thirty years in the State's Prison, and that he has not appealed.

Judgments: Death by asphyxiation as to both Raymond Williams and Henry Williams.

The defendants, Raymond Williams and Henry Williams, appeal, assigning errors.

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

P. D. Herring for defendant Raymond Williams.

B. H. Crumpler for defendant Henry Williams.

STACY, C. J. The deceased was a peddler, carrying his merchandise in an automobile, and selling it from house to house in Sampson County. On 24 November, 1938, it was known that he had a large sum of money. This was seen by the defendants when the deceased sold some goods at a filling station and made change from his pocketbook. The evidence discloses that the three defendants planned to rob the deceased by inducing him to go to the home of Lee Simpson under the pretext that Simpson's wife would buy some of his merchandise. They waited for the peddler upon the highway as he came from the filling station, and their plans were executed apparently with ease and precision. Soon after the deceased arrived at the Simpson home he was struck in the back of the head with an axe and mortally wounded. He was then placed in his automobile and the automobile was moved out of the yard and parked on the side of the road about 200 yards away. Here the deceased was found by some of the witnesses, bloody and struggling for life. Simpson's wife testifies that Raymond Williams struck the fatal blow, and that Raymond and Henry then placed the deceased in his car and moved it out of the yard. Thus, as a result of the conspiracy to rob, the deceased lost, not only his money, but also his life. Pools of blood and the empty bill-folder belonging to the deceased were found in the front yard of the Simpson home. The evidence points unerringly to the guilt of the defendants.

The exceptions present no new question of law or one not heretofore settled by the decisions. It is so well established as to be almost axiomatic that when the existence of a conspiracy has been shown, or facts from which it may be inferred, the acts and declarations of each conspirator, done or uttered in furtherance of the illegal design, are admissible in evidence against all. *S. v. Lea,* 203 N. C., 13, 164 S. E., 737.

One who enters into a criminal conspiracy, like one who participates in a lynching, or joins a mob to accomplish some unlawful purpose, forfeits his independence and jeopardizes his liberty, for, by agreeing with another or others to do an unlawful thing, he thereby places his safety and security in the hands of every member of the conspiracy. The acts and declarations of each conspirator, done or uttered in furtherance of the common, illegal design, are admissible in evidence against all. *S. v. Ritter,* 197 N. C., 113, 147 S. E., 733. "Everyone who enters into a common purpose or design is equally deemed in law a party to every act which had before been done by the others, and a party to every act which may afterwards be done by any of the others, in furtherance of such common design." *S. v. Jackson,* 82 N. C., 565; *S. v. Anderson,* 208 N. C., 771, 182 S. E., 643.

Another principle, also applicable to the facts appearing of record, is that where two or more persons aid and abet each other in the commission of a crime, all being present, all are principals and equally guilty. *S. v. Triplett,* 211 N. C., 105, 189 S. E., 123.

The record is free from reversible error. The exceptions addressed to the admission of evidence and those directed to the charge are too attenuate to require any extended discussion. Without elaboration, it is enough to say they cannot be sustained.

The verdict is supported by the evidence, and the judgments are such as the law commands.

No error.

STATE v. JOHN F. BLACK.

(Filed 8 November, 1939.)

Bastards § 1: Criminal Law § 56—Motion in arrest of judgment is proper when, and only when, some fatal defect appears on the face of the record.

Defendant pleaded guilty to an indictment charging him with the willful neglect and refusal to support his illegitimate child, and judgment was pronounced. Thereafter defendant moved in arrest of judgment on the ground that the power of the court to enter the judgment was taken

away by chapter 432, Public Laws of 1937, which repealed sec. 6, ch. 228, Public Laws of 1933. *Held:* Defendant's plea established his guilt of the offense charged and supported the judgment regardless of whether the whole of sec. 6, ch. 228, Public Laws of 1933, was repealed by the later act or not, and therefore no fatal defect appears upon the face of the record and the motion in arrest of judgment was properly denied.

APPEAL by defendant from *Bobbitt, J.,* at April Term, 1939, of RANDOLPH.

Proceeding upon indictment charging the defendant with willful neglect and refusal to support his illegitimate child, Frances Louise Frazier.

Upon plea of "guilty" at the December Term, 1938, Randolph Superior Court, it was adjudged that the defendant be imprisoned for a period of six months and to pay into the clerk's office the sum of $10.00 per week for the use and benefit of said illegitimate child.

At the April Term, 1939, the defendant lodged a motion in arrest of judgment on the ground that the power of the court to enter the judgment was taken away by ch. 432, Public Laws 1937, which repealed sec. 6 of ch. 228, Public Laws 1933.

From a denial of the motion, the defendant appeals, assigning error.

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

Gold, McAnally & Gold for defendant.

STACY, C. J. Without deciding whether the whole of sec. 6, ch. 228, Public Laws 1933, was intended to be repealed by ch. 432, Public Laws 1937, we think the power of the court to enter judgment in the case must be upheld on authority of what was said in *S. v. Bradshaw,* 214 N. C., 5, 197 S. E., 564. The defendant's plea of "guilty" presupposes the necessary disposition of matters required to establish his willful neglect or refusal to support the child in question.

Having admitted his guilt, the defendant's motion in arrest of judgment was properly denied. *S. v. McKnight,* 196 N. C., 259, 145 S. E., 281.

A motion in arrest of judgment is proper when—and only when—some error or fatal defect appears on the face of the record. *S. v. Bradley,* 210 N. C., 290, 186 S. E., 240; *S. v. Satterfield,* 207 N. C., 118, 176 S. E., 466; *S. v. McKnight, supra.*

Affirmed.

SWITZERLAND COMPANY v. NORTH CAROLINA STATE HIGHWAY AND PUBLIC WORKS COMMISSION.

(Filed 8 November, 1939.)

Appeal and Error § 38—When the Supreme Court is evenly divided in opinion, one Justice not sitting, the judgment will be affirmed.

In this proceeding in eminent domain to assess damages for lands and easements over adjacent lands taken for the establishment of the Blue Ridge Parkway, and for damages to contiguous lands resulting from such taking, less special and general benefits resulting to the remaining lands of petitioner, the Supreme Court being evenly divided in opinion as to whether error was committed on the trial of the issue, one Justice not sitting, the judgment of the lower court is affirmed without becoming a precedent.

The prevailing opinion written by SCHENCK, J., with DEVIN and SEAWELL, JJ., joining therein.

Dissenting opinion written by STACY, C. J., with BARNHILL and WINBORNE, JJ., joining therein.

CLARKSON, J., not sitting.

APPEAL by defendant from *Warlick, J.*, at March Term, 1939, of MITCHELL.

This is an action commenced by filing a petition before the clerk of the Superior Court of Mitchell County to recover compensation for the taking of lands and easements in lands of the petitioner by the defendant in Mitchell and McDowell counties for the construction of the Blue Ridge Parkway by virtue of chapter 2, Public Laws 1935; chapter 42, Public Laws 1937; and chapter 33 (Eminent Domain), Consolidated Statutes.

There was an appeal from the report of the commissioners appointed by the clerk to the Superior Court at term and the cause was there tried and the following verdict rendered, to wit:

"1. What sum, if any, is petitioner entitled to recover of the defendant for the appropriation of and damage to lands of the petitioner described in the petition, over and above all general and special benefits accruing to petitioner's lands by reason of the construction of the parkway? Answer: '$25,000.'"

From judgment predicated on the verdict, the defendant appealed to the Supreme Court, assigning errors.

J. C. B. Ehringhaus, G. T. Carswell, McBee & McBee, W. C. Berry, J. W. Ragland, M. L. Edwards, Fred Hamrick, and Taliaferro & Clarkson for petitioner, appellee.

Charles Ross, Charles Hutchins, and George L. Greene for defendant, appellant.

SCHENCK, J. The first exceptive assignment of error is to the following question and answer propounded to and made by the petitioner's witness, Heriot Clarkson, "Q. Tell the jury whether there is any reservation by the Highway Commission of North Carolina, or any division in it that you ever read which reserved or which required an exit from or entrance to the parkway from one end of the Little Switzerland property to the other? A. No, there is not." This assignment cannot be sustained. The answer of the witness is not a contradiction of the deed from the State of North Carolina to the United States, but is in accord with such deed. If it be conceded that there was originally error in the interrogatory and answer, such error was rendered harmless by the introduction of the deed referred to by both petitioner and defendant, which deed spoke for itself as to its provisions.

The second exceptive assignment of error was to a question propounded to the witness Clarkson, and which was never answered. The question, though permitted, cannot be held for error when not answered. It is a nullity.

The third exceptive assignment of error is to the following question and answer propounded to and made by the petitioner's witness, Heriot Clarkson, to wit: "Q. Just assuming that the regulations do not permit one to either enter or exit from the parkway except on the right-hand side, just assuming that the regulations require an entrance and exit on the right-hand side, where one is traveling and wishes to get off, is there any way to get off of the highway? A. Of course, if you are not permitted to get off, you cannot get off." This question and answer was no more than a harmless comment upon the obvious, and is in no way prejudicial to the appellant.

The fourth exceptive assignment of error is to the following question and answer propounded to and made by the petitioner's witness Clarkson, to wit: "Q. But don't you know that under the laws of the United States the Secretary of the Interior has no right to make an exception? A. I don't know that." The answer given to the question rendered it harmless.

The fifth exceptive assignment of error is to the following question and answer propounded to and made by the defendant's witness Hennesee, on cross-examination, to wit: "Q. What do you say as to the effect that would have on the property where the only access to this property would be a road with a fee simple title and easement to the United States Government, in which there is no restriction in the deed to make that road a permanent access to the property? A. Well, if there was no road whatsoever, and if it was closed up, unquestionably it would damage it if the road was closed up." This question was clearly competent to test the witness' knowledge of the value of the lands involved, especially in

view of his testimony in chief to the effect that the benefits to the lands would depend upon the road.

The sixth and seventh exceptive assignments of error are to the following questions and answers propounded to and made by the defendant's witness Stikeleather, on cross-examination, to wit: "Q. As a man interested in real estate and its sale and development, do you think that a man who was a prospective buyer would be affected as to his purchase, if his right of access and egress was cut off and there was just a mere possibility that he would have that right? A. I think that a man's ingress, egress and regress to his property would have a great deal to do with its value. Q. Do you think a man would want to purchase a lot if there was no permanent outlet, or what outlet there was was subject to revocation? A. No, I would not buy it as readily under those circumstances."

The witness had testified on direct examination, that if he owned the Switzerland Company's property he "would prefer to have it (the parkway) on rather than to miss it." This rendered the questions assailed by the exceptions competent to test the knowledge of the witness of the subject concerning which he had testified.

The eighth, ninth and tenth exceptive assignments of error relate to contentions and allegations stated by the judge in the charge. These exceptions are untenable, since they were not called to the attention of the court at the time in order to afford an opportunity to correct them if in error. *Walker v. Burt,* 182 N. C., 325; *S. v. Johnson,* 193 N. C., 701; *S. v. Herndon,* 211 N. C., 123.

The eleventh exceptive assignment of error is to the following excerpt from the charge, to wit: ". . . and thereafter, gentlemen of the jury, on March 4, 1938, the petitioner says and contends that you should find from the evidence that there was conveyed to the Federal Government in fee simple deed to land embraced within the 76.7 of the right of way taken under the condemnation, and easements to the remaining 12.12, making a total of 88.33 that was conveyed, which, as a matter of law, gentlemen of the jury, I instruct you, was a passing out of the State of North Carolina of the title by way of easements and fee simple to the property condemned, and which immediately upon its delivery vested in the Government of the United States the title to that land which prior thereto was in, without dispute, the Little Switzerland Company, a corporation." This is a correct statement of applicable law. The deed from the defendant to the United States both in fact and in law did "pass title" to the United States for lands formerly owned by the petitioner.

The twelfth exceptive assignment of error is to an excerpt from the charge for which no reason is given in the brief of the appellant except

that it does not comply with C. S., 564, but does not state wherein it fails to so comply, under which circumstances the exception is untenable. *Davis v. Keen,* 142 N. C., 496; *Jackson v. Lumber Co.,* 158 N. C., 317.

The thirteenth exceptive assignment of error is to the following excerpt from the charge, to wit: "An easement, gentlemen of the jury, has been defined as a liberty, privilege or advantage in the land, without profit, existing distinct from the ownership of the soil—(as in fee simple). An easement is the right which one person has to use the land of another for a specific purpose." This definition of an easement is in accord with *Thomas v. Morris,* 190 N. C., 244, and *Davis v. Robinson,* 189 N. C., 589, and the assignment cannot be sustained.

The fourteenth exceptive assignment of error is to the following excerpt from the charge, to wit: "Therefore, gentlemen of the jury, in this case I instruct you that in arriving at the amount of compensation the petitioner, the Little Switzerland Company, would be entitled to receive, if any, or ought to receive, if any, your general rule is to estimate the value of the land actually taken, in fee simple and by way of easements thereon, and the damage, if any, to the remainder of the petitioner's boundary or tract of land by reason of the location and construction of the parkway, and from such sum or sums there should be taken as a counterclaim or set-off or offset or reduction any benefits, general or special, which the petitioner has sustained or received by reason of the addition to the value, if any, of the remainder of the boundary or tract of land known as Little Switzerland, and owned by the Little Switzerland Company, by reason of the general or special advantages thereto." This charge is in accord with *Bailey v. Highway Commission,* 214 N. C., 278, and the exception is therefore untenable.

The fifteenth and sixteenth exceptive assignments of error are to the following excerpts from the charge, to wit: "Gentlemen of the jury, there has been introduced in evidence in this case a deed from the State of North Carolina to the United States Government conveying the premises described therein and in said deed certain reservations were made. I charge you that no evidence has been offered in this case of any conveyance or reconveyance, either to the State of North Carolina or its citizens, of any easements or rights in the property so acquired by any deed or instrument sufficient in law to reinvest in the State or in any of its citizens any rights or easements which were not reserved in the deed," and "I further charge you that under the laws of the United States, the Secretary of the Interior has only a limited right to grant concessions or make leases for a limited time, and that under said law there is no authority to grant a permanent right, privilege or easement which could only be authorized by an act of Congress." These are correct statements of the evidence and of the law, and the exceptions thereto are untenable.

The seventeenth exceptive assignment of error is to "the failure of his Honor to advise the jury of the legal effect of the scenic easements as set out in the pleadings and shown by the evidence." The court gave the jury a proper definition of the word easement as "the right which one person has to use the land of another for a specific purpose." The easements taken in petitioner's lands by the defendant and conveyed by it to the United States are clearly stated in the deed from the State to the Federal Government and are self-explanatory and self-definitive, and in the absence of any request for any further explanation of the legal effect of such easements we think this exception is untenable.

The eighteenth exceptive assignment of error is to "the failure of his Honor to explain to the jury the meaning of 'value' as used in the charge and limiting the appraisal to the 'fair market value'; and the failure of the court to explain the meaning of 'fair market value,'" and the nineteenth exceptive assignment of error is to "the failure of his Honor to define the term 'general and special benefits' referred to in the statute, and apply the law thus defined to the facts of this case."

The case was tried from beginning to end upon the theory that the plaintiff was entitled to recover damage for the appropriation of its lands taken in fee simple, and for damage to its land upon which easements were taken, plus any damage to the remaining lands by reason of the construction of the Parkway, diminished by any general and special benefits accruing to the remaining lands. The defendant's own witnesses gave estimates based upon this measure of damage to the effect that the petitioner should recover at least $7,500. The only question involved when the case finally reached the jury was what damage was the petitioner entitled to recover of the defendant under this theory of the trial. There was no question but that the plaintiff was entitled to recover some damage. His Honor read to the jury C. S., 3846 (bb), which furnishes the yardstick by which the damage was to be measured. There were no requests for explanations of the terms mentioned in these exceptions. Under the circumstances of this trial we think the charge as given was a substantial compliance with the law's requirements.

The twentieth exceptive assignment of error is to "the failure of his Honor to state in a plain and correct manner the evidence given in the case and to declare and explain the law arising thereon." This assignment in no way sets forth wherein the charge fails to comply with the statute, C. S., 564, and is therefore a broadside exception and is untenable. *Davis v. Keen, supra,* and *Jackson v. Lumber Co., supra.*

A reading of the rather voluminous record and a careful examination of each exception preserved leave us with the impression that the case has been tried in a fair and impartial manner. The parties were per-

mitted to develop their evidence and present their respective contentions with few interruptions or objections, the charge shows no bias and contains no intimation as to what facts were established.

This proceeding was instituted, under the provisions of the statute, solely for the assessment of damages for the taking of petitioner's property for a public use. The case resolved itself into a question of fact, presented to a jury whose intelligence must be presumed, under an issue correct in form, about a matter which the jurors were fully competent to determine. If the judge's charge was not as comprehensive and explicit as desired, the defendant has no just ground for complaint on that score, since it consented that the judge need not recapitulate the testimony, and offered no requests for instruction on any phase of the case. If the defendant desired more particular and detailed instructions relative to certain phases of the case, it was its duty to have requested special instructions. *S. v. Herndon, supra; Bank v. Yelverton,* 185 N. C., 314.

The amount assessed as compensation for the taking of petitioner's property may not be held unreasonable under the testimony adduced. The defendant made no motion before the trial court, and brings none here, to set aside the verdict on the ground that the amount was excessive.

If any errors of omission were committed by the trial judge in his instructions to the jury, it is not perceived that the jury was thereby misled, or that the defendant suffered prejudice or the denial of any substantial right, or that the amount of the recovery was enhanced thereby. It was well said in *Wilson v. Lumber Co.,* 186 N. C., 56: "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 appear not only that the ruling complained of is erroneous, but also that it is material and prejudicial, amounting to the denial of some substantial right. *In re Ross,* 182 N. C., 477; *Burris v. Litaker,* 181 N. C., 376." *Collins v. Lamb,* 215 N. C., 719. It would seem that the application of this salutary rule would entitle the appellee to the affirmance of the judgment.

The twenty-first, twenty-second and twenty-third exceptive assignments of error are formal and are disposed of in the discussion of the assignments that preceded them.

DEVIN and SEAWELL, JJ., join in this opinion, which makes the Court evenly divided, CLARKSON, J., not sitting. Under these circumstances the judgment of the court below is affirmed as the disposition of this appeal without becoming a precedent, in accordance with the practice of this Court. *Miller v. Bank,* 176 N. C., 152; *Durham v. R. R.,* 113 N. C., 240, and citations thereto in Anno. Ed.

Affirmed.

STACY, C. J., dissenting from the affirmance of the judgment: A careful perusal of the record leaves me with the impression that reversible error has been shown in respect of the land subjected to what is designated a "Scenic Easement," if not also in respect of the admeasurement of damages.

First. It is alleged in the petition, paragraph 6, subsection (i), that in addition to the 76.7 acres of petitioner's lands taken in fee simple, at least 12.12 acres adjacent to the right of way and belonging to the petitioner have been subjected to a scenic easement which is so drastic in its nature that it amounts "to the taking thereof in fee simple."

The answer admits that the respondent "has appropriated an easement on 12.12 acres belonging to the petitioner," but denies that the restrictions set forth in the appropriation will materially affect the value of the land. On the contrary, it is alleged that they will protect the land from improper or abusive use and ought to enhance rather than lessen its value for residential purposes. It is further averred that these restrictions are not as rigid in many respects as the restrictions already placed on the property by the petitioner.

The terms of the easement, as set out in the record, follow:

"(a) That buildings, pole lines and structures may be erected on such lands for farm or residential purposes. New buildings or major alterations of existing buildings shall be subject to the prior approval of the National Park Service. No commercial buildings, power lines or other industrial or commercial structures shall be erected on such lands, except that existing commercial buildings may be altered or the property may be otherwise improved for the purpose of continuing established use after plans have been approved by the National Park Service.

"(b) That no mature or stable trees or shrubs shall be removed or destroyed on such land without the consent of the grantee or its assigns, except such seedling shrubbery or seedling trees as may be grubbed up or cut down in accordance with good farm practice and residential maintenance, and except that cultivated crops, including orchard fruits, may be pruned, sprayed, harvested, and otherwise maintained in accordance with good farming practice.

"(c) That no dump of ashes, trash, sawdust or other unsightly or offensive material shall be placed upon such land.

"(d) That no sign, billboard or other advertisement shall be displayed or placed upon such land, except one sign not greater than 18 inches by 24 inches advertising the sale of said property or the products raised upon it."

The position of the petitioner is, that these restrictions "have the force and effect of taking the property in fee simple," while the respondent advances quite a different view.

Both sides introduced evidence on the issue thus raised by the pleadings. In the testimony offered by the petitioner, the 12.12 acres are referred to as "land actually taken," and a valuation of $500 per acre is placed thereon. The respondent, on the other hand, offered the estimate, "12.12 acres of scenic easements at $10 per acre."

With the record in this shape, the court gave the jury the following definition of an easement, and no more: "An easement, gentlemen of the jury, has been defined as a liberty, privilege or advantage in land without profit, existing distinct from the ownership of the soil—(as in fee simple). An easement is the right which one person has to use the land of another for a specific purpose." (Exception 13.)

It will be observed that in the court's definition of an easement, no reference is made to the effect of a scenic easement, such as was then before the court for determination.

It is provided by C. S., 564, that in jury trials, the judge "shall state in a plain and correct manner the evidence given in the case and declare and explain the law arising thereon," and this without expressing any opinion upon the facts. *S. v. Merrick,* 171 N. C., 788, 88 S. E., 501. In interpreting this statute the authoritative decisions are to the effect that it "confers upon litigants a substantial legal right and calls for instructions as to the law upon all substantial features of the case"; and further, that the requirements of the statute "are not met by a general statement of legal principles which bear more or less directly, but not with absolute directness, upon the issues made by the evidence." *Williams v. Coach Co.,* 197 N. C., 12, 147 S. E., 435; *S. v. Groves,* 121 N. C., 563, 28 S. E., 262. "The statement of the general principles of law, without an application to the specific facts involved in the issue, is not a compliance with the provisions of the statute." *Nichols v. Fibre Co.,* 190 N. C., 1, 128 S. E., 471.

The purport of the decisions may be gleaned from the following excerpts: "The failure of the court to instruct the jury on substantive features of the case arising on the evidence is prejudicial. This is true even though there is no request for special instruction to that effect." *Spencer v. Brown,* 214 N. C., 114, 198 S. E., 630. "On the substantive features of the case arising on the evidence, the judge is required to give correct charge concerning it." *School District v. Alamance County,* 211 N. C., 213, 189 S. E., 873. "A judge in his charge to the jury should present every substantial and essential feature of the case embraced within the issue and arising on the evidence, and this without any special prayer for instructions to that effect." *S. v. Merrick, supra.* "When the evidence is susceptible of several interpretations a failure to give instructions which declare and explain the law in its application to the several phases of the evidence is held for reversible error." *Williams v. Coach Co., supra.*

The manner in which the trial court shall state the evidence and declare and explain the law arising thereon must necessarily be left in large measure to his sound discretion and good judgment, "but he must charge on the different aspects presented by the evidence, and give the law applicable thereto." *Blake v. Smith,* 163 N. C., 274, 79 S. E., 596. In the cited case, which involved only $14.88, the value of a hog, the instruction, "take the case, gentlemen, and settle it as between man and man," was held for error because it did not comply with the mandatory requirements of the statute.

In many cases, to state the evidence in a plain and correct manner and declare and explain the law arising thereon, "requires the exercise of a cultivated intelligence, and to do it in a complicated case in the necessary haste of a jury trial, so as to stand subsequent examination, is one of the highest efforts of the mind." *S. v. Matthews,* 78 N. C., 523. Nevertheless, this is the *special* duty of the judge, "and always requires an amount of learning and practical ability which a jury is not supposed to possess." *S. v. Dunlop,* 65 N. C., 288. The chief purposes to be attained by the charge are clarification of the issues, elimination of extraneous matters, and declaration and application of the law arising upon the evidence. *Irvin v. R. R.,* 164 N. C., 6, 80 S. E., 78. These are essential in cases requiring the intervention of a jury. As was said by *Merrimon, C. J.,* in *S. v. Wilson,* 104 N. C., 868, 10 S. E., 315, "The jury should see the issues, stripped of all redundant and confusing matters, and in as clear a light as practicable."

The theory of trial by jury is, that, by and large, twelve capable and unbiased minds, guided by correct legal instructions, are best qualified to find the facts from the evidence and make true deliverance thereon. *Brewington v. Loughran,* 183 N. C., 558, 112 S. E., 257. The duty of guidance perforce devolves upon the judge—a duty incident to the high office which he holds, and made imperative with us by statute. *S. v. Merrick, supra.* The jury is not to be permitted to wander afield or to grope in the dark. *McCracken v. Smathers,* 119 N. C., 617, 26 S. E., 157. Consequently, the proper exercise of the court's function of instruction is indispensable, *Nichols v. Fibre Co., supra,* except perhaps in cases where the facts are few and simple, and no principle of law is involved, but in cases "where the witnesses are numerous, the evidence complicated and conflicting, and there are different principles of law applicable to the different aspects of the case, as presented by the opposing evidence, it is most clearly the duty of the judge to comply with the requirements of the statute." *Holly v. Holly,* 94 N. C., 96.

In the trial of causes, "it is wise to observe the 'landmarks,' and preserve the well-defined rights and duties of the court and jury." *S. v. Green,* 134 N. C., 658, 46 S. E., 761. It will not do in the instant case

simply to say that the terms of the easement were in evidence and that the jury could see and determine for themselves the effect the restrictions would have upon the value of the land. *Watson v. Tanning Co.,* 190 N. C., 840, 130 S. E., 833; *Mehaffey v. Construction Co.,* 194 N. C., 717, 140 S. E., 716. The parties were in sharp disagreement as to the meaning and effect of the easement. Its interpretation was for the court. *Young v. Jeffreys,* 20 N. C., 357. The situation called for a declaration and explanation of the law arising upon the evidence, which could not be met by silence. *Richardson v. Cotton Mills,* 189 N. C., 653, 127 S. E., 834; *S. v. Melton,* 187 N. C., 481, 122 S. E., 17; *McCracken v. Smathers, supra.* It was imperative that the court speak, and speak directly to the issue. Such, in effect, was the holding or pronouncement in *Robinson v. Transportation Co.,* 214 N. C., 489, 199 S. E., 725. The conclusion is likewise made manifest by what was said in *Nichols v. Fibre Co., supra; Williams v. Coach Co., supra; Watson v. Tanning Co., supra; S. v. Merrick, supra; S. v. Matthews, supra; Bowen v. Schnibben,* 184 N. C., 248, 114 S. E., 170; *Orvis v. Holt Mills,* 173 N. C., 231, 91 S. E., 948; and *Duckworth v. Orr,* 126 N. C., 674, 36 S. E., 150.

The court did give the jury an instruction, however, which, fairly interpreted, may be said to bear upon the easement in question.

"The petitioner contends that you should find from the evidence that this park-to-park roadway destroyed entirely the scenic beauty of the crest of the Blue Ridge Mountains, and that it has the force and effect of obliterating entirely the view that otherwise appeared on the crest of the east or south side of the ridge, of the mountain peaks that rise up into the heavens, and that the taking thereof by the defendant for the purpose of scenic easements, has the force and effect of the taking thereof in fee simple, . . ." (Exception 10) . . . "The petitioner says and contends that you should find from the evidence that there was conveyed to the Federal Government in fee simple deed to land embraced within the 76.7 of the right of way taken under the condemnation, and easements to the remaining 12.12, making a total of 88.33 that was conveyed, which, as a matter of law, gentlemen of the jury, I instruct you, was a passing out of the State of North Carolina of the title by way of easements and fee simple to the property condemned, and which immediately upon its delivery vested in the Government of the United States the title to that land which prior thereto was in, without dispute, the Little Switzerland Company, a corporation." (Exception 11.)

Without further explanation, it would seem that the court here intended to adopt, and did adopt, the petitioner's interpretation of the easement, to wit, that, in effect, it amounted "to the taking of the property in fee simple." *Dayton v. Asheville,* 185 N. C., 12, 115 S. E., 827. The petitioner's contention is reiterated several times in the charge,

while no separate or specific reference is made to the respondent's contention in respect of the scenic easement. The judge is not required to give the contentions of the parties, *Wilson v. Wilson,* 190 N. C., 819, 130 S. E., 834, but when he undertakes to state the contentions of one of the parties on any particular phase of the case, it would seem that, in fairness, he ought to state the opposing contentions which arise out of the evidence on the same aspect of the case. And so the law is written. *Messick v. Hickory,* 211 N. C., 531, 191 S. E., 43; *Lea v. Utilities Co.,* 176 N. C., 511, 97 S. E., 492; *Real Estate Co. v. Moser,* 175 N. C., 255, 95 S. E., 498. "Having undertaken to tell the jury how they should answer that issue if they found such facts according to the plaintiff's contention, it was manifestly incumbent upon the court to state the defendant's contention in respect to such phase of the evidence and to instruct the jury how to answer the issue should they sustain such contention." *Jarrett v. Trunk Co.,* 144 N. C., 299, 56 S. E., 937. The court seems to have assumed that, for all practical purposes, the petitioner has been deprived of 88.33 acres of its land.

This view is augmented by a later instruction which the court gave to the jury on the measure of damages.

"In this case I instruct you that in arriving at the amount of compensation the petitioner, the Little Switzerland Company, would be entitled to receive, if any, or ought to receive, if any, your general rule is to estimate the value of the land actually taken, in fee simple and by way of easements thereon, and the damage, if any, to the remainder of the petitioner's boundary or tract of land by reason of the location and construction of the parkway, and from such sum or sums there should be taken as a counterclaim or set-off or offset or reduction any benefits, general or special, which the petitioner has sustained or received by reason of the addition to the value, if any, of the remainder of the boundary or tract of land known as Little Switzerland, and owned by the Little Switzerland Company, by reason of the general or special advantages thereto." (Exception 14.)

The form of the issue, to which the charge was directed, also lends color to the interpretation which the court apparently placed upon the easement.

"What sum, if any, is petitioner entitled to recover of the defendant for the appropriation of and damages to lands of the petitioner described in the petition, over and above all general and special benefits accruing to petitioner's lands by reason of the construction of the parkway?"

The scenic easement does not deprive the petitioner of the entire use of the land. It burdens it according to the terms of the deed "for the enforcement of the restrictions" therein designated "and none other." As a matter of law the "taking" is only to the extent of the easement.

Brown v. Power Co., 140 N. C., 333, 52 S. E., 954; *Hodges v. Tel. Co.*, 133 N. C., 225, 45 S. E., 572. Otherwise the petitioner is left with the free use of its land.

The record, therefore, impels the conclusion that if the court intended to adopt, and did adopt, the petitioner's interpretation of the scenic easement, there was error. On the other hand, if no such adoption were intended, and the court failed to state the respondent's position after giving the petitioner's contentions in the matter, there was error in this respect. It can make no difference, so far as the ultimate effect is concerned, whether the error be one of omission or one of commission. In either event, it was hurtful to the respondent. There is no escape from this dilemma.

Moreover, it seems somewhat at cross purposes to award compensation for the scenic value of the part taken in fee simple, and then to award compensation for the preservation of the scenic value to a part of what is left. Yet this was sanctioned in the court's charge to the jury when the scenic value of the property was exalted over all other considerations, as witness the following recitation of one of the petitioner's contentions: "That it is situated in a place the like of which it says and contends is hardly found on the earth; that it is a spot favored by God Almighty when He created the earth, and that the location of the development was valuable in affording the character of relief that those in the shadows of life's end would want to repair to, and enjoy the remainder of their lives." (Exception 9.)

The purpose of the easement is to care for the landscape and to vouchsafe the beauty of the countryside. This may be enjoyed in common by the petitioner and others. It was error, therefore, to permit the jury to award compensation on the basis of an absolute taking of the 12.12 acres for all purposes as in fee simple. The matter should have been dealt with in a correct instruction to the jury. C. S., 564.

Nor is this a "subordinate feature of the cause, or some particular phase of the testimony," but it is to be considered as a "substantial defect." *Hauser v. Furniture Co.*, 174 N. C., 463, 93 S. E., 961. It undoubtedly weighed heavily against the respondent and added materially to the award. It may be regretted that it was not submitted under a separate issue as suggested in the case of *Power Co. v. Hayes*, 193 N. C., 104, 136 S. E., 353. The petitioner estimated its damage from the scenic easement to be $6,060, while the respondent placed the loss at $121.20—a difference of $5,938.80, which is more than 23% of the total recovery. The matter cannot be treated as *de minimis* or inconsequential.

Second. The respondent also assigns as error the inadequacy of the charge on the measure of damages, especially in the light of the claims made in respect of values. See Exceptions 9, 10, and 14 above set out.

In cases of this kind, the measure of damages is the difference in the fair market value of petitioner's land before and after the taking. *Elks v. Comrs.*, 179 N. C., 241, 102 S. E., 414. The items going to make up this difference are understood to embrace compensation for the part taken, and injury to the remainder, which is to be offset by any general and special benefits accruing to the landowner from the construction of the highway. *Bailey v. Highway Com.*, 214 N. C., 278, 199 S. E., 25; *Wade v. Highway Com.*, 188 N. C., 210, 124 S. E., 193; *Power Co. v. Power Co.*, 186 N. C., 179, 119 S. E., 213.

If the benefits, general and special, equal or exceed the damages sustained, no recovery can be had. *Goode v. Asheville*, 193 N. C., 134, 136 S. E., 340.

What is meant by "market value" was the subject of consideration in the case of *Brown v. Power Co., supra.* "Briefly, market value or price means the fair value as between one who desires but is not compelled to buy and one who is willing but not compelled to sell." *McCall v. Lumber Co.*, 196 N. C., 597, 146 S. E., 579.

It will be observed that in the court's instruction on the measure of damages, no reference is made to market value. *Pemberton v. Greensboro*, 208 N. C., 468, 181 S. E., 258.

There is ample authority for writing in a case where the Court is evenly divided in opinion, not merely to advance an argument, but to meet the responsibility of decision. *Miller v. Bank*, 176 N. C., 152, 96 S. E., 977. The case is an important one. Both sides are greatly interested in the result. It is ours to declare the law as we find it. *Moore v. Jones*, 76 N. C., 182.

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

GEORGE A. REAVES, EMPLOYEE, v. EARLE-CHESTERFIELD MILL COMPANY, EMPLOYER, AND MARYLAND CASUALTY COMPANY, CARRIER.

(Filed 8 November, 1939.)

1. Master and Servant §§ 39c, 46a—Jurisdiction of Industrial Commission over injuries sustained by employee while out of this State.

In order to give the North Carolina Industrial Commission jurisdiction of the rights of the parties arising out of an injury received by the employee while out of the State, it must appear that the contract of employment was made in this State, that the employee's place of business is in this State, and that the residence of the employee is in this State, and the concurrence of all three facts is prerequisite to its jurisdiction of such injury.

2. Master and Servant § 46a—

The North Carolina Industrial Commission is an administrative board with *quasi*-judicial functions, and its jurisdiction is limited to that prescribed by the statute.

3. Constitutional Law § 13—

The provision of the North Carolina Compensation Act excluding from its coverage nonresident employees involves no unconstitutional discrimination, the inadvisability of attempting to give the act extra-territorial effect being a sufficient basis for the provision.

4. Master and Servant §§ 39c, 46a—Jurisdiction may not be conferred on the Industrial Commission by consent or agreement of the parties.

The injured employee was a nonresident, but the contract of employment was made in this State and the employer maintained its place of business here. The injury occurred in another State, and the parties agreed upon a settlement accordant with the provisions of the North Carolina Compensation Act, which agreement was approved by the State Commission. The employee instituted this proceeding to enforce the terms of the agreement. *Held:* The Industrial Commission did not have jurisdiction over the original claim, and the parties may not confer jurisdiction by consent or agreement, the Industrial Commission's jurisdiction over contracts for the settlement of claims being limited to those made under and within the purview of the Compensation Act.

CLARKSON, J., dissenting.

APPEAL by defendants from *Pless, J.*, at June Term, 1939, of BUNCOMBE. Reversed.

This was a claim under the Workmen's Compensation Act for compensation for injuries alleged to have been caused by an accident which occurred in the State of South Carolina on 22 October, 1937, in the course of plaintiff's employment. The contract of employment was made in the State of North Carolina and plaintiff was at the time of the contract, and at all times subsequent, a resident and citizen of the State of South Carolina. The contract of employment was for him to work both in North Carolina and South Carolina.

An agreement for compensation for plaintiff's disability was entered into by the plaintiff and both defendants, supposedly in pursuance of the provisions of the North Carolina Workmen's Compensation Act, under which the amount of compensation due at the time the agreement was made was $210.73, and the amount due for medical services was $210.73. In addition thereto, the defendants agreed to pay to the plaintiff, as compensation, $16.21 weekly, beginning 29 October, 1937, for an unspecified number of weeks, until the agreement had been terminated by final receipt or supplemental agreement approved by the North Carolina Industrial Commission or order of such Commission. This memorandum of agreement was examined and approved by the North

Carolina Industrial Commission and notice of award given in accordance therewith for temporary total disability, at the rate of $16.21 per week, beginning on 29 October, 1937, and continuing for the period of total disability, not to exceed the provisions of the act.

Compensation was paid by the defendants under the agreement referred to until 14 July, 1938, or for a period of about thirty-eight weeks. The defendants then ceased payment and the plaintiff applied to the Industrial Commission for enforcement of the award and for additional compensation because of conditions arising from the injury. This petition was heard before Commissioner Dorsett and, upon a ruling adverse to the defendants, an appeal was made to the Full Commission, which, after hearing the case, gave notice of formal award on 24 February, 1939, affirming the award following the hearing before Commissioner Dorsett. This award was as follows: "Defendants will pay the plaintiff compensation for temporary total disability since the date of the accident under the terms of the agreement up until the time the defendants offer the plaintiff work suitable to his condition, and if the plaintiff does not earn as much at this work as he did prior to the injury the defendants will pay him compensation at the rate of 60 per cent of the difference in the wages under the provisions of the law, defendants will take credit for compensation payments already made and the payments due since July 14th, when the last payment was made, will be brought up to date in a lump sum payment. Defendants will pay all hospital and medical bills when they have been submitted to and approved by the North Carolina Industrial Commission."

Other provisions relate to the payment of witness' and attorneys' fees.

From this award defendants appealed to Buncombe County Superior Court, and, upon the hearing there, the award of the Full Commission was affirmed.

T. W. Crouch, Columbia, S. C., and Heazel, Shuford & Hartshorn, Asheville, N. C., for plaintiff, appellee.

W. C. Ginter and Jordan & Horner for defendants, appellants.

SEAWELL, J. In support of their appeal, the defendants challenge the jurisdiction of the North Carolina Industrial Commission in the premises on the ground that at the time of his injury plaintiff was not a resident of this State. With regard to its agreement it points out that since the Industrial Commission at no time had jurisdiction of the subject matter, the defendant did not waive its objection to the jurisdiction by that agreement or its subsequent payments, in accordance therewith, and neither conferred a jurisdiction upon the Industrial Commission which it did not have by virtue of the statute.

The North Carolina Workmen's Compensation Act, chapter 120, section 36, Public Laws of 1929, provides: "Where an accident happens while the employee is employed elsewhere than in this State, which would entitle him or his dependents to compensation if it had happened in this State, the employee or his dependents shall be entitled to compensation if the contract of employment was made in this State, if the employer's place of business is in this State, and if the residence of the employee is in this State; . . ."

In so far as it depends upon the statute alone, the jurisdiction of the Industrial Commission attaches only (a) if the contract of employment was made in this State; (b) if the employer's place of business is in this State; and (c) if the residence of the employee is in this State. All these circumstances must combine to give the jurisdiction.

We think it is clear that neither the agreement entered into by the plaintiff and the defendant nor the subsequent payments of the defendant thereupon amounted to a waiver of jurisdiction. The North Carolina Industrial Commission is not a court of general jurisdiction. It is an administrative board, with *quasi*-judicial functions (*Maley v. Furniture Co.*, 214 N. C., 589), and has a special or limited jurisdiction created by statute and confined to its terms. The following observation from *Hartford Accident and Indemnity Co. et al. v. Thompson*, ... Ga., ..., 147 S. E., 50, 51, is applicable here: "The authority of a court of limited jurisdiction in relation to subject matter over which it may exercise jurisdiction can be enlarged or extended only by the power creating the court. It cannot be done by act or consent of parties." *Thompson v. Funeral Home*, 205 N. C., 801, 172 S. E., 500; *Riggan v. Harrison*, 203 N. C., 191, 165 S. E., 358; *Reid v. Reid*, 199 N. C., 740, 155 S. E., 719.

We do not agree that jurisdiction can be conferred upon the court by the circuitous route contended for by plaintiff and apparently adopted by the Industrial Commission, namely, that otherwise the act would be unconstitutional, since "North Carolina cannot extend to its citizens a right that it does not extend to citizens of other States," or discriminate against a "nonresident employee." This view of the matter was taken in a similar situation by the Court in *Quong Ham Wah Company v. Industrial Accident Commission of California*, 192 Pac., 1021 (dismissed for want of jurisdiction, 255 U. S., 455, 41 Supreme Court Reports, 373), which is cited in the opinion of the Full Commission.

The apparent difficulty which the State might be under in extra-territorial extension of its laws, affecting the rights of residents of other states, and uncertainty as to the extent to which this State may be able to protect its own citizens and industries by giving its laws and the orders of the Industrial Commission such extra-territorial effect is sufficient ground to sustain the jurisdictional classification that the employee be a

resident of this State, and this involves no unconditional discrimination. See annotations to *Broderick v. Rosner;* 100 A. L. R., 1133, 1148 (294 U. S., 629, 79 L. Ed., 1100).

We have before us no question as to the policy of the Court, and not even a question as to the ultimate rights of the parties. We are only considering the jurisdiction of the Commission under the act creating it and the subject matter to which it is sought to apply that jurisdiction—whether it complies fully with the condition upon which the jurisdiction attaches.

The Industrial Commission can only enforce an agreement made in accordance with the provisions of the act and by virtue of its authority, and does this simply as a detail of administration provided by statute, and under its statutory jurisdiction. It is a statutory method entirely of settling claims within its jurisdiction. If it had no jurisdiction of the original claim it has none of the contract. It is not a general court in which claims, even between master and servant or employer and employee, may be litigated when they arise upon mere contract, independently of the statutory jurisdiction, although such contract may be physically filed with the Commission. Any relief which the Industrial Commission may give is of a totally different character. "When the statute creating the right provides an exclusive remedy to be enforced in a particular way, or before a special tribunal, the aggrieved party will be left to the remedy provided by statute." *Loomis v. Lehigh Valley Railway Co.,* 208 N. Y., 32, 101 N. E., 907.

The question is not before us as to whether the contract may be independently enforced. If so, it must be in another forum.

The judgment of the court below is

Reversed.

CLARKSON, J., dissenting: "The state has power to pass an act that will apply to injuries suffered by an employee in another state" (1 Schneider, Workmen's Compensation, 2nd Ed., p. 414), but this police power is necessarily a limited one in view of the essential requirements of interstate comity and state sovereignty. In *Farr v. Lumber Co.,* 182 N. C., 725, the injured plaintiff had contracted in Tennessee with the Tennessee defendant but was injured in North Carolina; in his suit in North Carolina the Tennessee Compensation Act was pleaded, but the extra-territorial effect of that act was denied by the holding that the North Carolina suit was proper. Again, in *Johnson v. R. R.,* 191 N. C., 75, plaintiff, a North Carolina resident, had contracted with the Tennessee defendant in Tennessee but was injured, and brought action, in North Carolina; in refusing to give effect to the plea of the Tennessee Compensation Act as a defense, the Court declared that to do so "would

be a denial of any remedy in the courts of this State." Finally, in *Lee v. Construction Co.*, 200 N. C., 319, a North Carolina resident, while in the employ of a Tennessee defendant in Tennessee, was injured; after executing what purported to be a settlement (which was never approved by the Compensation Board), he returned to North Carolina and sued defendant. It was *held* that the paper writing was no more than a release and that the Tennessee Compensation Act was not a bar to plaintiff's action. It was observed in the *Johnson case, supra,* that "the law is woefully in conflict in relation to extra-territorial jurisdiction of the Workmen's Compensation Acts," a statement which continues to be a sound legal observation, but, in my opinion, the principle of the *Farr, Johnson, and Lee cases, supra*—if it does not entirely negative all extra-territorial effect of Workmen's Compensation Acts—is at least authority that extra-territorial effect in any Workmen's Compensation statute will be carefully scrutinized by this Court, will be strictly limited in its application, and will be applied reluctantly.

Under the express terms of our act (S. 8081rr, Michie's Code of 1935), where an accident occurs outside of North Carolina, the employee is permitted to recover where each of the following conditions precedent exist concurrently: (1) "The contract of employment was made in this State," (2) "the employer's place of business is in this State," and (3) "the residence of the employee is in this State." Accordingly, the admission of the plaintiff and the finding of the Commission that plaintiff "is a resident of and citizen of the State of South Carolina," clearly negatives one of the necessary conditions of jurisdiction under the principle of the *Farr, Johnson, and Lee cases, supra.* This would end the case—favorable to defendants—but for the fact that plaintiff and defendants voluntarily contracted with respect to the settlement of plaintiff's cause. A contract is not a "scrap of paper."

The fact of plaintiff's residence was known to both plaintiff and defendants. If the defendants were in error in deciding to tender a voluntary settlement (which was later accepted and approved by the Commission) that error was one of law and not one of fact. A mistake as to the law, when the facts are known, will not invalidate a compromise and settlement arising out of such injury or death. *Obrien v. Det Forende Damphibs Selskab,* 94 N. J. L., 244, 109 Atl., 517. This agreement fixed the amount of weekly compromise and the date from which it was to run, but left open the question as to whether it was to run for the period specified for partial disability under section 30 of the act or for the period fixed for total disability under section 29 of the Workmen's Compensation Act. The contract of settlement also stipulated three methods of terminating the payment of compensation thereunder, to wit, (1) final receipt executed by plaintiff, or (2) supplemental agree-

ment approved by the N. C. Industrial Commission, or (3) order of the Commission. Defendants contracted with plaintiff that they would continue the payments of weekly compensation, under the terms of our act, until either released by further contract with plaintiff (*i.e.*, by final receipt or by supplemental agreement), or discharge by order of the Industrial Commission. All three of these methods are valid under our law. The first two methods are settlements by simple contract, and "amicable settlements, between the employer and the employee, of claims arising under the compensation act are looked upon with favor both in England and in this country" (2 Schneider, Workmen's Compensation Law, 2nd Ed., p. 1661); the third method—submission to arbitration by written agreement—is expressly approved by statute (ch. 94, sec. 1, Public Laws of 1927; S. 898a, Michie's Code of 1935). Defendants do not contend that they have discharged their duties under this contract by any of the three methods agreed upon; rather, they seek to avoid their contract by an attack upon the jurisdiction of the Industrial Commission. In my view of the case, defendants' attack upon the jurisdiction of the Commission comes too late. The issue here is not one as to the jurisdiction of the Commission but merely whether defendants shall be held to discharge the obligations voluntarily assumed by it in a solemn, validly executed contract of compromise. Whether such a contract may be enforced by a direct action in the Superior Court is not now before us.

JOHANNA FOX v. THE ASHEVILLE ARMY STORE, INC.

(Filed 8 November, 1939.)

1. Damages § 11—Evidence of past earnings must relate to probable future earnings with reasonable definiteness in order to be competent.

In an action for damages for personal injury which affects plaintiff's earning capacity, plaintiff is entitled to recover the reasonable present value of the amount by which his future earning power is diminished, and therefore evidence of his earning power before and after the injury is ordinarily competent, but evidence of past earnings must relate to the probable future earnings with sufficient certainty to throw some light upon that question by fair and legitimate deduction.

2. Same—Evidence of earnings six years prior to injury held incompetent on question of probable future earnings.

Plaintiff instituted this action to recover for a negligent injury which impaired her sight. Plaintiff contended that she had been a public school teacher and that although she had not taught school for six years prior to the injury she had not abandoned her profession and was undertaking

to procure a teacher's certificate to enable her to teach in the public schools in the future, and that the injury in suit so impaired her eyesight that she was unable to read sufficiently to follow the teaching profession and therefore her future earning power had been greatly reduced. *Held:* Whether plaintiff would have been able to obtain the required teacher's certificate rested in uncertainty and speculation, and evidence of her earnings as a teacher six years prior to the injury does not relate to her probable future earnings with sufficient definiteness to be competent, and the admission of such evidence must be held for prejudicial error, especially in view of the fact that it was referred to in the charge as a basis for the computation of damages.

SEAWELL, J., dissenting.

CLARKSON and SCHENCK, JJ., concur in dissent.

APPEAL by defendant from *Pless, J.*, at June Civil Term, 1939, of BUNCOMBE.

Civil action to recover damages for injury allegedly resulting from actionable negligence.

Certain evidence relating to the circumstances under which the alleged injury to plaintiff's left eye was received on 5 March, 1938, is set forth in opinion on former appeal. 215 N. C., 187.

Plaintiff alleges in her complaint that throughout her adult life she has been engaged in the profession of teaching in the public schools of Buncombe County, but that now since the injury of which she complains against defendant, her remaining eye has been so impaired that she is unable to read in the amount and to the extent required in teaching, and that, consequently, her earning capacity has been seriously and permanently impaired.

With relation to this allegation, evidence for plaintiff in the trial court tends to show substantially this factual situation: Plaintiff was fifty-five years of age at the time of the accident resulting in injury to her left eye about which she complains in this action. During her adult life to the year 1932, she has taught in the public schools of Buncombe County. While she has not taught since then, she has not abandoned the teaching profession. In 1933 and 1934, she was undertaking through correspondence study courses to raise the grade of her certificate as a teacher, "because the State was requiring a raise" by 1940. She says that she "knew it was coming and the higher the raise of the certificate the better position" one would get in teaching. She wanted to bring it up to the top—"to bring it to B and then to A." However, in 1934 plaintiff quit the correspondence course—"dropped it off" and was going to take it up again in 1938, and then she was "planning to finish the raise and doing the work" in 1938 and 1939. She says that she rested because she "had until 1940 to do it all up in." She further testified,

"I don't know that I was going to teach in 1940, or anything especially. I was planning to do the work by 1940." In the meantime, in November, 1935, plaintiff lost her right eye as the result of a chip of wood striking it. The evidence tends to show that she had ceased to suffer from this injury and could see to read with her left eye at the time of the accident in 1938.

In the course of her examination as a witness plaintiff was permitted to testify, over objection by defendant, that the last year she taught she was receiving a salary of $85 per month for eight months. Exception.

There was verdict and judgment for plaintiff. Defendant appeals to the Supreme Court, and assigns error.

Clarence E. Blackstock, George M. Pritchard, and M. A. James for plaintiff, appellee.

Smathers & Meekins for defendant, appellant.

WINBORNE, J. In the light of the facts shown in the record on this appeal, the evidence of salary plaintiff received as a teacher in the year 1932 is incompetent and should have been excluded.

In actions such as this for injuries by negligence, the plaintiff is entitled to recover the reasonable present value of his diminished earning power in the future. *Fry v. R. R.*, 159 N. C., 357, 74 S. E., 971; *Johnson v. R. R.*, 163 N. C., 431, 79 S. E., 690; *Brown v. Mfg. Co.*, 175 N. C., 201, 95 S. E., 168.

Hence, as a general rule, on the issue of damages, evidence of earning capacity of plaintiff before and after his injury is competent and material. *Wallace v. R. R.*, 104 N. C., 442, 10 S. E., 552; *Rushing v. R. R.*, 149 N. C., 158, 62 S. E., 890; *Ridge v. R. R.*, 167 N. C., 510, 83 S. E., 762; *Beaver v. Fetter*, 176 N. C., 334, 97 S. E., 145; *Ledford v. Lumber Co.*, 183 N. C., 614, 112 S. E., 421.

The purpose in admitting evidence of earnings from past employment in any case is to enable the jury to determine what the future earnings would have been but for the injury. Any earnings from such employment which may fairly and legitimately throw light upon what the probable future earnings would have been is admissible for that purpose. There seems to be no fixed rule as to time in such inquiry, but the past employment must be sufficiently related to the probable future employment of the plaintiff to be reasonably considered as a guide for determining his future earnings. *Wells-Fargo Co. v. Benjamin*, Court of Civil Appeals of Texas, 165 S. W., 120, 17 C. J., 904.

Applying these principles to the factual situation of the case in hand, the earnings of plaintiff as a teacher in 1932 do not fairly and legitimately throw light upon and cannot be reasonably accepted by the jury

as a guide for determining what her future earnings as a teacher would have been if she had not been injured in 1938.

Whether she would have possessed the qualifications and been able to meet the educational requirements for a teacher's certificate of the grade she says will be required in 1940, rested in uncertainty and in the realm of speculation. See *Carpenter v. Power Co.*, 191 N. C., 130, 131 S. E., 400. As in that case, the admission of the evidence cannot be held as harmless error, for here the court, in stating in the charge to the jury the contentions of plaintiff, specifically called attention in this language to the past employment and earnings of plaintiff as a teacher: "Her contention being that previous to the time in question she had been teaching school, and that at the immediate time she was preparing herself for a high certificate which would have permitted her to resume her occupation of teaching, and that from it she could have made a substantial salary, a salary in the neighborhood of $70.00 to $80.00 a month."

As there must be a new trial, other assignments are not considered as they may not then recur.

For error designated, let there be a

New trial.

SEAWELL, J., dissenting: While in her complaint the plaintiff does set up the fact that the injury to her eye, caused by the negligence of the defendant, has deprived her of the opportunity of engaging in teaching in the public schools, to which her life work had been devoted, and that she has received damage on that score, the allegations are quite sufficient to sustain a recovery for damages to her earning capacity when employed in any other occupation which might be open to her. Any evidence relative to that claim cannot be excluded without error. The objection and the exception to the admission of evidence that this plaintiff taught for a long period of years in the public schools of North Carolina, at a salary of $85.00 per month, raises only the question of relevancy, and has nothing to do with the force and effect of the evidence, and, for that reason, has nothing to do with any instruction which the judge may have given to the jury with relation to its proper use. If there is any error, it is necessarily in the instruction of the court, to which exception should have been made and this treated on its own merit.

Evidence of the character to which exception is made has been uniformly accepted as bearing upon the diminution of earning capacity, generally, to engage in any occupation involving the exercise of similar faculties of intelligence and habits of industry, and the salary received by this plaintiff in the work she chose, and to which she gave her continuous and loyal service, is a gauge of such capacity: Sutherland on

Damages, Vol. 4, sections 1245, 1246, *et seq.*, pp. 4690, *et seq.; Missouri, etc., R. Co. v. Nesbit,* 40 Tex. Civ. App., 209; *Escher v. Carroll County,* 159 Iowa, 627; *Hughes v. Harbor & S. B. & S. Assn.,* 131 App. Div. (N. Y.), 185; *McCullough v. Illinois S. Co.,* 14 Ill. App., 566; *O'Connell v. City of Davenport,* 164 Iowa, 95; *Southern Bell Tel. Co. v. Shamos,* 12 Ga. App., 463; 17 C. J., pp. 901, *et seq., ibid., pp.* 903, *et seq.;* subhead, "Earnings in Other Employments," note 51, and cases cited; *Pawlicki v. Detroit United R. Co.,* 191 Mich., 536, 158 N. W., 162.

This is not a proceeding under the Unemployment Compensation Law, where the award is calculated upon recent earnings and the pay is out of a fund raised by contribution; it is not a case under the Workmen's Compensation Act, where the employer is assessed by uniform rules based upon the employee's earnings in his job; it is a suit against a third party for a negligent injury which has diminished the plaintiff's earning capacity with reference to any employment that might be open to her. In fact, the evidence has nothing to do with the measure of damages, but is intended to be evidentiary only as to the effect of the injury on earning capacity.

We cannot deny to the plaintiff in a case of this sort the opportunity for readjustment, and even for rehabilitation, or its consideration by the jury. Even if we consider the relation of plaintiff's earning capacity to the profession in which she had been employed—teaching—competent authority is to the effect that she has the right to show that she was fitting herself to continue the very vocation for which the injury incapacitated her, and which defendant claims she could not have entered on other grounds. Sutherland on Damages, sec. 4698, note 49; *Howard O. Co. v. Davis,* 76 Tex., 630, 17 Am. Neg. Cas., 615. Here, the defendant was permitted to show that the plaintiff had no certificate to teach in the public schools, and probably would not be able to get one. This evidence is unobjectionable, as it bears upon the earning capacity of the plaintiff generally, and also tends to rebut the evidence of the plaintiff that she might avail herself of a future opportunity to return to teaching in the public schools; but if there is any speculation in the matter, it is on the part of the court when it arbitrarily assumes that she will not be able to make the grade and will, therefore, not be permitted to teach in the public schools again. Upon such arbitrary conclusion alone could the court have excluded her earning capacity as a teacher in the public schools. Further, the laws of North Carolina do not prohibit teaching without a certificate; a certificate is only required for teaching in the public school system. The opportunity for private teaching and tutoring is still large, and plaintiff, albeit handicapped by narrowing the field of her activity as a teacher, still might have had this field to look to.

What seems to me to be error in the decision of the Court is that it is practically held that plaintiff can only recover for the diminution of her earning capacity as a teacher in the public schools of North Carolina, and if she can teach in them no more, evidence of her earning capacity in that regard is incompetent. See authorities above cited. Since the inquiry under the pleadings, as exemplified in the issue submitted to the jury, covered, as it should, a much wider scope and related to her general capacity to earn a living in any gainful occupation, it would have been error to exclude this evidence, or, in fact, any evidence of a prior occupation in which she earned money at any time. If plaintiff cannot present to the jury evidence pertaining to the only occupation she had ever pursued, and the salary which she received therein, so far as available evidence is concerned she may have spent her whole life in mental and physical ineptitude, without either the ability or the desire to do work of any kind. The evidence considered throws the light upon plaintiff's intelligence, industry and adaptability, prime qualifications in any vocation she might undertake; and the amount earned by her is a further indication as to their extent and effectiveness.

In *Wallace v. R. R.,* 104 N. C., 442, the rule given in 2 Wood Railways, 1240, on this point is adopted and italicized: "The age and occupation of the injured person, the value of his services, that is, *the wages which he has earned* in the past, whether he has been employed at a fixed salary or as a professional man, are proper to be considered." This case makes the distinction, to which I have already called attention, that inquiry into the earnings does not involve the rule of damages, but only services to enable the jury to arrive at a fair estimate of the amount. "An inquiry, however, as to his earnings in his business is competent. *It is not itself a rule of damages.* There are many other elements of damages to be considered, and 'upon all the circumstances it is for the jury to say what is a reasonable and fair compensation which the defendant should pay the plaintiff, by way of compensation, for the injury he has sustained.' " Here, the admission of evidence as to plaintiff's salary received in past time as a teacher in the public schools establishes no rule that the award of the jury should be measured by it, or even that it should have a controlling influence amongst the many elements considered in determining the amount they should, in their discretion, allow.

In *Broyles v. Prisock,* 97 Ga., 643, 25 S. E., 389, evidence that plaintiff was earning a salary in a certain position was admitted not only as an element in establishing his loss, but also to throw light, generally, upon his earning capacity.

In *Pawlicki v. Detroit United R. Co., supra,* the plaintiff had been, at some time before his injury, a shoemaker, but did not intend to resume that business. The Court said: "His fitness for that vocation and what

he had recently been able to earn in it were the only available evidence from which his loss by reason of destruction of earning capacity could be weighed, and we think was clearly competent for the jury to take into consideration for whatever light it might throw on the question of damages."

See, also: *Grimmelman v. Railway Co.*, 70 N. W., 90, 98, confirming this principle, and *Rayburn v. Railway Co.*, 74 Iowa, 643, 35 N. W., 606.

In the main opinion this evidence seems to be condemned as improper because of its remoteness, although it is admitted in the opinion that "there seems to be no fixed rule as to time in such inquiry." The "remoteness" upon which the evidence is considered inadmissible must, therefore, relate, as I said in the beginning, to its relevancy as evidence of earning capacity. It seems to me obvious that if it were conceded, and it is neither conceded nor proved, that she could teach no more, such evidence still has some probative force in connection with what she might be able to do, even in her partially blinded condition, or might have done except for the injury.

Evidence of earning capacity must come up the hard way—that is, through experience in earning. Evidence of holding one job or another is not of itself sufficient. Courts speak of the market value of services. The test of earning capacity lies in the actual earnings. There is an evidential connection between this plaintiff's earnings in her former work and her general earning capacity which cannot be denied.

I am quite sure that the profession at large, who have had experience with the development of like cases, will consider the decision as an innovation upon the practice.

CLARKSON and SCHENCK, JJ., concur in dissent.

SARAH GOOD HOSIERY MILLS, INC., v. CAROLINA, CLINCHFIELD & OHIO RAILWAY.

(Filed 8 November, 1939.)

1. Removal of Causes § 1—

While issues of fact raised by a petition for removal of a cause must be determined in the Federal Court, whether the right of removal has been established, admitting the facts alleged in the petition to be true, is a question of law which the State courts have jurisdiction to determine.

2. Same—Where answer to petition raises no issue of fact but only question of law, it is properly considered in determining petition for removal.

The complaint alleged that defendant railroad corporation had purchased and was the successor to the South and Western Railroad Company, a corporation chartered by this State and was, therefore, a domestic corporation. Defendant's petition for removal alleged that it was a nonresident corporation which had purchased the properties of the said railroad corporation but that such purchase did not render it a North Carolina corporation so as to deprive it of the right of removal on the ground of diverse citizenship. Plaintiff filed an answer to the petition again setting forth the fact that defendant had purchased the properties of the said railroad corporation and averred that defendant was deprived of its right to remove by virtue of section 8, chapter 12, Private Laws of 1907. *Held:* Plaintiff's answer to the petition contained no controverted issue of fact, but merely raised a question of law as to defendant's right to remove upon the admitted facts, and therefore plaintiff's answer to the petition was properly considered in determining the right of removal.

3. Removal of Causes § 3—Purchaser of South and Western Railroad Company held a domestic corporation in operation of the properties and not entitled to removal.

The purchaser of the South and Western Railroad Company is created a new domestic North Carolina corporation in the operation of the properties purchased by provision of chapter 12, Private Laws of 1907, and therefore it is not entitled to a removal of a cause growing out of such operation on the ground of diverse citizenship, even though the corporation purchasing the properties is a nonresident corporation. The distinction between creating the purchaser a new corporation and the mere licensing of a foreign corporation which had bought the properties, is pointed out.

APPEAL from *Rousseau, J.*, at Chambers in Asheville, 3 August, 1939. From MCDOWELL. Affirmed.

Edward H. McMahan and Jordan & Horner for plaintiff, appellee.

James J. McLaughlin, J. W. Pless, and Robert W. Proctor for defendant, appellant.

SCHENCK, J. This is an action to recover $60,000 damage for injury to the hosiery plant of the plaintiff alleged to have been caused by the negligence of the defendant.

It is alleged in the complaint that the plaintiff is a North Carolina corporation with its principal place of business in Sevier, McDowell County, North Carolina, and "That the defendant, Carolina, Clinchfield and Ohio Railway, is a railroad corporation, and the successor to the South and Western Railroad Company (of North Carolina), which said South and Western Railroad Company was duly chartered by the Legis-

lature of North Carolina, and under and by virtue of the terms of its said charter the defendant, Carolina, Clinchfield and Ohio Railway, by reason of its purchase and succession to the properties, rights and franchise of said South and Western Railroad Company, became and was and is a domestic corporation, and as such domestic corporation owns and operates a common carrier railroad through McDowell County, operating, as this plaintiff is advised and believes, from South Carolina through North Carolina to some point in Tennessee or Kentucky."

In apt time the defendant filed petition to have the cause removed to the United States District Court of the Western District of North Carolina upon the ground that the defendant "is a corporation created, organized and existing under the laws of the State of Virginia, and was, at the time of the commencement of this suit, and still is, a nonresident of the State of North Carolina, and was then, and still is, a corporation duly formed, created and organized under and by virtue of the laws of the State of Virginia, and was then, and still is, a citizen and resident of said State of Virginia; that said defendant was incorporated in the State of Virginia in the year 1905, and in the year 1908, purchased the properties of South and Western Railroad Company, a North Carolina corporation. Defendant avers that by reason of such purchase it did not become a corporation of the State of North Carolina so as to divest the Federal courts of jurisdiction, or to deprive this defendant of the right to remove this case to the Federal Court on the ground of diverse citizenship." The defendant filed the bond required by the statute.

The plaintiff filed an answer to the petition for removal, in which it alleges that due to the fact that the defendant railway company purchased the properties of the South and Western Railroad Company, a North Carolina corporation, the defendant was deprived of its right to remove to the Federal Court by virtue of the provisions of section 8, chapter 12, Private Laws 1907, which reads in part: "Provided, however, that any corporation which is not a corporation of this State, so purchasing, acquiring or taking a lease, shall, by virtue of such purchase or lease, become a corporation of this State as to all properties and franchises so purchased or leased, and shall be subject to the laws and to the jurisdiction of the courts of North Carolina as fully as if incorporated under the laws of this State as to all causes of action and legal proceedings affecting and growing out of the properties and franchises so purchased, acquired or leased, and all other properties held or acquired by virtue of the powers herein conferred, and the operation and management of such properties." The answer also alleges certain matters and things by way of estoppel to the defendant to assert that it is not a domestic corporation.

The order of removal was allowed by the clerk of the Superior Court of McDowell County, and an appeal was taken by the plaintiff to the judge presiding. Judge Johnston, who was holding the courts of McDowell County, having been of counsel for the plaintiff, disqualified himself to hear the motion and referred the same to Judge Rousseau, the resident judge of an adjoining district for determination. Ch. 48, Acts 1939. Judge Rousseau overruled the order of the clerk and denied the motion for removal to the Federal Court, and to such action the defendant excepted and appealed to the Supreme Court.

The first question presented by the appellant for decision is as to whether the plaintiff is entitled to file and have considered the answer to the defendant's petition for removal.

It will be noted that the answer to the petition filed by the plaintiff does not present any questions of fact for determination. The answer alleges the same facts as those set forth in the petition, both the petition and the answer aver that defendant purchased the properties of the South and Western Railroad Company and by virtue of such purchase is operating a railroad in North Carolina. There is no controversy as to the facts involved. The defendant, petitioner, however, contends that by reason of such purchase it did not become a corporation of the State of North Carolina so as to be deprived of the right to remove the case to the Federal Court. The plaintiff, on the other hand, contends that the purchase of the properties of the South and Western Railroad Company by the defendant by virtue of the provisions of section 8, chapter 12, Private Laws 1907, the defendant became a corporation of this State as to all properties and franchises so purchased and subject to the laws and jurisdiction of the courts of North Carolina as fully as if incorporated under the laws of this State.

The only question raised by the answer is a question of law, namely, did the defendant by the purchase of the properties and franchises of the South and Western Railroad Company and by the operation of a railroad in North Carolina by virtue of such purchase become a North Carolina corporation, which question the State court had jurisdiction to determine.

In *Hurst v. R. R.,* 162 N. C., 368, which is similar in many respects to the case at bar, it is said: "The case of *Herrick v. R. R.,* 158 N. C., 310, is not in conflict with this view. It was there held that 'all issues of fact made upon the petition for removal must be tried in the Circuit Court, but the State court is at liberty to determine for itself whether, on the face of the record, a removal has been effected,' and that the theory on which the rule as to removal rests is 'that the record closes, so far as the question of removal is concerned, when the petition for removal is filed and the necessary security furnished. It presents, then, to

the State court a pure question of law, and that is, whether, admitting the facts stated in the petition for removal to be true, it appears on the face of the record, which includes the petition and the pleadings and proceedings down to that time, that the petitioner is entitled to a removal of the suit. That question the State court has the right to decide for itself.'

"Applying this rule to the record before us, it appears that there is no dispute as to the facts, and that the real controversy is whether, upon these facts, the defendant is, as matter of law, a North Carolina corporation under our statute, by reason of its purchase of the Western North Carolina Railroad Company, and this question the State courts can decide."

It will be noted that in the case at bar the fact that the defendant purchased the properties of the South and Western Railroad Company appears in the only pleading filed, namely, the complaint, and in both the petition and the answer thereto, leaving only a pure legal question for determination, which question the State court had jurisdiction to determine, and to enter an order accordant with its determination. *Hurst v. R. R., supra.*

In so far as the answer to the petition avers that the defendant purchased the properties of the South and Western Railroad Company and by reason of such purchase became a North Carolina corporation subject to the jurisdiction of the North Carolina courts, we think, and so hold, the plaintiff had a right to file it and have it considered, since only admitted facts and a question of law were presented thereby, and, in so far as it avers matters and things in estoppel, it is unnecessary for us to decide whether its filing and consideration was authorized, since our view of the case sustains the action of the judge of the Superior Court upon the other grounds therein set forth.

The cases cited by the appellant are not apposite to the case at bar for the reason that it was sought in such cases to have the State court pass upon controverted questions of fact.

The second question presented by the appellant for decision is as to whether the defendant by purchasing the properties of the South and Western Railroad Company by virtue of chapter 12, Private Laws 1907, became a domestic corporation to the extent that the defendant is deprived of its right of removal to the Federal Court.

Where the language of a statute manifests a clear intention to create a new corporation, and such act of creation is accepted, a domestic corporation is created, and a suit cannot be removed from the State to the Federal Court upon the ground of diversity of citizenship by a corporation of another state which became the purchaser of the properties of a corporation in this State created under such statute. *Coal & Ice Co. v. R. R.*, 144 N. C., 732.

Defendant, appellant, relies upon *Allison v. Railway,* 190 U. S., 326 (47 L. Ed., 1078), wherein the Supreme Court of the United States reversed the opinion of this Court in 129 N. C., 336. The opinion of this Court in *Coal & Ice Co. v. R. R., supra,* was delivered subsequent to the opinion of the Supreme Court of the United States in *Allison v. Railway, supra,* and refers to and distinguishes the *Allison case, supra,* in the following language: "It is insisted, however, that recent decisions of the Supreme Court hold that a foreign corporation may become domestic for some purposes, but retain its citizenship in its domicile of original creation for the purpose of jurisdiction; that notwithstanding the fact that the Southern Railway Company is created for the purpose of owning the Western North Carolina Railroad Company, a domestic corporation, the Virginia corporation may remove a cause brought against it into the Federal Court. It would seem that the language used by *Judge Gray* in *Martin v. Railroad, supra* (151 U. S., 673, 38 L. Ed., 311), is conclusive that where a corporation of one state is created a corporation of another state, it cannot remove its cause, whereas where such corporation is licensed to do business in another state it may do so, and this we understand to be the distinction upon which the *Allison case,* 190 U. S., 326, is decided. In that case the Court construed the Act of 1899, known as the 'Craig Act,' to license and not create. By the provisions of that act the foreign corporation was required to file a copy of its charter in the office of the Secretary of State, whereupon it should 'become a corporation of this State.' This act the Court held to license the foreign corporation to come into this State. Certainly no such attitude can be assumed by the Virginia corporation in this case."

Upon a reading of chapter 12, Private Laws 1907, it is manifest that its purpose and its effect was to create a corporation, and that any purchaser of its properties became "subject to the laws and jurisdiction of the courts of North Carolina as fully as if incorporated under the laws of this State as to all causes of action and legal proceedings affecting and growing out of the properties and franchises so purchased, acquired or leased, and all other properties held or acquired by virtue of the powers herein conferred, and the operation and management of such properties," and that the statute could in no sense be interpreted as a mere license for a foreign corporation which had bought the properties of the corporation so created to come into this State to do business by operating the railroad.

The judgment of the Superior Court is

Affirmed.

C. D. SIDES, TRADING AS SIDES LUMBER COMPANY, v. U. D. TIDWELL, Q. B. YATES AND C. O. CARTER, TRUSTEES OF THE CHURCH OF GOD; L. J. MILLER, TRUSTEE, AND J. W. FURR.

(Filed 8 November, 1939.)

1. Trial § 22b—

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

2. Contracts § 1—

In order to make a valid contract, the parties must agree to each of its terms at the same time and in the same sense, and each of its terms must be certain or capable of being made certain by proof.

3. Contracts § 9—

Plaintiff's evidence that plaintiff was to furnish at an agreed price all building materials, except brick and cement, necessary to the construction of a church in accordance with a blueprint, is sufficient to be submitted to the jury on the question of whether the contract was entire and indivisible, and the fact that plaintiff was not called upon to deliver all of such material does not alter the result.

4. Laborers' and Materialmen's Liens § 8—

Evidence that plaintiff agreed to furnish certain material for a building by entire and indivisible contract and that he began to furnish material thereunder prior to the registration of a deed of trust on the property, *is held* sufficient to be submitted to the jury on the question of the priority of plaintiff's lien for materials furnished over the lien of the deed of trust.

APPEAL by defendants L. J. Miller, Trustee, and J. W. Furr from *Bobbitt, J.*, at June Term, 1939, of CABARRUS.

Civil action to recover on contract for building materials furnished and to declare a prior lien therefor.

Plaintiff alleges in substance that, beginning 19 August, 1937, and ending 12 November, 1937, pursuant to an entire and indivisible contract, he furnished to defendants, Trustees of the Church of God, certain building materials of the value of $1,499.74 to be used in the erection of a church on a certain lot of land owned by said defendants in the city of Concord, North Carolina, against which he is entitled to materialman's lien in the sum of $1,183.01, with interest, balance due and unpaid after allowing credit for payment of $316.73, for which balance notice of claim was duly filed and on which this action was instituted in due time; that on 25 August, 1937, defendants, Trustees, executed and delivered to defendant L. J. Miller, Trustee, a deed of trust, which was duly registered 28 August, 1937, conveying the said lot of land as security for

their note for $3,000 payable to defendant J. W. Furr, to which lien of plaintiff is superior.

Defendants deny that the materials were furnished pursuant to an entire and indivisible contract, that the balance due is correct, and that lien asserted by plaintiff is prior to the lien of deed of trust to L. J. Miller, Trustee. Defendants aver that plaintiff was paid $375.43 in full for materials and lumber furnished to 5 October, 1937. Other allegations are admitted.

On the trial below plaintiff testified: That some time in August, 1937, Rev. L. J. Miller, pastor of the Church of God, came to his office and said that they were building a new church on West Depot Street, and wanted to see about getting material; that he had a blueprint, and "we looked over that"; that he said: "It is to be built just like the church at Cramerton"; that after he, Sides, inquired of Mr. Miller as to what arrangements had been made for financing the purchase of material and building the church, he asked: "What material do you want?" Mr. Miller replied: "We have the grill and we are going to get the cement; we want all the doors, floors, ceiling and roofing." He asked the price, and "We made him a price." He said: "For a church you would take off some of that?" I said, "If you go ahead and pay along as you go, and when you get through, pay it off in full, I will give you 3% discount." He replied, "I am sure the Lord will bless you." I said, "If you are going to do that, I will furnish it." "He gave me an order for what he wanted and I told him I'd send it. I inquired about his credit, and in pursuance of that agreement I did furnish the material for the church just as we agreed." Plaintiff further testified that he investigated the title to the lot belonging to the Church of God, and found it free from encumbrance; that he began furnishing the material on 19 August, 1937, on which date eight pieces of 2 x 8's were furnished; that the total material furnished amounted to $1,497.49, of which amount $316.73 was paid on 5 October, 1937; that at that time he received a check for $375.43, but that the difference between the amount received and the amount credited on the open account was for material bought on that date, as a cash transaction. On cross-examination plaintiff testified "that the second bill was dated August 31, 1937, and was for eight steel basement sashes." Later he was asked: "You state you made a contract with Rev. Miller to furnish material?" He replied: "That is right." Further, "Was there any agreement as to the total amount that you were to furnish?" A. "No, sir; he said he got it for around $3,500 in Cramerton, and I assumed this church would cost around $3,500."

P. A. Hargett, witness for plaintiff, with respect to the same transaction, stated that Mr. Miller wanted prices "on all material outside of the brick and cement—roughing, flooring, ceiling, sheathing and some

dressed framing, doors, windows, steel casing, coal chute and several other items." This witness further testified that, after Mr. Sides had given the prices as requested by Mr. Miller, and had agreed upon the discount, Mr. Miller said: "We will buy that material."

For the defendant, L. J. Miller testified that he was pastor of the Church of God at the time of the purchase of the material from the Sides Lumber Company, that he went to the Sides Lumber Company in August, 1937, for the purpose of obtaining prices for the material with which to build said church; that he obtained prices also from two other lumber companies; and that the only material purchased in August, 1937, from the Sides Lumber Company were eight pieces of 2 x 8's. He said: "After I told Mr. Sides we were going to get the money from Mr. Furr, he was in to sell me the material. He wanted to sell all the material to me, but I seen where I could buy it at another place cheaper than I could buy from him, and that is the reason I didn't buy it all from him. There wasn't any agreement that I was to buy all from him. When I gave Mr. Sides that check he told me, 'Anything you want, you come and get it.'" Witness also stated that on 5 October, 1937, he gave Sides Lumber Company a check for $375.43, which paid their bill in full to that date, but that he later bought material amounting to the sum of $1,124.31.

These issues were submitted to and answered by the jury:

"1. In what amount are the defendants, Trustees, indebted to the plaintiff?

"2. Did the plaintiff furnish and deliver the materials described in the notice of claim of lien pursuant to an entire and indivisible contract, as alleged in the complaint?

"3. If so, were any materials furnished and delivered by the plaintiff to the defendants, Trustees, thereunder prior to the registration of the deed of trust to L. J. Miller, Trustee, to wit, August 28, 1937?"

The jury answered the first issue "Yes, $1,183.01," the second issue "Yes," and the third issue "Yes."

From judgment thereon in favor of plaintiff for the sum of $1,183.01, and declaring same a lien upon the lot in question as of 19 August, 1937, superior to that of the said deed of trust, defendants L. J. Miller, Trustee, and J. W. Furr appeal to Supreme Court and assign error.

Sherrin & Barnhardt for plaintiff, appellee.
W. S. Bogle for defendants, appellants.

WINBORNE, J. Appellants' challenge to the judgment below is directed solely to the refusal of the court to grant motion, made in apt time by them, for judgment as in case of nonsuit. C. S., 567. They

contend: (1) That there is not sufficient evidence to establish an entire and indivisible contract between plaintiff and defendants, Trustees of the Church of God, for furnishing the building material for which lien is claimed by plaintiff; and (2) that if there be sufficient evidence of such contract, the pieces of lumber furnished 19 August, 1937, do not "constitute material in the building" of the church, and, hence, plaintiff did not begin to furnish material under such contract until after 28 August, 1939, the date on which the deed of trust was registered.

Viewing the evidence in the light most favorable to plaintiff, as we must do in considering motions of this character, we are of opinion that the evidence with respect to both contentions is abundantly sufficient to present a proper case for determination by the jury.

(1) In the making of a contract it is essential that the parties thereto assent to the same thing in the same sense, and their minds must meet as to all the terms. *Elks v. Ins. Co.*, 159 N. C., 619, 75 S. E., 808; *Croom v. Lumber Co.*, 182 N. C., 217, 108 S. E., 735; *Dodds v. Trust Co.*, 205 N. C., 153, 170 S. E., 652.

To be binding the terms shall be definite and certain, or capable of being made so. *Elks v. Ins. Co., supra.* But the contract need not definitely and specifically contain in detail every fact to which the parties are agreeing. It is sufficient if the terms can be made certain by proof. "An agreement is sufficiently definite as to quantity if a reasonably exact meaning with respect thereto can be ascertained by a proper interpretation of the agreement as shown by admissible evidence." 12 Amer. Jur., 560.

Tested by these principles there is evidence in the present case upon which the jury could reasonably find that the parties entered into a contract by the terms of which plaintiff was to furnish all the material, except brick and cement, required immediately in the construction of a building "just like the church at Cramerton" in accordance with the blueprint in hand and examined by the parties, to cost approximately $3,500, for the financing of which arrangements had been made. The fact that plaintiff was not called upon to deliver all of the material does not alter the situation.

(2) Likewise, evidence of the circumstances surrounding the ordering out of the material, 2 x 8's, on 19 August, 1937, is such that the jury could fairly find it to be a part of the material covered by the agreement then made. There is no evidence to the contrary.

In the judgment below we find

No error.

ROBERT FREEMAN v. C. W. THOMPSON.

(Filed 8 November, 1939.)

1. Pleadings § 6—Defendant may set up as many defenses as he has.

A defendant may plead as many defenses as he has, and it is not required that the defenses be consistent with each other, and therefore a defendant in a negligent injury action may enter a general denial of the allegations of negligence, and also allege that the negligence of a third person was the sole proximate cause of the accident, and that if defendant was negligent such negligence concurred with the negligence of the third person, and move to have such third person joined as a defendant.

2. Torts § 6: Parties § 10—Defendant in negligent injury action is entitled to joinder of third person upon allegations that such person was joint tort-feasor.

When a defendant in a negligent injury action denies negligence and alleges that the negligence of a third person is the sole proximate cause of the injury, and that if defendant was negligent his negligence concurred with the negligence of such third person, the defendant is entitled to have such third person joined as a defendant upon the allegation of joint negligence upon motion duly made, C. S., 618, as amended, the purpose of the statute being that the entire controversy between joint tort-feasors should be settled in one action.

3. Appeal and Error § 2—

A defendant in a negligent injury action may appeal from the denial of his motion to have a third person joined as a defendant upon allegation that such third person was a joint tort-feasor, since the denial of the motion directly affects a substantial right. C. S., 632.

APPEAL by defendant from *Bobbitt, J.*, at March Term, 1939, of IREDELL. Reversed.

This is an action for actionable negligence. The plaintiff seeks to recover damages against the defendant in this action alleging negligence on the part of the defendant in the operation of his automobile, and the defendant denies negligence, and sets forth facts which, he alleges, constitute negligence on the part of John Campbell, driver of the car in which the plaintiff was riding. In his prayer for relief, the defendant asks that John Campbell be made a party defendant in the action under the provisions of section 618 of the North Carolina Code, 1935 (Michie). Upon hearing, the clerk of the Superior Court of Iredell County entered an order in the cause on 28 February, 1939, making John Campbell a party defendant to the action. From this order the plaintiff appealed to the Superior Court. A hearing upon the appeal was heard before his Honor, Judge Bobbitt, at the March Term of the Iredell Superior Court. At the conclusion of the arguments of counsel, an order was

signed by Judge Bobbitt reversing the order signed by the clerk of the Superior Court. To the signing of the order the defendant excepted, assigned error and appealed to the Supreme Court of North Carolina.

The other necessary facts will be set forth in the opinion.

Scott & Collier for plaintiff.
Adams, Dearman & Winberry for defendant.

CLARKSON, J. N. C. Code, 1935 (Michie), sec. 618, in part, is as follows: "In all cases in the courts of this State wherein judgment has been, or may hereafter be, rendered against two or more persons or corporations, who are jointly and severally liable for its payment either as joint obligors or joint tort-feasors, and the same has not been paid by all the judgment debtors by each paying his proportionate part thereof; if one of the judgment debtors shall pay the judgment creditor, either before or after execution has been issued, the amount due on said judgment, and shall, at the time of paying the same, demand that said judgment be transferred to a trustee for his benefit, it shall be the duty of the judgment creditor or his attorney to transfer without recourse such judgment to a trustee for the benefit of the judgment debtor paying the same; and a transfer of such judgment as herein contemplated shall have the effect of preserving the lien of the judgment and of keeping the same in full force as against any judgment debtor who does not pay his proportionate part thereof to the extent of his liability thereunder in law and in equity, and in the event the judgment was obtained in an action arising out of a joint tort, and only one, or not all of the joint tort-feasors, were made parties defendant, those tort-feasors made parties defendant, and against whom judgment was obtained, may, in an action therefor, enforce contribution from the other joint tort-feasors; or at any time before judgment is obtained, the joint tort-feasors made parties defendant may, upon motion, have the other joint tort-feasors made parties defendant," etc.

In *Bargeon v. Transportation Co.,* 196 N. C., 776 (777), it is said: "Can one defendant, sued alone for personal injury, file an answer denying negligence and liability, and then proceed to allege that the injury was due to the specific acts of negligence of a third party, and thereupon, without asking relief against such party, have such party brought into the suit? It is well settled under our system of procedure that in order to hold a party in court a cause of action must be alleged against him. If a defendant against whom a cause of action exists alleges a cause of action against a codefendant, growing out of the same matter, then all the parties are in court and the causes must be tried upon their merits. *Bowman v. Greensboro,* 190 N. C., 611, 130 S. E.,

502; *Ballinger v. Thomas,* 195 N. C., 517, 142 S. E., 761. . . . The amendment of C. S., 618, enacted 27 February, 1929, permitting contribution between joint tort-feasors, does not of course apply to the case at bar, for the reason that the amendment creating such a cause of action was passed after this suit was commenced." The present action was instituted after the enactment of section 618, *supra.*

Upon the pleadings in this cause defendant is entitled to the following defenses: (1) General denial of negligence. (2) Sole negligence on the part of John Campbell. (3) Joint and concurring negligence.

Section 522 provides: "Several defenses—The defendant may set forth by answer as many defenses and counterclaims as he has, whether they are of a legal or equitable nature, or both. They must be separately stated and numbered, and refer to the cause of action which they are intended to answer in such manner that they may be intelligibly distinguished."

In discussing the question of defenses, and after quoting the above statute, McIntosh, N. C. Prac. & Proc. in Civil Cases, at p. 490, says: "It is not required that the pleas be consistent with each other, but the defendant may plead as many defenses as he may have, whether consistent or inconsistent with each other."

The defendant in his answer says, in part: "That without repeating, the defendant denies that the plaintiff was injured because of the negligence of this defendant, as alleged in the complaint, as he has heretofore specifically set forth, and reaffirms and realleges that if the plaintiff received any injuries by reason of the collision, such injuries were caused by his own negligence or by the negligence of John Campbell, or by their joint negligence; but, in truth and in fact, if this defendant was negligent in any manner as alleged in the plaintiff's complaint, he is informed and believes and so alleges that such negligence on his part concurred with the negligence of John Campbell, and such negligence on the part of both of them was the proximate cause of the plaintiff's injuries, and such joint and concurring negligence continued until the actual time of the collision and the resultant injuries, if any, to the plaintiff."

The defendant, among other things, prays: "That the verified answer filed in this cause be treated as an affidavit and motion to have John Campbell made a party defendant in this action. That an order be issued from this court making John Campbell a party defendant to this action under the provisions of section 618 of the North Carolina Code, 1935 (Michie). That if it is determined that the plaintiff was injured by the joint and concurring negligence of the defendant and John Campbell, as alleged in this answer, the defendant have and secure judgment against John Campbell in such a manner and in such amount as is provided in section 618 of the North Carolina Code, *supra.*"

In *Mangum v. R. R.*, 210 N. C., 134 (137), speaking to the subject, it is said: "In accordance with this section (618), the defendants Southern Railway Company and North Carolina Railroad Company (original parties), prayed that the receivers of Seaboard Air Line Railway Company, residents of Virginia, be made parties defendant, and allege that they are not guilty of negligence; but further allege, in substance, that if they are guilty of negligence they are liable only as joint tort-feasors with the receivers. We think that this procedure is permissible under the section, *supra*. The plaintiff, from her allegations in the complaint against the original defendants, cannot be affected by this procedure of the original defendants under the statute bringing in the receivers as joint tort-feasors." *Hamilton v. R. R.*, 203 N. C., 468 (471).

The purpose of section 618, *supra*, is to settle the conflicting joint tort claims in one action. The plaintiff could have made Campbell a party defendant, as a joint tort-feasor. The defendant under the statute has prayed that he be made a party defendant to the end that the entire controversy can be settled in one action under section 618, *supra*. We think the language and intention of the statute was to settle a controversy of this kind in one action.

N. C. Code, *supra*, section 632, is as follows: "Any party aggrieved may appeal in the cases prescribed in this chapter." McIntosh, N. C. Prac. & Proc. in Civil Cases, pp. 767-8. "And a 'party aggrieved' is one whose right has been directly and injuriously affected by the action of the court."

Unnecessary parties and jungle pleadings in an action should not be allowed, but the statute opens the door so that all joint tort-feasors can be brought in for a complete determination of the controversy.

For the reasons given, 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 22 November, 1939.)

1. Appeal and Error § 49a—

A decision reversing a judgment as of nonsuit constitutes the law of the case as to the sufficiency of the evidence upon the subsequent hearing.

2. Automobiles §§ 9c, 18h: Negligence § 20—It is reversible error for the court to fail to charge on element of proximate cause.

A charge that if the jury should find by the greater weight of the evidence that defendant was guilty of negligence *per se* in violating a

safety statute regulating the operation of motor vehicles, they should answer the issue of negligence in the affirmative, is reversible error in failing to charge on the element of proximate cause, since plaintiff is not entitled to recover unless the jury should further find that such negligence proximately caused the injury.

3. Automobiles § 24d—Instruction held for error in failing to charge basis for application of doctrine of respondeat superior.

When recovery is sought against one defendant as the driver of the car causing the injury and against the other defendant under the doctrine of *respondeat superior*, and instruction permitting a recovery against both defendants if the issue of negligence is answered in the affirmative, without submitting the question of whether the driver, at the time, was an employee acting within the scope of his employment, is reversible error.

4. Appeal and Error § 39e—

Any substantial error in the portion of the charge applying the law to the facts of the case is perforce material. C. S., 564.

5. Automobiles § 7—Pedestrians may not cross streets between intersections at which traffic lights are maintained except at marked cross-walks.

It is unlawful for a pedestrian to cross a street between intersections at which traffic lights are maintained unless there is a marked cross-walk between the intersections at which he may cross and on which he has the right of way over vehicles, sec. 135 (c), ch. 407, Public Laws of 1937, and his failure to observe the statutory requirement is evidence of negligence but not negligence *per se*.

6. Appeal and Error § 41—

When a new trial is awarded on certain exceptions, other exceptive assignments of error relating to matters not likely to arise upon the subsequent hearing need not be considered.

APPEAL by defendant from *Johnston, Special Judge,* at September Extra Civil Term, 1939, of MECKLENBURG. New trial.

Civil action to recover damages for personal injuries alleged to have been caused through the negligent operation of an automobile by the defendant Kelley, as agent and employee of the defendant Beaty Service Company.

The plaintiff was crossing West Trade Street in the city of Charlotte between two intersections, at which traffic lights were maintained. When he was at about the center of the street he was struck by a car being operated by the defendant Kelley. He contends that he stopped to permit two cars going in a westerly direction to pass; that the second car, being driven by Kelley, suddenly whipped around the front car at an excessive rate of speed and ran over and against him, causing the injuries. The defendants contend that Kelley was operating his car in a westerly direction at a moderate rate of speed and that the plaintiff, while crossing the street, in an effort to dodge or get out of the way of

another car, suddenly ran in front of or into the car being operated by Kelley. The other facts are fully stated in the opinion of this Court on the former appeal in this case. *Templeton v. Kelley,* 215 N. C., 577.

The jury answered the issues submitted in favor of the plaintiff. From judgment thereon the defendants appealed.

Uhlman S. Alexander for plaintiff, appellee.
H. L. Taylor for defendants, appellants.

BARNHILL, J. The exception of the defendants to the refusal of the Court to sustain the motion as of nonsuit cannot be sustained. On the former appeal this Court reversed the judgment of nonsuit, holding that there is sufficient evidence to be submitted to the jury. *Templeton v. Kelley, supra.* That opinion constitutes the law of this case in that respect.

On the issue of negligence, in its charge, the court instructed the jury in part as follows: "If you find by the greater weight of this evidence, the burden being upon the plaintiff to so satisfy you, that the defendant was operating that car in a straight line, and the plaintiff was standing in the middle of the street in plain view where the driver of that car saw him or, by the exercise of reasonable care, could have seen him, and he violated this section 116 (sec. 116, ch. 407, Public Laws 1937), which I read to you a minute ago, by turning suddenly to the left without giving any warning by the sounding of a horn, and struck this plaintiff, that's negligence *per se,* and you will answer that issue yes." This charge is materially defective in that, for one reason, it entirely omits the element of proximate cause. Notwithstanding the fact the conduct of the defendant may have constituted negligence *per se,* this, of itself, does not require an affirmative answer to the issue. *Woods v. Freeman,* 213 N. C., 314, 195 S. E., 812; *Fleeman v. Coal Co.,* 214 N. C., 117, 198 S. E., 596; *Morris v. Johnson,* 214 N. C., 402, 199 S. E., 390; *Marsh v. Byrd,* 214 N. C., 669, 200 S. E., 389. *Non constat* the testimony of the plaintiff may establish conduct on the part of the defendant which constitutes negligence *per se* or *prima facie* evidence of negligence, the question of proximate cause still remains to be determined by the jury. Proof of negligence *per se* does not, as a matter of law, require an affirmative answer to an issue of negligence. In this case the defendants contend, and offer evidence tending to show, that the cause of the collision between the car and the plaintiff was proximately caused by the conduct of the plaintiff. The jury must determine upon all the evidence not only that the defendants were guilty of negligence *per se* but that such negligence was the cause without which the injuries would not have occurred.

This charge was prejudicial to the defendant Beaty Service Company for a further reason. The issue submitted was:

"1. Was the plaintiff injured by the negligence of the defendants, as alleged in the complaint?"

If there was negligence the defendant Kelley was the active agency thereof and the defendant Beaty Service Company is liable, if liable at all, under the doctrine of *respondeat superior*. Yet this instruction, upon a finding by the jury of the facts outlined therein, requires an affirmative answer as against the defendant Beaty Service Company without any regard to whether Kelley was, at the time, an agent and employee of said defendant, acting within the scope of his employment.

The quoted portion of the charge is, on the first issue, the heart of the instructions. The court thereby undertook to apply the law to the facts of the case on that issue, as required by C. S., 564. Any substantial error therein is material.

The error in the charge already noted is sufficient to require a new trial. However, the provisions of sec. 135 (c), ch. 407, Public Laws 1937, are pertinent on the facts in this case and the court undertook to charge the jury thereon. As, apparently, this is the first time provisions of this section have been involved on an appeal to this Court, it may be well to point out the error of the court in its charge in respect thereto which seems to be based upon a misinterpretation of the provisions of the act.

The court instructed the jury:

"Now if you find, gentlemen of the jury, by the greater weight of this evidence, that there were marked crossways up at Mint Street or down at Graham Street, and the plaintiff wanted to cross that street, it was his duty to go to one of those marked crossways and observe traffic lights and cross in the markings, and if he violated this statute that was negligence *per se*, but that does not relieve entirely the driver of the motor vehicle, only subject to that provision of the statute that I have read to you."

The court later corrected the statement that such acts constituted negligence *per se*. But the charge is based upon the assumption that the statute applies when there are marked cross-walks rather than when there are traffic lights *at* the adjacent intersections. When such lights exist at adjacent street crossings the act, sec. 135 (c), ch. 407, Public Laws 1937, makes it unlawful for a pedestrian to cross the street other than at the intersection unless there is a marked cross-walk at the point he undertakes to cross.

Local authorities may, and often do, mark off, on congested streets, cross-walks at points other than at intersections, particularly opposite the entrance to schools and other public buildings. When traffic control

signals are maintained at adjacent street crossings pedestrians are forbidden to cross the street at any point—other than at the intersection—except at such marked cross-walks. In such case, whether a pedestrian may lawfully cross at any point other than at the intersection depends upon the existence or nonexistence of a marked cross-walk between the adjacent intersections, and, when the pedestrian is crossing at such cross-walk, vehicles must yield the right of way. Sec. 134 (a), ch. 407, Public Laws 1937.

The questions presented by the other exceptive assignments of error may not arise upon the retrial of this cause. We, therefore, refrain from discussion thereof.

New trial.

R. S. RIDDLE, INDIVIDUALLY AS A TAXPAYER OF THE CITY OF CHARLOTTE, AND ON BEHALF OF ALL TAXPAYERS SIMILARLY SITUATED, v. L. L. LEDBETTER, TREASURER OF THE CITY OF CHARLOTTE, A MUNICIPAL CORPORATION.

(Filed 22 November, 1939.)

1. Municipal Corporations § 5—Powers of municipal corporations.

A municipal corporation has only those powers expressly granted in its charter and by the general law, construing the acts together, and those powers reasonably implied in or incident to the granted powers which are necessary to effect the fair intent and purpose of its creation, and it may exercise a sound discretion as to the means by which the purposes of its creation may be accomplished.

2. Municipal Corporations § 11a—City of Charlotte has power to create office of commissioner of police or safety.

The city of Charlotte, which has the form of government as set forth in plan "D" of the general act as modified by its charter, *is held* to have the power to create the office of commissioner of police or public safety and to provide compensation for the incumbent under the provisions of its charter and the general law, C. S., 2623 (7), 2898, 2899; ch. 366, Public-Local Laws of 1939.

APPEAL by plaintiff from *Gwyn, J.*, at June Term, 1939, of MECKLENBURG. Affirmed.

Plaintiff instituted this action as a citizen and taxpayer of the city of Charlotte to restrain the payment of any money by the defendant City Treasurer to the person named as commissioner of police of the city, on the ground that the city was without power to create such office or position and to provide compensation therefor.

Plaintiff alleged that the city council had adopted a resolution that "it is to the best interests of the city to appoint a commissioner of police,

whose duties shall be to coördinate the various functions of the police department, to develop greater efficiency so that the service of the defendant may be improved," and had thereupon created this office or position and directed the city manager to appoint some suitable person to perform its duties. The complaint further alleged that the city council subsequently adopted another resolution, in amplification of the former resolution, prescribing that the duties of the commissioner of police or safety should be to "investigate and study the budget and various functions of the police department of the city and to advise and recommend to the mayor and city council and to the city manager and chief of police as to the best methods of creating efficiency in said department and of improving the service of said department. . . . All duties to be performed by said commissioner of police or safety or which may be imposed hereafter shall be done and performed under the supervision and direction of the mayor and city council."

The former resolution was reënacted and affirmed. It was alleged that the salary for the person filling the position was fixed at $4,200 per annum. It was alleged that neither by the city charter nor by general law was the city empowered to create and compensate the position of commissioner of police or safety.

The defendant demurred on the ground that it appeared from the complaint that the commissioner of police was appointed pursuant to resolution of the city council, and that it did not appear that this action of the city was beyond its power under the law.

The demurrer was sustained and the plaintiff appealed.

E. Riggs McConnell, Clayton L. Burwell, and John James, Jr., for plaintiff, appellant.

J. M. Scarborough for defendant, appellee.

DEVIN, J. The only question presented by this appeal is whether the city of Charlotte had power to create the office of commissioner of police or safety, and to provide for the compensation of the incumbent from the city treasury. No point is made as to the form of the action. There is no allegation of want of good faith or of abuse of discretion, or that the creation of the position is not in the public interest. The validity of the action of the city council is assailed only on the ground of want of power.

A municipal corporation has only such powers as are granted to it by the General Assembly in its specific charter or by the general laws of the State applicable to all municipal corporations, and the powers granted in the charter will be construed together with those given under the general statutes. *S. v. Bridgers,* 211 N. C., 235, 189 S. E., 869; *Burt*

v. Biscoe, 209 N. C., 70, 183 S. E., 1; *Asheville v. Herbert,* 190 N. C., 732, 130 S. E., 861; Dillon Municipal Corporations (5th Ed.), sec. 237.

It is an established principle of law that a municipal corporation possesses and can exercise only those powers expressly granted and those necessarily or fairly implied in or incident to the powers expressly granted, or those essential to the declared purposes of the corporation. 1 Dillon, sec. 237. But it is also true that a municipal corporation may exercise all the powers within the fair intent and purpose of its creation which are reasonably necessary to give effect to the powers expressly granted, and in doing this it may exercise discretion as to the means to the end. *Smith v. New Bern,* 70 N. C., 14; 1 McQuillin Municipal Corp., sec. 367.

The general statutes relating to municipal corporations provide that each "shall have the powers prescribed by statute and those necessarily implied by law and no other" (C. S., 2623), and "to provide for the municipal government of its inhabitants in the manner required by law" (C. S., 2623 [7]). By C. S., 2898, power is given to appoint "such city officers and employees as the council shall determine are necessary for the proper administration of the city." And it is further provided by C. S., 2899, that "officers and employees of the city shall perform such duties as may be required of them by the city manager, under general regulations of the city council."

These sections, 2898 and 2899, of the Consolidated Statutes, are part of Plan "D" of the general act of 1917 relating to municipalities, and it is prescribed by ch. 366, Public-Local Laws 1939 (the city charter) that the form of government of the city shall be as set forth in Plan "D," subject to the modifications set forth in the act. By sec. 32 (32) of this act the city is given power "to pass such ordinances as are expedient for maintaining and promoting the peace, good government and welfare of the city, and the morals and happiness of its citizens, and for the performance of all municipal functions."

In *Simmons v. Elizabeth City,* 197 N. C., 404, 149 S. E., 375, where the charter of the city gave authority to appoint a health officer, city attorney and manager, and "all such other officers, deputies and assistants as it should deem necessary," it was held that the city had power to create the office of sanitary inspector and to appoint someone to perform the duties prescribed. To the same effect is the decision in *City of Covington v. Hicks* (Ky.), 33 S. W. (2), 342, where the creation of the office of supervisor of the fire department and the employment of a person to fill it were held to be within the general powers of the city.

It was said in *S. v. Staples,* 157 N. C., 637, 73 S. E., 112: "It is well recognized in this State that courts will not interfere with the exercise of discretionary powers conferred upon municipal corporations for the

public welfare unless their action is so clearly unreasonable as to amount to an oppressive and manifest abuse of discretion." In *State v. Swearingen,* 12 Ga., 23, *Lumpkin, J.,* uses this language: "These municipal corporations are the germs and miniature models of free government, and their internal police and administration should not be interfered with for slight causes; not unless some great right has been withheld, or wrong perpetrated." 1 McQuillin Municipal Corporations (2nd Ed.), sec. 390.

We conclude that the city of Charlotte had power under the charter and the general statutes to create the position or office of commissioner of police or safety, and to provide for the compensation of the person duly appointed to perform the duties prescribed. The demurrer was properly sustained, and the judgment of the court below is

Affirmed.

STATE v. ANDREW LEFEVERS, BRUCE DUCKWORTH, HARRY BOWMAN AND NEWLAND LEFEVERS.

(Filed 22 November, 1939.)

1. **Assault and Battery § 11: Criminal Law § 52b—Case must be submitted to the jury if evidence considered in light favorable to State is sufficient to sustain verdict of guilty.**

The evidence tended to show that the four defendants, the prosecuting witness and the wife of the prosecuting witness were riding together in an automobile, that one of the defendants held the witness and another defendant cut him with a knife, that the third defendant struck him over the head and that the fourth defendant told the prosecuting witness' wife to keep quiet, he was going to kill the prosecuting witness, *is held* sufficient to be submitted to the jury as to the guilt of each of defendants of assault with a deadly weapon, notwithstanding evidence on the part of defendants that the defendant who cut the witness did so in self-defense in an altercation solely between them, and that the other defendants did not aid or abet him therein. C. S., 4643.

2. **Assault and Battery § 10: Criminal Law § 29e—**

Evidence tending to show ill will between the prosecuting witness and the defendant, arising from the destruction of certain whiskey stills by officers of the law, is competent for the purpose of showing motive.

3. **Criminal Law § 78c—**

Where part of the answer of a witness is not responsive to the question propounded, defendant, if he deems it prejudicial, should request the court to strike it from the record and to instruct the jury not to consider it.

4. Criminal Law § 41b—

When testimony elicited from defendant's witness on cross-examination is confined by the court to the question of the witness' credibility, defendant's exception thereto cannot be sustained.

5. Criminal Law § 81c—

Exceptions to the charge of the court will not be sustained when the charge is free from prejudicial error when read contextually as a whole.

6. Criminal Law § 53e—

A charge to the effect that the trial of the cause involved heavy expense to the county and that it was the duty of the jury to continue their deliberations and decide the issue, will not be held for error when the court, immediately following such instruction, charges the jury that it was its duty to try to come to some agreement and that the court was not attempting to force it to agree.

APPEAL by defendants from *Armstrong, J.*, at June Term, 1939, of BURKE.

The defendants were convicted of an assault with a deadly weapon, to wit: a knife, upon one C. A. Mull.

The State's evidence tended to show that the four defendants, together with C. A. Mull and his wife, were riding in an automobile driven by Andrew Lefevers; that Mull and his wife and one Fred Shuping were riding on the front seat with the driver, and that the defendants Duckworth, Bowman and Newland Lefevers, with Bill Branch, were riding on the back seat; that Andrew Lefevers took his foot off of the accelerator and laid his arm around Mull and said, "I've got the s. o. b., kill him," and immediately Harry Bowman cut the prosecuting witness about the neck and ear, and that Bruce Duckworth struck him over the head, that Newland Lefevers had a blackjack and when the wife of Mull screamed he told her to "shut her damn mouth" that he was going to kill her husband.

The defendants' evidence tended to show that C. A. Mull took offense at Harry Bowman's speaking of Mull's brother as a "weasel face man," and attacked Bowman with his knife, cutting his shirt just over the heart, and that Bowman cut Mull in self-defense; and that none of the other defendants aided or abetted Bowman in doing what he did in cutting Mull.

The jury returned a verdict of guilty of an assault with a deadly weapon as to all four of the defendants, and from judgments of imprisonment, the defendants appealed, assigning errors.

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

Hatcher & Berry and I. T. Avery for defendants, appellants.

SCHENCK, J. While the evidence was conflicting and may have justified an acquittal, when taken in the light most favorable to the State it sustains the verdict, and for that reason the defendants' motions to dismiss the action under C. S., 4643, were properly denied.

The defendant Bruce Duckworth assigns as error the testimony of the witness C. A. Mull, that "He (Bruce Duckworth) met me near my home and there had been several stills cut down; and he asked me had I not reported them stills; he was making liquors. When I said No, that I had not reported it, he said it was going to cause trouble." This assignment is untenable for the reason that the testimony was competent for the purpose, if no other, of showing motive, which though not always necessary to be shown is always competent to be shown in the trial of a criminal action. *S. v. Wilkins,* 158 N. C., 603. The statement "he was making liquors" was not responsive to the question propounded, and the defendant, if he deemed it prejudicial, should have requested the court to strike it from the record and to instruct the jury not to consider it. *S. v. Green,* 152 N. C., 835.

The assignments of error relating to questions propounded to the defendants' character witness, Causby, on cross-examination, as to whether the defendant Andrew Lefevers did not have the general reputation of starting and engaging in fights, are untenable since it appears in the record that the court instructed the jury not to consider the answers against Andrew Lefevers, but only to consider it as bearing upon the credibility of the witness then testifying. *S. v. Holly,* 155 N. C., 485.

There are many assignments of error to excerpts from the charge. We have examined all of these with care and are of the opinion that when the excerpts are read contextually with the whole charge, and not disconnectedly and disjointedly, they are free from prejudicial error. The most serious of these assignments relate to that portion of the charge which, with the context, reads: "That this case took a good little time to try and about a half a day in the argument and the charge of the court and some jury in this county have to pass on it, and you have been selected and sworn to decide, and it is your duty to decide it because it is an expense to the county to retry it. And it is your duty to try to come to some agreement. I am not trying to force you to agree on this case and you may go back to the jury room and continue your deliberations. . . . Remember about the expense of this case and the fact that someone has to try it. You are intelligent men and can try it as well as any men in the county."

In *S. v. Brodie,* 190 N. C., 554 (558), where exception was preserved to an almost similar instruction to the one assailed in the case at bar, it is said: "But in the instruction complained of there is no intimation of an opinion either as to the weight of the evidence or as to the guilt or

innocence of the defendant. His Honor told the jury that a mistrial would be unfortunate, but he was very careful to say, while he hoped they would come to an agreement, he had no desire to force or coerce a verdict. In doing so he exercised the prerogative of a judicial officer, and in his instruction there is nothing which warrants a new trial." While his Honor in the case at bar told the jury "it is your duty to decide it," he immediately followed this instruction with the words "it is your duty to *try* to come to some agreement," and "I am not trying to force you to agree." We think the instructions when read as a whole left the jury free "to try to come to some agreement" uninfluenced by the fact that a mistrial would result in additional cost to the county, and that there was no breach of the judicial prerogative.

No error.

IN RE WILL OF CORA E. REDDING.

(Filed 22 November, 1939.)

1. Wills §§ 17, 24—

Proceedings to caveat a will are *in rem* and must proceed to judgment, and motions for judgment as of nonsuit or requests for a directed verdict will be disallowed.

2. Wills § 21a—

Evidence tending to show that one of the subscribing witnesses signed the will as such in the presence of testatrix and the other subscribing witness, warrants the jury in finding that the witness' subscription met the requirements of C. S., 4131, notwithstanding that the witness wavered somewhat in her testimony.

3. Appeal and Error § 39d—

Where the record does not show what the testimony of a witness would have been had he been permitted to answer the question propounded, the ruling of the court sustaining the objection to the question cannot be held for error.

4. Wills § 22—

While the fact that testatrix gives all her property to a stranger to her blood to the exclusion of her kinspeople may be evidence of mental incapacity or undue influence, it raises no presumption thereof and does not shift the burden of proof to the propounders.

APPEAL by caveator from *Bobbitt, J.*, at March Term, 1939, of RANDOLPH.

On 31 January, 1938, a paper writing propounded by Clifford Nixon as the last will and testament of Cora E. Redding was prepared at her home by G. W. Pugh, a justice of the peace, and purports to be signed

by her on that date. Cora E. Redding died 4 March, 1938. Caveat was filed by Delbert P. Foster, brother of the decedent, wherein it is alleged that the paper writing is not the last will and testament of Cora E. Redding for the reason that at the time of the execution thereof she did not have sufficient mental capacity to make a will and that her signature thereto was procured by undue influence. Clifford Nixon, the propounder, by the terms of the paper writing is made the sole devisee and legatee of the decedent, as well as her executor.

The jury returned the following verdict:

"1. Was the paper writing offered for probate as the last will and testament of Cora E. Redding signed and executed according to law? Answer: 'Yes.'

"2. Was the said Cora E. Redding mentally incapable of making a will? Answer: 'No.'

"3. Was the execution of said paper writing procured by undue influence? Answer: 'No.'

"4. Is the paper writing propounded by Clifford Nixon, and every part thereof, the last will and testament of Cora E. Redding, deceased? Answer: 'Yes.'"

From judgment predicated upon the verdict, the caveator appealed to the Supreme Court, assigning errors.

J. G. Prevette for caveator, appellant.
Moser & Miller for propounder, appellee.

SCHENCK, J. The proceedings to caveat a will are *in rem* without regard to particular persons, and must proceed to judgment, and motions as of nonsuit, or requests for direction of a verdict on the issues, will be disallowed. *In re Will of Hinton,* 180 N. C., 206; *In re Will of Westfeldt,* 188 N. C., 702.

Besides, there was ample evidence to sustain the affirmative answer to the first issue. While the witness to the will, Nettie Davis, may have wavered somewhat in her testimony, still she testified, "I signed my name there as Nettie Davis. When I signed it I was at the home of Mrs. Redding. I was on the other side. I saw her sign it," and further, that when she was sent for "he (Nixon) told me Cora was making a will and that she wanted me to sign it." *Stacy, C. J.,* in *In re Will of Kelly,* 206 N. C., 551, says: "The law makes two subscribing witnesses to a will indispensable to its formal execution. But its validity does not depend solely upon the testimony of the subscribing witnesses. If their memory fail, so that they forget the attestation, or they be so wanting in integrity as willfully to deny it, the will ought not to be lost, but its due execution and attestation should be found on other credible evidence. And so the law provides."

There was other evidence than the testimony of the witness Nettie Davis that she was present and witnessed the will. It is not contended that the other witness, G. W. Pugh, did not properly sign as a witness to the will. Therefore, the jury was warranted in finding that the requirements of C. S., 4131, had been met, by the witnessing in the lifetime of the testator and the subscribing in her presence by two witnesses of the will signed by her.

To the court's sustaining objection to the question propounded by the caveator to his witness, as follows: "Had he, Clifford Nixon, ever done anything specially for her (the decedent)," the caveator preserved exception. This exception cannot be held for error since the answer the witness would have made had he been permitted to reply does not appear in the record. *Lumber Co. v. Childerhose,* 167 N. C., 34.

The court properly told the jury that the burden of proof was on the propounder "to satisfy you from the evidence, and by its greater weight, . . . that you should answer the first issue 'Yes.'"

The appellant assigns as error the failure of the court to charge the jury that under the circumstances of this case the burden of proof on the second issue as to mental incapacity was on the propounder—that since the will gave all of the testatrix' property to a stranger to her blood and cut off her kinspeople, brothers and sister, it was unreasonable and unnatural and raised a presumption of mental incapacity, and that the burden was upon the propounder to rebut this presumption. Such is not the law as enunciated by the decisions of this Court. The decisions are to the effect that unreasonableness and unnaturalness in a will are evidence of mental incapacity and should be so considered by the jury upon the issue as to mental incapacity, but not that the burden of showing testamentary capacity is placed upon, or shifted to, the propounder. *Mayo v. Jones,* 78 N. C., 402; *In re Will of Staub,* 172 N. C., 138; *In re Will of Brown,* 200 N. C., 440.

For the same reasons set forth, the assignments of error relating to the failure of the court to charge that the burden of proof was on the propounder on the third issue as to undue influence is untenable. *In re Will of Broach,* 172 N. C., 520.

We have carefully read the record and examined each exception preserved by the appellant, and are left with the impression that clear cut questions of fact were raised by the pleadings and evidence, that these questions were fairly and impartially presented upon the issues submitted, and that while contrary answers, particularly to either the second or third issue, might have been warranted by the evidence, such answers were not impelled thereby; that the charge was in accord with the decisions of this Court, and we, therefore, find

No error.

STATE OF NORTH CAROLINA, EX REL. A. J. MAXWELL, COMMISSIONER OF REVENUE, v. MARGARET H. TULL.

(Filed 22 November, 1939.)

Taxation § 29—When corporation pays as dividend stock of another corporation, such dividend is equivalent to a cash dividend.

Plaintiff, owning stock in a foreign investment corporation, received as a dividend on such stock, stock of another foreign corporation. *Held:* The stock received as a dividend was taken from the surplus of the investment corporation and was equivalent to a cash dividend, and was taxable as income from stock in a foreign corporation under the provision of 311½ Revenue Act of 1935.

APPEAL by defendant from *Frizzelle, J.*, at Chambers, 9 October, 1939. From WAKE.

Petition for refund of alleged overpayment of income tax.

During the year 1935, the petitioner, Margaret H. Tull, was a resident of the State of North Carolina, and as such, duly filed her income tax return for that year. Thereafter, and within the time allowed by law, the petitioner filed claim for refund, alleging that she had made an overpayment of the tax rightfully due by her.

The facts are not in dispute. Petitioner owned certain stock in the Olympia Investment Corporation, a foreign corporation, and received as a dividend from said corporation during the taxable year in question, 520 shares of the stock of the Coca-Cola Company, another foreign corporation, which, at the time of its receipt, had a market value of $43,355; and in filing her return, this amount was included therein as "dividends from foreign corporations" and a tax of $2,601.30 paid thereon.

The Olympia Investment Corporation was not domesticated in North Carolina during the year 1935 and paid no tax to this State on any part of its income for that year.

The petitioner contended before the Commissioner of Revenue that no income tax was laid upon dividends from stock in foreign corporations by the Revenue Act of 1935, save and except as provided in section 311½ thereof, and that the stock in question did not come within the purview of this section.

The matter was heard by the Commissioner of Revenue on 28 June, 1939, and claim for refund denied. On appeal to the Superior Court of Wake County, the position of the Commissioner of Revenue was upheld. From this ruling, the petitioner appeals, assigning error.

Attorney-General McMullan and Assistant Attorney-General Gregory for plaintiff, appellee.

Murray Allen for defendant, appellant.

STACY, C. J. The pertinent clause in section 311½ of the Revenue Act of 1935 is, that "income from stock in foreign corporations, either in cash or stock dividends, . . . shall be subject to a tax of six per cent," etc.

It is the position of the petitioner that the Coca-Cola stock received by her from the Olympia Investment Corporation in 1935 was neither a "cash" dividend nor a "stock" dividend of the disbursing corporation, and that therefore it was not subject to tax under the above provision of the Revenue Act.

The respondent concedes that it was not a stock dividend, *Trust Co. v. Mason,* 152 N. C., 660, 68 S. E., 235, but contends that it has all the characteristics of a cash dividend, *Trust Co. v. Taintor,* 85 Conn., 452, 83 Atl., 697, and was in fact such a dividend. *Humphrey v. Lang,* 169 N. C., 601, 86 S. E., 526. Additionally, it is the position of the respondent that the words "either in cash or stock dividends," appearing in said section, were not intended to be restrictive, but were inserted therein to make clear the taxability of stock dividends, all other dividends being regarded as cash or its equivalent. *Morgan v. Wisconsin Tax Commission,* 195 Wis., 405, 217 N. W., 407, 61 A. L. R., 357.

We think the tax in question must be upheld as a tax on the "income from stock in foreign corporations." The Coca-Cola stock was taken from the surplus assets of the Olympia Investment Corporation and immediately became the property of the petitioner. This was the equivalent of a cash dividend and in legal parlance is so classified. 11 C. J., 22. "Cash dividends include all distributions of surplus assets, whether in the form of cash or property, taken from the body of the assets to become the property of the shareholders." *Trust Co. v. Taintor, supra.*

The correct result seems to have been reached.

Affirmed.

C. W. FALLS v. ARTHUR GOFORTH.

(Filed 22 November, 1939.)

1. Bailment § 1—

Where the owner of a mule loans the animal to another for the convenience of such other person in harvesting his crop, the relation of bailor and bailee exists between the parties.

2. Bailment § 6—

The burden is upon the bailor to prove negligence on the part of the bailee as a basis of the recovery of damages for the failure of the bailee to make safe return of the property bailed, but such negligence is established *prima facie* by a showing that the bailee received the property in good condition and failed to return it, or returned it in a damaged condition.

3. Same—Evidence that property, at the time it was loaned to bailee, was in good condition and that bailee failed to return same held sufficient to overrule nonsuit.

Evidence that at the time plaintiff loaned his mule to defendant, the mule was in good condition, that defendant hitched plaintiff's mule, which was a willing worker, to a mowing machine with defendant's mule, which was a slow worker and failed to pull his share of the load, that defendant worked the mules without rest on a very hot day until plaintiff's mule fell in harness and died of heat exhaustion, *is held* sufficient to be submitted to the jury in plaintiff's action to recover the value of the mule, and the granting of defendant's motion for judgment of nonsuit was error.

APPEAL by plaintiff from *Ervin, Special Judge,* at May Term, 1939, of GASTON.

Civil action to recover the value of a mule loaned the defendant by plaintiff.

On 22 June, 1938, the plaintiff loaned the defendant a mule to mow a field of oats. The defendant hitched the plaintiff's mule and one of his own to a mowing machine and started mowing about 2:00 p.m. The field was 726 steps in circumference. The defendant went round and round, in a circle, and did not have to stop to turn around. In about an hour, the plaintiff's mule fell in harness and died of heat and exhaustion.

Sam Childres, witness for the plaintiff, testifies that he saw the defendant working the mules "mighty fast to be as hot as it was. . . . It was awful hot. . . . He slapped at the mule (with a little whip) one time and the mule was pulling most of the machine. . . . He did not stop at all while I was in sight of them for some 4 or 5 minutes."

There is further evidence that the defendant's mule was "pretty slow" and would not keep up with plaintiff's mule, which was "a smart mule, free to go, . . . could not take a whipping and didn't need it." Also that plaintiff's mule was in good condition when loaned to the defendant.

From judgment of nonsuit entered at the close of plaintiff's evidence, he appeals, assigning error.

A. C. Jones and John A. Wilkins for plaintiff, appellant.
Ernest R. Warren for defendant, appellee.

STACY, C. J. The appeal presents the question whether the facts bring the instant case within the principle announced in *Beck v. Wilkins,* 179 N. C., 231, 102 S. E., 312, or the rule applied in *Morgan v. Bank,* 190 N. C., 209, 129 S. E., 585. We think the case is controlled by the decisions in *Beck v. Wilkins, supra; Hutchins v. Taylor-Buick Co.,* 198 N. C., 777, 153 S. E., 397; and *Hanes v. Shapiro,* 168 N. C., 24, 84 S. E., 33.

The relation of plaintiff and defendant was that of bailor and bailee. Ordinarily, the liability of a bailee for the safe return of the thing bailed is made to depend upon the presence or absence of negligence. In proving this, the bailor has the laboring oar, but it has been held in a number of cases that a *prima facie* showing of negligence is made out when it is established that the bailee received the property in good condition and failed to return it, or returned it in a damaged condition. *Trustees v. Banking Co.,* 182 N. C., 298, 109 S. E., 6.

The case is not like *Fortune v. Harris,* 51 N. C., 532, where the plaintiff's own evidence exculpated the defendant of any negligence, in that, the horse there loaned fell and injured itself on a stump in the common horse-lot surrounding the defendant's stables.

The case of *Sawyer v. Wilkinson,* 166 N. C., 497, 82 S. E., 840, is likewise distinguishable, for there admittedly the burning to death of the hired mules "was not caused by any negligence of the defendant."

The present case is more nearly parallel to *Rowland v. Jones,* 73 N. C., 52, where a hired horse on being driven a distance of 33 miles in 7½ hours on a very hot day in September was overcome by the heat and died, the ruling being that the case was properly submitted to the jury.

Viewing the evidence with the degree of liberality required on motion to nonsuit, the conclusion is reached that it should be submitted to the jury.

Reversed.

THE FEDERAL FARM MORTGAGE CORPORATION v. HERBERT S. HOLDING AND WIFE, GENEVA J. HOLDING.

(Filed 22 November, 1939.)

Pleadings § 15: Mortgages § 36—Where complaint is sufficient to state any cause of action, judgment dismissing action upon demurrer must be reversed.

Plaintiff instituted this action to recover deficiency judgment upon allegations that after the application of the purchase price at the foreclosure sale to the note secured by the deed of trust there remained a balance

due in a specified sum for which judgment was asked. Defendants set up the defense that the property was purchased at the sale by plaintiff and that, at the time, the property was worth the full amount of the debt (chapter 275, Public Laws of 1933). Plaintiff filed a reply alleging that in the application for the loan defendants waived all right under the said act. Defendant's demurred *ore tenus* to the complaint on the ground that it failed to state a cause of action, and also demurred to the reply, and both demurrers were sustained and judgment was entered dismissing the action. *Held:* The complaint was sufficient to state a cause of action and therefore the judgment dismissing the action must be reversed, and the question of the validity of the waiver agreement, raised by defendant's demurrer to the reply, is not necessary to the determination of the appeal.

APPEAL by plaintiff from *Stevens, J.*, at April Term, 1939, of WAKE. Reversed.

Plaintiff sued for the balance due on a note, secured by deed of trust on land, executed by defendants in March, 1934. Plaintiff alleged that after sale of the land by the trustee under the deed of trust, and after crediting proceeds of sale of $500, there remained a balance due on the note of $669.14, for which judgment was asked. Defendants admitted the execution of the note and deed of trust and the sale of the land, but alleged as defense and set-off that plaintiff had become the purchaser of the land at the sale, and that at the time and place of purchase the land was worth the full amount of the debt secured (ch. 275, Public Laws 1933). Plaintiff filed a reply alleging that defendants, both in the application for the loan and in the deed of trust, had expressly waived all rights under chapter 275, Public Laws 1933, and had agreed to pay the full amount of any deficiency remaining after sale of the land, and that defendants were thereby estopped to claim set-off under the statute. Defendants demurred to the reply, and also demurred *ore tenus* to the complaint, on the ground that the complaint failed to state a cause of action. The demurrer to the complaint was sustained and the action dismissed at the cost of the plaintiff. The court also sustained the demurrer to plaintiff's reply. Plaintiff appealed.

Bailey & Lassiter for plaintiff.
J. G. Mills for defendants.

DEVIN, J. The court below was in error in holding that the complaint did not state facts sufficient to constitute a cause of action, and the judgment sustaining the demurrer *ore tenus* to the complaint and dismissing the action must be, in that respect, reversed. *Ramsey v. Furniture Co.*, 209 N. C., 165, 183 S. E., 536; *Avery County v. Braswell*, 215 N. C., 270.

This disposition of the appeal renders it unnecessary to consider the question, raised by defendants' demurrer to the reply, as to the validity of the waiver agreement contained in the application for the loan and in the deed of trust executed by defendants. As to that we express no opinion.

Judgment reversed.

W. H. BASS, JR., ET AL. v. W. MYERS HUNTER.

(Filed 22 November, 1939.)

Deeds § 16—Findings, supported by evidence, held to warrant judgment that restrictive covenants were no longer enforceable inter se.

Findings, supported by evidence, that the character of the development in which the parties owned lots derived from a common source of title by deeds containing covenants restricting the use of the said lots to residential purposes, had undergone such a substantial and fundamental change as to render the enforcement of the restrictions unjust and inequitable, supports the judgment of the court that the restrictions were no longer enforceable, and denying the injunctive relief sought.

APPEAL by plaintiffs from *Johnston, Special Judge,* at October Term, 1939, of MECKLENBURG.

Civil action to enjoin erection of filling station or automobile service station on defendant's lot in "Cottage Place," city of Charlotte, as violative of restrictive covenants in deeds conveying said property.

The essential facts follow:

1. Plaintiffs are the owners of Lot No. 18, Cottage Place, as shown on map duly recorded, etc., and the defendant is the owner of the southerly half of Lot No. 1, said development. Plaintiffs and defendant derive title from a common source, and the action is to enforce restrictive covenants *inter se.*

2. Deeds to both lots contain restrictive covenants "running with the land," among which is one providing that said lots "shall be used for residential purposes only."

3. After making detailed findings, the court concluded as a fact "that as a consequence of the influx of business in proximity to and thickly surrounding defendant's lot, the value of the said lot as business property is at least 100% more than its value as residential property; that the said community has, during the past ten years, undergone a substantial and fundamental change in its character; that the restrictions placed on defendant's lot more than 26 years ago are of no value to the defendant; and that they operate as a distinct hardship upon the defendant on account of the encroachment of business houses surrounding said lot."

From judgment denying the injunctive relief sought and holding that the restrictive covenants on defendant's lot are no longer enforceable because the character of the surrounding territory or neighborhood has undergone a substantial and fundamental change, the plaintiffs appeal, assigning error.

John James, Jr., for plaintiffs, appellants.
Clayton L. Burwell for defendant, appellee.

STACY, C. J. The question for decision is whether the restrictions in defendant's paper chain of title are enforceable under the rule applied in *Johnston v. Garrett,* 190 N. C., 835, 130 S. E., 835, and *McLeskey v. Heinlein,* 200 N. C., 290, 156 S. E., 489, or unenforceable according to the principle announced in *Starkey v. Gardner,* 194 N. C., 74, 138 S. E., 408, 54 A. L. R., 806; *Higgins v. Hough,* 195 N. C., 652, 143 S. E., 212; *Stroupe v. Truesdell,* 196 N. C., 303, 145 S. E., 925; *Snyder v. Caldwell,* 207 N. C., 626, 178 S. E., 83; *Elrod v. Phillips,* 214 N. C., 472, 199 S. E., 722.

We think the case is controlled by the decisions in the latter line. Indeed, it is patterned after the *Elrod case, supra,* which involved a lot in the same vicinity though not in the same subdivision. The findings are supported by the evidence, and the court's conclusion is a *sequitur* under the applicable decisions. Annotations: 85 A. L. R., 985; 54 A. L. R., 812. See, also, as obliquely pertinent, the case of *Humphrey v. Beall,* 215 N. C., 15, 200 S. E., 918.

Affirmed.

WILLIAM COWARD, LILLIE BELLE COWARD HADDOCK, CORNIE COWARD AND LENA COWARD SPEAR v. CLAUDE COWARD, WILLIAM COWARD, PETE COWARD, HAZEL COWARD, KATHLEEN COWARD, MARY GRAY COWARD, GRACIE COWARD, MINOR CHILDREN OF CLAUDE COWARD, DECEASED.

(Filed 22 November, 1939.)

1. Descent and Distribution § 12: Estoppel § 6g—Evidence of heir's acceptance of lands as his share of parents' estates held sufficient for jury on question of his estoppel from claiming interest in other lands.

The evidence disclosed that parents, each owning certain lands, entered into an agreement to pool their lands for division among their children, that pursuant thereto the share of each child was allotted, that the shares of certain daughters were allotted in their mother's lands but no deeds therefor were executed and that the mother died intestate, but that deeds

were executed to some of the childern and accepted by each as his full share in his parents' lands, that one son signified his willingness to accept the share allotted to him as his full share, but that at his request and direction his share was deeded to his brother in exchange for other lands deeded to him by his brother. *Held:* The son's signified willingness to accept the share allotted to him and the deeding of such share to his brother at his request in exchange for lands deeded him by his brother is tantamount to his acceptance of deed from his parents for the share allotted to him, and such fact, under the circumstances, would estop him from claiming any interest in the lands of his mother, and the evidence is sufficient to be submitted to the jury on the question of estoppel.

2. Estoppel § 10—

When a child would be estopped, if living, from asserting any interest in lands of which his mother died intestate by reason of his prior acceptance of deed to other lands as his full share in his parents' lands under an agreement by them to pool their lands for division among all their children, such child's children, as his sole heirs at law, are bound by the estoppel.

3. Evidence § 32—Widower has no interest in division of wife's lands among their children, precluding his testimony as to agreement with her.

When a husband and wife, each owning certain lands, enter into an agreement to pool their lands for division among their children, and the wife dies intestate before her lands are deeded in accordance with the agreement, the husband has a life estate in her lands as tenant by the curtesy regardless of the disposition of the lands among the children, and therefore has no direct pecuniary interest in an action by the children to whom deeds were not executed to declare the heirs of another child estopped to assert an interest in the lands of their mother, and his testimony of the agreement with his wife is not precluded by C. S., 1795.

4. Husband and Wife § 4b—

An agreement by a husband and wife to pool their respective lands for division among their children is not an agreement under which any interest in his wife's lands moves to the husband, and it is not required that such agreement be executed in accord with C. S., 2515.

APPEAL by defendants from *Hamilton, Special Judge,* at May Term, 1939, of CRAVEN.

L. I. Moore for plaintiffs, appellees.
J. H. Harrell for defendants, appellants.

SCHENCK, J. This is an action to have the plaintiffs other than William Coward, namely, Lillie Belle Coward Haddock, Cornie Coward and Lena Coward Spear, declared the owners of a tract of land containing 110 acres, of which their mother, the late Mary Argent Coward, died seized.

The plaintiffs alleged and offered evidence tending to show that William Coward and his wife, Mary Argent Coward, had seven children, namely, Lena Coward Spear, Herman Coward, Luther M. Coward, Mary Gray Coward, Lillie Belle Coward Haddock, Cornie Coward and Claude Coward; that William Coward was seized and possessed of a tract of land containing 185 acres and that Mary Argent Coward was seized and possessed of a tract of land containing 110 acres; that William Coward and his wife, Mary Argent Coward, entered into an agreement to pool their real estate holdings and make a joint division of the same among their children; that in execution of said agreement William Coward and Mary Argent Coward executed deeds to their children, Luther M. Coward, Mary Gray Coward and Herman Coward, respectively, for portions of the 185-acre tract owned by William Coward, which deeds and the land conveyed thereby were delivered to and accepted by the respective grantees therein pursuant to and in acknowledgment of said agreement theretofore entered into between their parents to pool their lands and divide the same among their children; that the said William Coward and his wife, Mary Argent Coward, in execution of said agreement also allotted another portion of the said 185-acre tract to their son, Claude Coward, which the said Claude Coward signified he was willing to accept as his share in his parents' lands but which he requested his parents to convey to his brother, Herman Coward, as he and Herman had traded lands, he giving to Herman Coward his share in his parents' lands for a certain tract of land in Pitt County; that William Coward and Mary Argent Coward, in compliance with the request of their son, Claude Coward, did convey the land they had allotted to Claude Coward to Herman Coward; that Herman Coward conveyed to Claude Coward a tract of land in Pitt County in exchange for Claude Coward's interest in his parents' lands; that William Coward and his wife, Mary Argent Coward, never made any conveyance to their three daughters, plaintiffs in this case, in pursuance to their agreement to pool their lands and divide them among their children, for the reason that their said daughters were in no immediate need of land; that Mary Argent Coward died intestate in the year 1930; that Claude Coward, son of William Coward and Mary Argent Coward, died intestate in the year 1931; that the defendants are the children of Claude Coward, deceased, and are his sole heirs at law, the minors among them being represented by a guardian *ad litem* duly appointed by the court.

The jury returned the following verdict:

"1. Did the plaintiff, William Coward, and his wife, Mary Argent Coward, prior to 1918, pool their respective tracts of land for the purpose of making a division thereof among their seven children, as alleged in the complaint? Answer: 'Yes.'

"2. Did Claude Coward, father of the defendants in this action, accept and receive his share of such division during his lifetime, and cause, procure and direct his said share to be conveyed to Herman Coward, his brother, in exchange for a tract of land in Pitt County, as alleged in the complaint? Answer: 'Yes.'

"3. Are the defendants, and each of them, estopped from claiming any interest in the remaining land of said William Coward and Mary Argent Coward, as alleged? Answer: 'Yes.'"

To judgment to the effect "that the defendants, and neither of them, are the owners of any interest in the lands described in the complaint known as the Mary Argent Coward lands, and that said defendants are estopped to claim any interest in said land," the defendants excepted and appealed to the Supreme Court, assigning errors.

There was ample evidence to sustain the verdict and the motion for judgment as in case of nonsuit entered pursuant to C. S., 567, was properly denied. The verdict supports the judgment.

The law governing the case is thus stated by *Barnhill, J.*, in *Allen v. Allen,* 213 N. C., 264: "Where parents pool their real estate interests for the purpose of making an equitable partition thereof among their children, and actually partition and allot to each child the share they desire it to have in their real estate, and actually execute and deliver to two of the children a deed for the tract allotted to them jointly, which deed was accepted by the two children with full knowledge of the conditions upon which it was executed, and with the information at the time that it was tendered to them as representing their full interest in the joint real estate holdings of their parents, will the acceptance of such deed by said children estop them from claiming any further interest in the estate of their parents other than personal property which was not then divided? We answer this question in the affirmative."

The evidence is plenary that the parents of Claude Coward, prior to his death, entered into an agreement to pool their lands and to divide such lands among their seven children, and that pursuant to such agreement they allotted a portion of the lands of his father to their son Claude, and that the said Claude signified his satisfaction with the land allotted to him and his willingness to accept it as his share in his parents' lands, and that the said Claude requested that the deed for his portion be made to his brother, Herman Coward, as he had traded his share in his parents' lands to said Herman for a tract of land in Pitt County, and that the said Herman conveyed land in Pitt County to the said Claude, and that William Coward and his wife, Mary Argent Coward, conveyed the land they had allotted to their son Claude to their son Herman. These facts are sufficient to estop Claude Coward, were he alive, from asserting any claim in the land of his mother, since the deed

to his brother Herman made at his request and the acceptance by him of a deed from his brother for the Pitt County land were tantamount to a deed made to and accepted by him from his parents for his share in their lands. The defendants, being the sole heirs at law of Claude Coward, deceased, are estopped, as were their ancestor, to assert any claim to a share in the lands of Mary Argent Coward.

The assignments of error relating to the testimony of William Coward, one of the plaintiffs, to the effect that the said William Coward and his wife, Mary Argent Coward, had entered into an agreement to pool their lands and divide them among their children upon the ground that William Coward was "a party interested in the event" and was being examined as a witness against the survivors of a deceased person in violation of C. S., 1795, are untenable, for the reason that it appears from the pleadings and from the evidence that the estate of William Coward in the lands involved would be the same irrespective of which parties prevailed in this action, his interest being a life estate as tenant by the curtesy in any event. William Coward had no interest in the event, that is, he had no legal or pecuniary interest, such as is required by the statute, in the result of the litigation. *Jones v. Emory,* 115 N. C., 158; *Burton v. Styers,* 210 N. C., 230; *Allen v. Allen, supra.*

The assignments of error based upon the fact that the agreement to pool and divide their lands among their children entered into by the parents was not executed in accord with C. S., 2515, are untenable, for the reason that the agreement was not a contract between husband and wife whereby any interest was moving to the husband in the real estate of his wife, which the statute was passed to prevent unless the wife freely and voluntarily assented thereto and was not unreasonably and injuriously affected thereby. The question involved in this case is not whether a contract between husband and wife affecting or changing her real estate is valid, but whether the defendants are estopped by the action of their ancestor in accepting the land allotted him as his share in his parents' lands.

We have examined the other assignments of error relating to the admission and exclusion of evidence, and to certain excerpts from the charge and we are of the opinion that no prejudicial error was committed. The principal questions involved in the case, we think, are settled by *Allen v. Allen, supra.*

No error.

NORMAN GOLD, ADMINISTRATOR OF ESTATE OF COY AUSTON, v. W. B. KIKER, L. C. YOUNT AND C. G. GAITHER, TRADING AS KIKER & YOUNT, AND AMES & WEBB, INC.

(Filed 22 November, 1939.)

1. Negligence § 1—Definition of actionable negligence.

In order to establish actionable negligence plaintiff must show a failure to exercise proper care in the performance of some legal duty which defendant owed plaintiff under the circumstances in which they were placed, and that such negligent breach of duty was the proximate cause of the injury.

2. Negligence § 5—Definition of proximate cause.

The proximate cause of an injury is that cause which produces 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.

3. Highways § 19—Evidence held for jury on question of negligence of contractors in failing to maintain proper warnings of danger.

The evidence favorable to plaintiff tended to show that defendants were awarded, respectively, a contract to widen a public highway and a contract to widen a bridge thereon, that the road contractor had finished widening the highway to a point 20 feet from the bridge, that the bridge contractor had not started work on the bridge proper, but had started the construction of a temporary bridge for a detour, that the highway at the time of the accident was thus four feet wider than the bridge, that no lights or warning signals were placed at the bridge or along the highway, and that the driver of the truck in which plaintiff's intestate was riding, was driving with its right wheels on the widened portion of the highway and struck the abutment of the bridge, resulting in the death of intestate, and that the injury occurred after both contracts had been awarded and before any work under either had been accepted by the State Highway Commission. *Held:* The evidence was sufficient to be submitted to the jury as to each contractor upon the issue of negligence and proximate cause in failing to maintain reasonable warnings and safeguards as they were under duty to do for the safety of the traveling public under the terms of their contracts with the State Highway Commission.

4. Negligence §§ 7, 19d—Intervening act must be unforeseeable in order to insulate primary negligence.

A nonsuit may be granted for intervening negligence only when the injury is independently and proximately produced by the wrongful act, neglect or default of an outside agency or responsible third person, and an intervening act will not break the sequence or insulate the primary negligence if the intervening act is foreseeable under the circumstances in the exercise of ordinary prudence.

5. Negligence § 6—

Each person whose negligence is a proximate cause, or one of the proximate causes of injury may be held liable.

6. Automobiles § 18d—Held: Accident was foreseeable under conditions of road under construction, and therefore failure of driver to have avoided injury did not insulate negligence of contractors.

The evidence disclosed that the highway at the scene of the accident had been widened but that the bridge on the construction project had not yet been widened, so that the bridge was four feet narrower than the highway, that plaintiff's intestate was a passenger in a truck driven along the highway at night with its right wheels on the widened portion of the highway, that there were no flares or warning signals at the bridge or along the highway, and that the driver of the truck hit the abutment of the bridge, resulting in the death of intestate. *Held:* Even conceding that the driver of the truck was guilty of negligence in failing to see the abutment of the bridge in time to have avoided the injury, the negligence of the driver will not insulate the negligence of defendant contractors in failing to maintain reasonable warnings and safeguards as they were required to do under their contracts with the State Highway Commission, since an ordinarily prudent person could have foreseen the intervening act and resulting injury.

BARNHILL, J., concurs in part and dissents in part.

APPEAL by plaintiff from *Thompson, J.*, at February Term, 1939, of NASH.

Civil action for recovery of damages for alleged wrongful death. C. S., 160.

On the night of 19 May, 1938, plaintiff's intestate, Coy Auston, while traveling asleep in the cab of a truck operated by one I. D. Walker, en route from Philadelphia to Florida, was killed when the truck collided with west abutment wall of a bridge over a prong of Swift Creek approximately two miles south of Whitakers, North Carolina, and two miles north of Battleboro, on State Highway Project No. 1647, and burned.

Plaintiffs allege that the death of intestate was proximately caused by the joint and concurrent negligence of the defendants in failing in their duty to provide adequate warning signals along the said highway and at the bridge to indicate to the traveling public the dangerous condition created there by widening of the old paved portion of the highway.

Plaintiff further alleges and offered evidence tending to show:

1. That at that time defendant, Ames & Webb, Inc., under contract with State Highway and Public Works Commission of North Carolina, dated 3 December, 1937, for widening the highway between said points adjacent to said bridge, had widened same by laying a strip of concrete paving four feet wide along the west side of and adjoining the old concrete road, from Whitakers to a point 20 feet north of said bridge; thus leaving the west abutment of the bridge four feet east of the western margin of the added strip, and that said defendant "was waiting on the defendants, Kiker & Yount, to complete the bridge project" before

returning to fill in the space between the end of above strip and the bridge.

2. That defendants, Kiker & Yount, entered into contract with State Highway and Public Works Commission of North Carolina, dated 28 January, 1938, for the construction of all bridge structures on said State Highway Project No. 1647 between said points, including the bridge at which plaintiff's intestate met his death, and entered upon the performance of said contract about 14 February, 1938; that, under the terms of their contract, and during the construction of said bridge, these defendants were required to build a detour bridge for the accommodation of traffic over said road; and that prior to 19 May, 1938, they had caused piling to be driven adjacent to and west of the bridge in question for the purpose of constructing thereon a temporary detour bridge. Plaintiff offered in evidence part of answer of these defendants admitting these facts, but averring that they "had not touched the bridge or in any way interfered therewith or done anything either to the bridge or highway to make the same more hazardous than it had been since its construction many years prior thereto."

3. That on 19 May, 1938, no part of the work covered by the contracts of Ames & Webb, Inc., and of Kiker & Yount with State Highway and Public Works Commission had been accepted by said Commission.

4. That these contracts provide that the construction work included therein is to be done in accordance with the specifications contained in the published pamphlet entitled "State of North Carolina, State Highway and Public Works Commission specifications April 1, 1935," and supplements thereto, which are by reference incorporated in and made a part of the contracts.

5. That said specifications provide, *inter alia,* that: (a) "Where used therein the word 'contractor' shall mean any individual, firm or corporation with whom a contract is made by the State Highway and Public Works Commission." Paragraphs 5.4 of section 5, page 15. (b) "Where the road to be constructed under the specifications follows the general route of an existing road which is wholly or in part used by the traveling public the contractor shall at his own expense repair and maintain in safe, passable and convenient condition such part or parts of such existing roads as are being so used between extreme limits of the work under this contract during the entire time from the award of this contract until the final acceptance of the work hereunder and all such existing road end parts thereof and construction thereon shall be under the jurisdiction of the contractor and he shall be liable therefor." Paragraph 4.5, section 4, page 12.

(c) "The contractor shall provide, erect, maintain and illuminate where necessary all barricades placed at the beginning or end of the

construction project and any barricades that are needed in case through detour intersects or crosses construction work. . . . The contractor shall erect and be responsible for all local detour signs and all barricades." Paragraph 7.7 of section 7, page 22.

6. That in the contract of Ames & Webb, Inc., it is provided: "Maintenance of Traffic: The roadway contractor will be required to take care of all local and through traffic within the limits of this project during construction by using the present road where possible and constructing and maintaining a suitable detour and crossings where necessary, all of which shall be done at his own expense. He shall place and maintain such signs, danger lights and watchmen as in the opinion of the engineer may be necessary."

Defendants respectively deny the allegations of duty to warn, of breach of duty and several alleged acts of negligence, and aver that proper warning signs, flares and lights were displayed and that the death of intestate was "proximately caused by the sole negligence of the driver of the truck in failing to keep a proper lookout."

Defendants, Kiker & Yount, aver that at the time of the accident in question the actual repair of the bridge itself had not begun, and say that, while they had driven some piling in Swift Creek on the west side and near to the bridge, they were not charged with any duty to warn the public of any danger on the said bridge before they had begun to dismantle it or in some way to increase the hazard of travel over it.

Defendants, Ames & Webb, Inc., aver that on 19 May, 1938, they had completed the construction of the strip of paving to a point 20 feet on each side of and in front of the bridge, and, as required by their contract with the State Highway and Public Works Commission, were deferring the paving of that space until the bridge project had been completed by Kiker & Yount; that some time prior thereto Kiker & Yount had hauled material to the bridge project and had driven piling in the stream on the west side of the bridge for the purpose of building a temporary bridge to be used by the traveling public while the original bridge was being widened, and "were in full charge of said project, including the bridge and highway adjacent thereto, and were charged with the duty of maintaining same in a reasonably safe condition, including the display of all necessary warning signs, and that Ames & Webb, Inc., was not then charged with any duty whatever in connection with safeguarding the project."

Plaintiff further offered evidence tending to show substantially these facts: That the highway south of Whitakers was then open to and used by public traffic; that in traveling from Whitakers and approaching the bridge the truck, empty at the time, was being operated on the right-hand side of the road with right wheels on the strip of new paving; that the driver was not familiar with that part of the road; that he did not

see any signs at Whitakers or along the road to indicate that any construction work was going on; that there were no lights along the road to indicate such work; that there was no light on the bridge; that there was not any sign or barricade to indicate that the bridge was narrower than the pavement and extended into the highway; that there was nothing to warn that the four-foot strip of pavement ended within approximately 20 feet of the bridge; that the truck was properly equipped with lights; that the driver was awake and alert just before the accident, and was driving at such a speed and had the truck under such control that he could have stopped it and avoided colliding with the bridge if there had been a light on the bridge; that the truck was traveling 35 to 40 miles per hour; that it came to rest at the south end of bridge, which was 60 feet long; that the driver on cross-examination being asked this question—"You tell the jury, running 35 to 40 miles an hour you could not see as big a thing as a bridge in front of you?" replied: "Not when it is white, standing up there like the road, you can't."

There was evidence that the right abutment of the bridge was four and a half to five feet high and two feet wide; that the driver did not see the bridge until too close to avert the collision, and that though there was no light on the bridge another truck driver saw it that night and did not hit it.

Evidence for plaintiff further tended to show that the driver of the truck, while being taken to the hospital immediately after the accident, while in the hospital and afterward, had stated to different persons that the left front tire blew out, causing the truck to run into the bridge abutment on the right. The driver testified that he did not remember making such statements. In this connection there is evidence tending to show that the driver was severely burned, suffered intensely, and was under influence of opiates for several weeks, and, was not responsible for such statements, if made; and there was also evidence that he appeared to know and understand what he was saying.

While there is evidence that the driver of the truck did not see any signs at Whitakers, which was at one end of the project, and two miles from the scene of the accident, there is testimony from another witness that he knew there were two signs there, one saying "the speed limit was 25 miles," and the other, "Road under construction."

While there is evidence that in approaching the bridge from the north the road is practically straight and level for more than one hundred yards, one witness testified: "You come around the curve and drop down a hill and it makes your lights closer to the ground," and another testified: "When you come down that little hill with an empty truck it throws the lights close to you," and again, "When you go down that little hill, it is kinder dark down at the bridge. Your lights don't pick it up 200 feet. You can drive and tell it."

From judgment sustaining demurrer to the evidence as to both defendants, plaintiff appeals to the Supreme Court and assigns error.

Thorp & Thorp and Norman Gold for plaintiff, appellant.
R. L. Savage and Battle & Winslow for defendants Kiker & Yount.
Thos. W. Ruffin for defendants Ames & Webb, Inc.

WINBORNE, J. The only exceptive assignment on this appeal is to judgment as of nonsuit. C. S., 567. This presents two questions: (1) Is there sufficient evidence of actionable negligence on the part of (a) defendants Ames & Webb, Inc., and (b) defendants Kiker & Yount to require the submission of an issue or issues to the jury with respect thereto? (2) Is there sufficient evidence of negligence on the part of the driver of the truck in which intestate was traveling at the time of his injury and death as insulates any negligence on the part of the defendants, or either of them, as a matter of law?

The first is answered "Yes" and the second "No."

(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 defendants 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." *Templeton v. Kelley,* 215 N. C., 577, 2 S. E., 2d, 696.

Measured by the requirements of these principles, the evidence in the instant case, considered in the light most favorable to plaintiff, is sufficient to take the case to the jury on the issue of actionable negligence as above defined. The contractual obligations assumed by each of the defendants as reflected in the provisions quoted in the above statement of the case provide evidence of legal duty which the defendants, and each of them, owed to plaintiff intestate, and others traveling the highway, to exercise ordinary care in providing and maintaining reasonable warnings of and safeguards against conditions existent at the time and place in question—a duty which originated upon the award of the contract and continued until the final acceptance of the work by the State Highway and Public Works Commission.

(2) A nonsuit may not be granted on the ground of insulation of negligence unless "it clearly appears from the evidence that the injury complained of was independently and proximately produced by the

wrongful act, neglect or default of an outside agency or responsible third person." *Stacy, C. J.*, in *Smith v. Sink*, 211 N. C., 725, 192 S. E., 108, and cases cited. See, also, *Powers v. Sternberg*, 213 N. C., 41, 195 S. E., 88; *Ferguson v. Asheville*, 213 N. C., 569, 197 S. E., 146.

"Foreseeability is the test of whether the intervening act is such a new, independent and efficient cause as to insulate the original negligent act. That is to say, if the original wrongdoer could reasonably foresee the intervening act and resultant injury, then the sequence of events is not broken by a new and independent cause, and in such event the original wrongdoer remains liable." *Brogden, J.*, in *Hinnant v. R. R.*, 202 N. C., 489, 163 S. E., 555. See, also, *Harton v. Tel. Co.*, 141 N. C., 455, 54 S. E., 299; *Herman v. R. R.*, 197 N. C., 718, 150 S. E., 361; *Beach v. Patton*, 208 N. C., 134, 179 S. E., 446.

Where two or more proximate causes contribute to the injury, a defendant whose negligent act brought about one of such causes is liable. *Albritton v. Hill*, 190 N. C., 429, 130 S. E., 5; *Campbell v. R. R.*, 201 N. C., 102, 159 S. E., 327; *Johnson v. R. R.*, 205 N. C., 127, 170 S. E., 120; *Lewis v. Hunter*, 212 N. C., 504, 193 S. E., 814.

Applying these principles to the case in hand, evidence appears from which the jury may find that, even though the driver of the truck be guilty of negligence contributing to the accident, the conditions existent at the time and scene of the accident were such that an ordinarily prudent person in the exercise of due care could foresee the intervening act and resultant injury. These are questions for the jury under appropriate instructions by the court.

The judgment below is

Reversed.

BARNHILL, J., concurs as to the defendants Ames & Webb, Inc., but dissents as to the defendants Kiker & Yount.

MRS. LAURA R. SMITH, WIDOW OF JOHN HAZEL SMITH, DECEASED, v. CITY OF GASTONIA AND/OR GASTONIA ATHLETIC ASSOCIATION, EMPLOYERS, AND AMERICAN EMPLOYERS' INSURANCE COMPANY, CARRIER.

(Filed 22 November, 1939.)

1. Master and Servant § 40f—

While ordinarily an employer is not liable under the Workmen's Compensation Act for an injury suffered by an employee while going to or returning from work, the employer may be held liable when he furnishes the means of transportation as an incident to the contract of employment.

2. Same—Injury to policeman inflicted while he was returning home, after regular hours, on motorcycle under his exclusive control, held compensable.

The evidence tended to show that the deceased employee was a motorcycle policeman, that he had regular hours of duty, but that he was under duty to arrest violators of the law and prevent a breach of the peace within the city limits at all times and was subject to call at any time, that he was furnished a motorcycle for which he was solely responsible, that at the time he was employed it was understood that he could leave the motorcycle at headquarters or take it home as he preferred, and that he had customarily ridden it home. *Held:* The evidence is sufficient to support the finding of the Industrial Commission that a fatal accident occurring while he was riding the motorcycle home after his regular hours of duty arose out of and in the course of his employment, and sustains an award against the city for compensation to his dependents for his death.

APPEAL by defendants, City of Gastonia and American Employers' Insurance Company. Affirmed.

This was a proceeding before the North Carolina Industrial Commission upon a claim of Mrs. Laura R. Smith *v.* the City of Gastonia, the Gastonia Athletic Association, Employers, and American Employers' Insurance Company, Carrier. During the proceeding the claim as to Gastonia Athletic Association was disallowed for want of any evidence of liability, and as to this there was no appeal. The present controversy concerns the liability of the city of Gastonia and the American Employers' Insurance Company only. The cause was heard by Commissioner Dorsett, and upon appeal by the defendants from adverse findings of fact and conclusions of law by the hearing Commissioner the matter was heard by the Full Commission, and the opinion was filed and award made on 24 October, 1938. From this there was an appeal to the Superior Court, where the award was affirmed, and, thereupon, the defendants appealed to this Court.

Leaving out the more formal part of the evidence, as to which there is no controversy, the facts disclosed are substantially as follows:

At the time of his injury and death John Hazel Smith was employed by the city of Gastonia in the capacity of motorcycle policeman. Certain hours were prescribed during which the policeman was said to be "on duty," but it was also one of the duties of his employment to arrest at any time violators of the law or to prevent infractions of peace within the city limits, and he was also at all times "on call." At the particular time his "on duty" hours, in the sense above named, had expired, and he was riding home on the motorcycle furnished him by the city.

As to this, the evidence tended to show that at the time he was sworn in he was provided with a motorcycle and other equipment necessary to the discharge of his duties, and as to the motorcycle he was given the

entire responsibility and care for it, and it was understood that he might keep it at headquarters or at his home, according to his preference. He had been keeping it in the garage at home. Smith used the motorcycle in the discharge of his duties as a policeman within the city limits, and used it as a means of transportation to his home when the hours for his more exacting duties had elapsed, and this was through the authorization of the city manager at the time of his employment.

Thus returning to his home on the motorcycle he collided with an approaching car, which, as the evidence discloses, was driven carelessly and recklessly, and he was killed.

Upon this evidence the Full Commission found as fact that the city of Gastonia furnished the deceased with transportation to and from his home and police headquarters in the form of a motorcycle, which was used by the deceased while performing his regular duties as an officer, and that on 4 September, 1937, "said Smith sustained an injury by accident arising out of and in the course of his regular employment," which resulted in his death on 5 September, 1937.

Upon this evidence and these findings of fact (and others not in controversy), the court sustained the conclusions of law reached by the Industrial Commission and affirmed the award.

Cherry & Hollowell for plaintiff, appellee.

King & King, H. B. Foster, and Harry Rockwell for defendants, appellants.

SEAWELL, J. The sole question in controversy here is as to whether the decedent was at the time of his injury and death in the exercise of any of the duties of his employment or in the enjoyment of its protection.

Nothing else appearing, an employer is not liable for accidents occurring to an employee while going to or returning from the employer's premises in order to begin his work or after its conclusion, and an accident so occurring is not held to arise out of and in the course of the employment. *Bray v. Weatherly & Co.,* 203 N. C., 160, 161, 165 S. E., 332, 94 A. L. R., 589.

But the authorities seem to be uniform to the effect that where the employer furnishes the means of transportation to and from the place where the service is performed as an incident to the contract of employment an injury suffered by the employee while going to and from work is compensable. *Phifer v. Dairy,* 200 N. C., 65, 156 S. E., 147; *Jackson v. Creamery,* 202 N. C., 196, 162 S. E., 359; *Bellamy v. Mfg. Co.,* 200 N. C., 676, 158 S. E., 246; *Parrish v. Armour & Co.,* 200 N. C., 654, 158 S. E., 188; *Massey v. Board of Education,* 204 N. C., 193, 167 S. E., 695, and cases cited.

It is contended here that the furnishing of the motorcycle by the city of Gastonia was not incident to the contract of employment and, therefore, did not come under the rule.

The testimony is that at the time he was employed or sworn in the motorcycle was furnished him, and the understanding was that he could use it in his employment as a motorcycle policeman and that he could leave it at headquarters or carry it home, as he saw fit; but that at any rate he was solely responsible for it at all times.

If this should need strengthening, and we do not think so, as throwing some light on the intention of the parties, we may consider the course of their dealings as to a certain extent indicating the interpretation they themselves put upon it. *Cole v. Fibre Co.*, 200 N. C., 484, 157 S. E., 857; *Hood v. Simpson*, 206 N. C., 748, 175 S. E., 193; *Bank v. Courtway*, 200 N. C., 522, 157 S. E., 864. Daily, and with the knowledge of the authorities, the decedent rode the motorcycle from his home to headquarters to begin his more particular duties, and when the hours were over he rode it back again to his home. The fact also that he was a motorcycle policeman and so equipped because it was necessary for him immediately to respond to emergencies, which he could do only by the use of the motorcycle given into his complete custody and control, and that he was always on call, strongly supports the view taken of the case both by the Industrial Commission and the court below, and their conclusion that he suffered his injury and death from an accident arising out of and in the course of his employment. We reach the same conclusion.

The judgment is

Affirmed.

THE TOWN OF ZEBULON v. MRS. EMMA R. DAWSON AND HUSBAND, A. C. DAWSON; SHERWOOD BRANTLEY, TRUSTEE; ELEANOR D. CHAMBLEE AND WAKE COUNTY.

(Filed 22 November, 1939.)

1. Equity § 3—

Equity is the complement of law for the purpose of rendering justice between litigants where the law, by reason of its inflexibility, is deficient, and equity never overrides or sets at naught a positive statutory provision, but, as an instrument of remedial justice, follows the law.

2. Municipal Corporations § 34—

The interest rate on street assessments is fixed by statute, C. S., 2716, 2717, Public Laws of 1929, ch. 331 (1), and the courts are without authority at law or in equity to prescribe a lesser interest rate.

3. Same—Assessments for public improvements are not subject to set-off or counterclaim.

Defendant, owning lands subject to a lien for delinquent street assessments, pleaded a past-due bond of the municipality as an offset in the municipality's action to foreclose the assessment lien, and judgment was entered permitting defendant to pay the assessments in ten yearly installments, reducing the interest rate thereon, and providing that the municipality should hold the bond issued to refund the bond owned by defendant, as collateral security, and should return the bond to defendant when the assessments were fully paid. *Held:* Assessments for public improvements are not subject to set-off or counterclaim, and the court erroneously took into consideration the municipal bond owned by defendant in adjudicating the rights of the parties.

4. Same—

In ordering the foreclosure of a lien for paving assessments, the court may grant defendant reasonable time in which to pay in order to give defendant opportunity to refinance and prevent foreclosure, but a grant of ten years within which to pay in equal annual installments is unwarranted.

5. Same: Costs § 2a—

Costs follow the final judgment, and when a municipality is entitled to the relief sought in its action to foreclose a paving assessment lien, it is error to tax any part of the costs against it.

APPEAL by plaintiff from *Stevens, J.*, at May Term, 1939, of WAKE. Error and remanded.

This is a civil action to foreclose a paving assessment lien on property now owned by the defendants.

The plaintiff having heretofore, to wit, on or about 1 March, 1926, duly assessed two certain lots within its corporate limits, their proportionate part of the costs of paving, now holds said lien upon which no payment has been made since 30 April, 1928. It is admitted that there is now due thereon, on the first tract, $311.57 with 6% interest from 30 April, 1928, and on the second tract, $338.35 with 6% interest from 30 April, 1928.

The defendants purchased the said two tracts of land in March, 1936, subject to said street paving assessments. Thereafter, in March, 1938, the defendants purchased, for $600, a water bond of the plaintiff in the sum of $1,000 payable 1 May, 1937. The bond issue of which this bond is a part has been refunded by the town, new bonds bearing 3% interest having been issued for the old bonds. The defendants in their answer pleaded this bond by way of set-off and counterclaim.

When the cause came on for hearing the parties waived trial by jury and agreed that the judge presiding should hear the evidence, find the facts and render judgment thereon. At the same time, the defendants admitted the legality of the assessments and the correctness of the

amount claimed by the town. After hearing the evidence the court found the facts, made certain conclusions of law, and adjudged and decreed:

"(1) That the defendant Mrs. Emma R. Dawson is justly indebted to the plaintiff town of Zebulon in the sum of $1,001.83, together with interest thereon at the rate of 3% per annum from May 1, 1937, until paid, which indebtedness is hereby declared to be a lien on the property described in the complaint and described in this judgment, but is in no wise a personal judgment or a lien on any other property owned by said defendant.

"(2) That the defendant Mrs. Emma R. Dawson is hereby ordered to deposit with the clerk of the Superior Court of Wake County the new bond issued by the town of Zebulon in lieu of the old bond herein described as collateral security to the paving assessment lien hereinabove described. That the clerk of the Superior Court of Wake County, North Carolina, will hold said bond until said paving assessment lien is fully discharged, and will then deliver the same to the defendant Mrs. Emma R. Dawson.

"(3) It is further ordered, adjudged and decreed that the paving assessment, to wit, $1,060.00, be divided into ten equal payments or installments, and that the defendant Mrs. Emma R. Dawson be allowed to pay said assessment in ten equal annual installments of $105.00 each, together with interest at the rate of 3% per annum, payable annually; the first payment or installment to be made January 1, 1940, and the last payment on January 1, 1949.

"(4) It is further ordered and adjudged that the costs of this action be taxed equally against the plaintiff and the defendants."

The plaintiff excepted and appealed.

A. R. House and J. G. Mills for plaintiff, appellant.
Thomas W. Ruffin for defendant, appellee.

BARNHILL, J. Equity supplements the law. Its office is to supply defects in the law where, by reason of its universality, it is deficient, to the end that rights may be protected and justice may be done as between litigants.

Its character as the complement merely of legal jurisdiction rests in the fact that it seeks to reach and do complete justice where courts of law, through the inflexibility of their rules and want of power to adapt their judgments to the special circumstances of the case, are incompetent so to do. It was never intended that it should, and it will never be permitted to, override or set at naught a positive statutory provision. It is

an instrument of remedial justice within and not in opposition to the law. *Equitas sequiter legem.*

The statute fixes a rate of interest on street assessments payable in installments. C. S., 2716 and 2717; Public Laws 1929, ch. 331, sec. 1. The court below was without authority at law or in equity to prescribe a rate of interest less than that fixed by the statute.

Taxes are not subject to set-off or counterclaim. To so hold "would be utterly subversive of the power of the government and destructive of the very end of taxation." Cooley on Taxation; *Gatlin v. Comrs.*, 92 N. C., 540; *Comrs. v. Hall,* 177 N. C., 490, 99 S. E., 372; *Graded School v. McDowell,* 157 N. C., 316, 72 S. E., 1083. We apprehend that the same law applies with equal force to a street assessment due a municipality. By purchasing at a discount a past-due bond of the plaintiff for the purpose of treating the same as an offset or counterclaim to the street assessment due the plaintiff the defendants created no equity in their behalf. The Court below was in error in taking into consideration the ownership of said bond in attempting to work out alleged equities between the parties.

In actions to foreclose mortgages and other liens upon real property it has long been the practice, when judgment of foreclosure is entered, to provide that the debtor may have a reasonable time within which to redeem, before sale. Ordinarily, a period of 60 days to 4 months is allowed so that the debtor may have an opportunity to refinance the debt without foreclosure. The street assessment at issue was payable in ten equal installments. Nothing has been paid thereon for more than ten years. The plaintiff, as a matter of right, is entitled to its money. There is no principle of equity which would justify a further delay in its payment other than such reasonable time as may be necessary to give defendants an opportunity to attempt to refinance the obligation. The grant of ten years within which to pay the assessment in equal annual installments was unwarranted.

The costs follow the result of the final judgment. Except where otherwise provided by statute, the party cast in the suit is the one upon whom the costs must fall. *Ritchie v. Ritchie,* 192 N. C., 538, 135 S. E., 458; *Kincaid v. Graham,* 92 N. C., 154; *Williams v. Hughes,* 139 N. C., 17, 51 S. E., 790; *Smith v. R. R.,* 148 N. C., 334; *Cotton Mills v. Hosiery Mills,* 154 N. C., 462, 70 S. E., 910. It was error to tax any part of the costs against the plaintiff.

To the end that a proper judgment may be entered in accord with this opinion this cause is remanded.

Error and remanded.

HENRY MAYNARD AND WIFE, DESSIE MAYNARD, v. GENEVA MARTIN HOLDER, WIDOW; GRACIE HOLDER JONES AND ROBERT JONES, HER HUSBAND; CLOIE HOLDER WALL AND DUTCH WALL, HER HUSBAND; BERDIE HOLDER WALL AND ROSCOE WALL, HER HUSBAND; VALLIE HOLDER HODGE AND ARTHUR HODGE, HER HUSBAND; AND NANNIE HOLDER JACKSON AND ALVESTA J. JACKSON, HER HUSBAND.

(Filed 22 November, 1939.)

1. Quieting Title § 1: Statutes § 5d—

The statute relating to actions to quiet title is a remedial statute and must be liberally construed.

2. Quieting Title § 1—

An action to quiet title may be maintained to determine conflicting claims of title to a strip of land lying between the lands of the parties, C. S., 1743.

APPEAL by plaintiffs from *Stevens, J.*, at May Civil Term, 1939, of WAKE. Reversed.

This was an action to quiet title to certain described land. Plaintiffs alleged that the defendants wrongfully claimed title to a strip of land on the northern side of plaintiffs' land adjacent to and adjoining lands of defendants, and that the claim of defendants cast a cloud upon the title of plaintiffs. Plaintiffs also alleged title by adverse possession. Defendants denied plaintiffs' title to the land referred to and denied that defendants' claim constituted any cloud thereon. At the hearing, upon the reading of the pleadings and arguments of counsel, the court below held that the proper relief of plaintiffs was a suit in ejectment and not an action to quiet title, and thereupon dismissed the action at the cost of plaintiffs. Plaintiffs excepted and appealed.

Stanley L. Seligson and John W. Hinsdale for plaintiffs, appellants.
Douglass & Douglass and Thomas W. Ruffin for defendants, appellees.

PER CURIAM. It is prescribed by C. S., 1743: "An action may be brought by any person against another who claims an estate or interest in real property adverse to him for the purpose of determining such adverse claims."

Giving a liberal construction to this remedial statute, it is apparent that the court below was in error in dismissing this action. The pleadings were sufficient to raise an issue under which the court could proceed to determine the rights of the parties. *Satterwhite v. Gallagher,* 173 N. C., 525, 92 S. E., 369; *Hardware Co. v. Cotton Co.,* 188 N. C., 442, 124 S. E., 756.

Reversed.

DAISY RHEM PATRICK v. BRANCH BANKING AND TRUST COMPANY, GUARDIAN OF HOSEA COLLINS RHEM, DISABLED VETERAN.

(Filed 29 November, 1939.)

1. **Insane Persons § 9b—In proper instances, clerk, with approval of judge, may order guardian to purchase home for use of dependent sister of incompetent and to make proper advances for her support.**

The evidence tended to show that petitioner is the sister of a World War veteran, that prior to the time he was drafted he gave her what assistance he could for her support, and that he sent her money after he was in the army, that he is unmarried and has no other dependents, that he became incurably insane and was placed in a Government hospital where he is being taken care of without charge, that his guardian has on hand $22,046.81, representing payments on his War Risk Insurance, and that petitioner is destitute and without means of support. *Held:* The clerk of the Superior Court, with the approval of the resident or presiding judge, has the power, upon proper findings from the evidence, to order the guardian to purchase a home in the name of the incompetent for the use of petitioner, and to advance petitioner a reasonable sum monthly for her support, since petitioner comes within the terms of C. S., 2296, and since advancements authorized by the statute may be made partly in cash and partly in providing a home free of rent. Whether petitioner is a "dependent" within the meaning of the Veterans' Guardianship Act, ch. 33, Public Laws of 1929, as amended by ch. 262, Public Laws of 1933, *Michie's Code*, 2202 (13) (14), held not necessary to be decided.

2. **Same: Attorney and Client § 10—Attorney's fees are not part of costs.**

Attorneys' fees are not part of the costs and may not be recovered by the successful litigant, and while the courts in the exercise of their chancery or statutory powers may allow the recovery of attorneys' fees for professional services rendered in the protection of trust funds, there is no statutory or equitable authority for allowance of attorneys' fees out of the estate of an incompetent for services rendered in successful prosecution or establishment of a claim against the estate of the incompetent.

APPEAL by defendant from *Frizzelle, J.*, at 14 April, 1939, Term, of LENOIR. Modified and affirmed.

The following judgment was rendered in the court below:

"This cause was heard before the undersigned clerk of the Superior Court of Lenoir County on April 1, 1939, as will appear by the transcript of evidence filed herein, and upon the conclusion of the evidence the court reserved its rulings and findings until the matter could be argued by counsel for petitioner and respondent, and thereupon it was agreed that this cause be argued by counsel on April 14, 1939. Accordingly, on April 14, 1939, while the Superior Court was in session with Honorable J. Paul Frizzelle, Judge presiding, it was agreed that J. Paul Frizzelle, Judge riding the Sixth Judicial District, should sit with the

undersigned clerk and hear a review of the evidence and the arguments of counsel, and at said hearing Judge Frizzelle did sit with the undersigned clerk and hear a review of the evidence and arguments by counsel.

"Thereupon the court makes the following findings of fact:

"1. That Hosea Collins Rhem is a non-sane veteran of the World War and has been mentally incompetent and confined in a veterans' hospital suffering from a probably incurable insanity since 1918, and that said veteran will probably remain so non-sane and so confined during the remainder of his life.

"2. That said non-sane veteran, Hosea Collins Rhem, is of full age, unmarried and without issue, and that the guardian, Branch Banking & Trust Company, is possessed for him of an estate and income which is more than sufficient to provide for him, he being confined in a veterans' hospital without expense to said guardian.

"3. That Hosea Collins Rhem was drafted into the United States Army in the spring, 1918, and at the time of his enlistment or entrance into the United States Army, or within a short period thereafter, was required and did take out War Risk Insurance as evidenced by Certificate No. 1816040, the original of which certificate is filed in this record.

"4. That Hosea Collins Rhem designated as beneficiary in said policy of War Risk Insurance the petitioner, Daisy Rhem Patrick, his sister.

"5. That at the time said Hosea Collins Rhem was drafted into the United States Army and for some time prior thereto, Daisy Rhem Patrick was dependent upon him for support and looked to and received from him moneys, wearing apparel and other necessaries.

"6. That Daisy Rhem Patrick is the only surviving sister of Hosea Collins Rhem.

"7. That Hosea Collins Rhem recognized a responsibility and obligation to provide support for the petitioner, Daisy Rhem Patrick.

"8. That Daisy Rhem Patrick is married and has four children, the oldest child, a son, being married, and the other three infant children, one son and two daughters, reside with petitioner.

"9. That Hosea Collins Rhem has living one sister, Daisy Rhem Patrick, the petitioner, of Lenoir County, North Carolina; one brother, Alonza Rhem, of New York City, and one niece, Jessie May Fisher, of Lenoir County, North Carolina.

"10. That the Branch Banking & Trust Company is the only qualified and acting guardian of Hosea Collins Rhem.

"11. That there has accumulated in the Guardian Account of Hosea Collins Rhem from the payments upon the policy of War Risk Insurance the sum of $22,046.81, and that Daisy Rhem Patrick, the petitioner, has never received any benefits whatsoever or any amount of money whatsoever from said Guardian Account.

"12. That the petitioner, Daisy Rhem Patrick, is a pauper and in need of a home and maintenance.

"*Conclusions of Law:* Upon the foregoing findings of fact the court is of the opinion and concludes as a matter of law that Daisy Rhem Patrick is and has been dependent on Hosea Collins Rhem within the meaning of sections 2202 (13), 2202 (14), 2295 (a), and 2296, of the North Carolina Code of 1935.

"Upon suggestion of the court, Daisy Rhem Patrick, through her counsel, has suggested the purchase of the following described piece or parcel of land situate in the city of Kinston, North Carolina, for the use and occupancy of the petitioner, Daisy Rhem Patrick, as a home for herself during her lifetime, or during the time said Hosea Collins Rhem remains insane, the title to be taken in the name of Hosea Collins Rhem at the purchase price of $1,250.00. And the court, after hearing the evidence upon the value of said premises, finds as a fact upon said evidence that $1,250.00 is a reasonable and fair price for said property, said property being described as follows: Situate in the city of Kinston, Lenoir County, North Carolina, in what is known as 'Lincoln City' and described as follows: Beginning at the southwest corner of Ed Jackson's lot on the north side of Reed Street and runs north about 140 feet to a ditch; thence west 50 feet; thence south 140 feet to Reed Street; thence east with line of Reed Street 50 feet to the beginning. Being the same lot conveyed by Ed Whitfield to Marzella Whitfield for life and after her death to T. Roosevelt Whitfield, Vida Whitfield (now Vida Jordan) and Rudolph Whitfield, by deed of record in Book 65, page 413, and being the lot conveyed to Ed Whitfield by J. A. McDaniel and wife, by deed of record in Book 31, page 720.

"The petitioner having prayed for a monthly allowance for her maintenance, the court further finds as a fact that $20.00 per month is a fair and reasonable allowance for said petitioner.

"It is thereupon in the discretion of the court ordered, adjudged and decreed—That Branch Banking & Trust Company, guardian, be and it is hereby authorized and directed to purchase in the name of Hosea Collins Rhem the real estate herein described for the use and occupancy of Daisy Rhem Patrick, the petitioner, free of rent and taxes during her lifetime, or during the time said Hosea Collins Rhem remains insane.

"It is further ordered, adjudged and decreed that the Branch Banking & Trust Company, guardian, pay over to said Daisy Rhem Patrick for maintenance and support during her lifetime, or during the time said Hosea Collins Rhem remains insane, the sum of $20.00 per month, beginning April 1, 1939, from money belonging to Hosea Collins Rhem, the said sum of $20.00 per month to be charged as an advancement against any interest of said Daisy Rhem Patrick in the estate of Hosea Collins Rhem.

"It further appearing to the court that Messrs. Allen & Allen, attorneys, have rendered to the petitioner, Daisy Rhem Patrick, valuable legal services in establishing her relationship to Hosea Collins Rhem and her right to benefits as a dependent of Hosea Collins Rhem, the court finds that said services are reasonably worth $625.00.

"It is thereupon further ordered and adjudged that Branch Banking & Trust Company, guardian, pay to Messrs. Allen & Allen the sum of $625.00 for legal services rendered to petitioner, to said attorneys' fee to be charged as an expense against the general fund of Hosea Collins Rhem in the hands of said guardian, and shall represent a disbursement from his estate. Dated at Kinston, North Carolina, this the 25th day of April, 1939. John S. Davis, Clerk of Superior Court.

"The undersigned Judge of the Superior Court, riding the Sixth Judicial District, sat with the clerk of the Superior Court of Lenoir County upon the final hearing of this cause and heard a review of the evidence and the argument of counsel. The proceeding, together with the findings of fact, conclusions of law, orders and judgment, are hereby approved. This the 25th day of April, 1939. J. Paul Frizzelle, Judge Presiding."

The defendant made numerous exceptions and assignments of error and appealed to the Supreme Court. The material ones and necessary facts will be set forth in the opinion.

Allen & Allen for plaintiff.
John G. Dawson for defendant.

CLARKSON, J. The questions involved: (1) Whether or not the clerk of the Superior Court, with the approval of the judge, resident or presiding, has the power to direct and order a guardian to purchase a home in the name of the ward and for the sole use of a dependent of said ward, under the provisions of section 2202 (13), of the North Carolina Code of 1935 (Michie). We think so. (2) Whether or not the clerk of the Superior Court, with the approval of the judge, has the power to order a guardian to make fit and proper advancements out of the surplus of the ward's estate or income to a dependent sister, under the provisions of sections 2296 and 2202 (14), of the North Carolina Code of 1935, *supra*. We think so. (3) Whether or not the clerk of the Superior Court, with the approval of the judge, has the power to order a guardian to pay the attorney fees of the petitioner, plaintiff. We think not.

The General Assembly of North Carolina, Public Laws 1929, ch. 33, passed the "Veterans' Guardianship Act." This was amended by ch. 262, Public Laws 1933. The amendment material to this controversy reads as follows: Section 1 (c). ". . . Provided, said guardian may purchase with said funds a home or farm for the sole use of said ward or

his dependents upon petition and order of the clerk of Superior Court, said order to be approved by the resident or presiding judge of the Superior Court, and provided further that copy of said petition shall be forwarded to said Bureau before consideration thereof by said court." N. C. Code, *supra,* sec. 2202 (13).

N. C. Code, *supra,* sec. 2296, is as follows: "When any non-sane person, of full age, and not having made a valid will, has children or grandchildren (such grandchildren being the issue of a deceased child), and is possessed of an estate, real or personal, whose annual income is more than sufficient abundantly and amply to support himself, and to support, maintain and educate the members of his family, with all the necessaries and suitable comforts of life, it is lawful for the clerk of the Superior Court for the county in which such person has his residence to order from time to time, and so often as may be judged expedient, that fit and proper advancements be made, out of the surplus of such income, to any such child, or grandchild, not being a member of his family and entitled to be supported, educated and maintained out of the estate of such person. Whenever any non-sane person of full age, not being married and not having issue, be possessed, or his guardian be possessed for him, of any estate, real or personal, or of an income which is more than amply sufficient to provide for such person, it shall be lawful for the clerk of the Superior Court for the county in which such person resided prior to insanity to order from time to time, and so often as he may deem expedient, that fit and proper advancements be made, out of the surplus of such estate or income, to his or her parents, brothers and *sisters,* or grandparents to whose support, prior to his insanity, he contributed in whole or in part."

Section 2297 provides that such advancements shall be ordered only "for the better promotion in life of such as are of age or married," etc.

The acts of the General Assembly are clear and explicit, and are sufficient to grant the relief prayed for by petitioner, the plaintiff. In fact, the act is the logic of the situation and righteous.

In the present proceeding it is admitted that the defendant, guardian of the insane or incurable veteran of the World War, has in its possession in the bank, as guardian, $22,046.81, a sum which, together with the income, is more than amply sufficient to provide adequately for all the needs of the ward. Under these circumstances, it is immaterial—and we need not decide—whether the sister is a dependent within the meaning of that term as used in the Veterans' Guardianship Act.

It is clear that the petitioner comes within the terms of C. S., 2296. The advancements there provided for may be made in cash or by providing a home free of rent. Here the clerk ordered, and the judge approved, advancements partly in cash and partly by providing a home.

Where the estate is sufficiently large to justify it, it makes no matter whether the sister is advanced cash with which to rent a home or is permitted to use a house purchased by and belonging to the estate.

The evidence offered is amply sufficient to support the conclusion of the clerk that the petitioner is entitled to aid from the estate of the ward of the respondent.

The plaintiff petitioner offered in evidence envelope addressed to Daisy Rhem, R. 3, Grifton, N. C., dated Washington, D. C., 31 July, 1918, 10 p.m. On the left-hand corner of said envelope appears the following: "Treasury Department, Bureau of War Risk Insurance, Division of Military and Naval Insurance, Life Insurance Section, Official Business, Return after 5 days unopened." On the right-hand corner of said envelope appears the following figures, "1816040," and also certificate, dated 9 April, 1918, for $10,000 War Risk Insurance, in favor of Hosea Collins Rhem. She testified, in part: "After my brother went in the Army, I received through the mails moneys. . . . I have seen my brother since the war. He was in the hospital for the insane at Goldsboro. . . . I do not have any property, and my husband does not have any, and I do not have any money. My husband is not living at home with me. He has been living away from me for some time at intervals. I have four children, two boys and two girls. One of the boys is twenty, and the other is sixteen years old. The oldest boy is married. One of my girls is eighteen, and the other fifteen years old, and one of them is in bad health."

Henry Duggin testified, in part: "I knew Hosea Collins Rhem well, as we were schoolmates. . . . I went to the war and I knew Daisy Rhem Patrick, sister of Hosea Collins Rhem. I saw them both often just before the war. I know that Hosea contributed to the support of his sister, Daisy Rhem Patrick. I used to go over there right much because he and I were going to school together, and I knew him well, and I know that he did all he could for her and gave her money at times and bought things for her. That is, he bought clothes. She was living with her uncle and Hosea helped her all he could. They both worked there for John Bryant. I know that Daisy looked to her brother, Hosea, for help, and I know that she called upon him for help. I quite often talked with him about his sister and did so just before he went into the Army."

Cora Lowick Dunn testified, in part: "Hosea and Daisy lived with Bryant and worked. After they grew up, they lived with their uncle and Hosea helped his sister like he could. He helped her with work. . . . When Hosea worked, he divided his money with Daisy, that is, what he could. He didn't get much, but what he got, he divided with his sister the best he could."

The petitioner offered in evidence letter from the United States Veterans Bureau at Washington, D. C., acknowledging receipt of copy of petition in this proceeding and signed by H. L. McCoy, Director of Insurance, dated 2 March, 1939. The petitioner offered in evidence carbon copy of letter to State Service Officer, U. S. Veterans Administration, Charlotte, N. C., dated 18 February, 1939, signed by Allen & Allen, attorneys, and which reads as follows: "We beg to enclose herewith copy of petition filed in the Superior Court of Lenoir County. This copy is being sent in pursuance of chapter 40 (a) of North Carolina Revised Code of 1935. We shall ask that the petition be heard on March 3, 1939."

The defendant excepted and assigned error to the allowance of attorney fees for plaintiff-petitioner. This is the only error revealed by the assignments of error. In neither brief filed herein are any authorities cited approving the allowance of attorney fees in circumstances similar to the present case. As well stated in *Parker v. Realty Co.,* 195 N. C., 644 (646): "The general rule is stated in *Ragan v. Ragan,* 186 N. C., 461, 'Attorneys' fees are not recoverable by successful litigants in this State, as such are not regarded as a part of the court costs.'" Again, in *In re Will of Howell,* 204 N. C., 437, citing numerous authorities, "Accordingly, it may be stated as the general rule in this jurisdiction that counsel fees, as such, are not allowed as a part of the costs in civil actions or special proceedings." There are recognized exceptions to this rule where courts, in the exercise of chancery or statutory powers, are aiding certain fiduciaries in the management of estates or trusts (see *In re Will of Howell,* 204 N. C., 437 [438]; and the cases there cited), as, for example, the allowance of fees to an administrator's attorney (*Overman v. Lanier,* 157 N. C., 544), to the attorney for the next friend of an infant (*In re Stone,* 176 N. C., 336), to the attorney for the receiver of an insolvent corporation (*Graham v. Carr,* 133 N. C., 449; *Hood, Comr. of Banks, v. Cheshire,* 211 N. C., 103), these, and the other cases examined, permitted the allowance of attorneys' fees for services rendered in the protection of the trust funds; we have found no cases in this jurisdiction in the absence of statutes permitting fees to attorneys who were successful in adverse proceedings directed against the trust estate. That there is a distinction between services rendered in the protection of a trust estate and those rendered by attorneys successfully establishing claims against such estates is made clear by two cases in our Reports. In *Wells v. Odum,* 207 N. C., 226, *it is held* that attorneys' fees for the successful propounders of a will are allowable out of the assets of the estate, whereas, in *In re Will of Howell,* 204 N. C., 437, *it was held* that attorneys' fees for caveators of a will may not be ordered paid out of the assets of the estate (now *contra* by statute, see *In re Will*

of Slade, 214 N. C., 361). In the *Howell case, supra,* in discussing the lack of precedent for ordering payment of caveators' attorneys' fees out of the funds of the estate, this Court said: "Nor is the authority supported in tendency by our decisions. They point in the other direction." This quoted statement is equally true of the present case. As the instant case is a statutory proceeding, in the absence of statutory authority for taxing the fees of attorneys successfully proceeding against the fund in the costs of the proceeding, we hold the general rule to be determinative, *i.e.,* such fees may not be allowed from the assets of the estate.

In accordance with the above opinion, the judgment below is

Modified and affirmed.

CHARLES P. ELDRIDGE AND LUCY C. ELDRIDGE, HIS WIFE, v. P. M. MANGUM, BUILDING AND ELECTRICAL INSPECTOR OF THE CITY OF RALEIGH; GRAHAM H. ANDREWS, MAYOR AND COMMISSIONER OF PUBLIC ACCOUNTS AND FINANCE; R. C. POWELL, COMMISSIONER OF PUBLIC SAFETY; AND ROY L. WILLIAMSON, COMMISSIONER OF PUBLIC WORKS, CONSTITUTING THE BOARD OF COMMISSIONERS OF THE CITY OF RALEIGH, STATE OF NORTH CAROLINA.

(Filed 29 November, 1939.)

1. Municipal Corporations § 5—

Where there is a conflict between a municipal ordinance and the general law of the State regulating the same matter, the ordinance must yield to the State law.

2. Municipal Corporations § 37—Change in zoning regulations must be made in conformity with general law.

It appeared that the proposed change in the defendant municipality's zoning regulations was protested by the owners of 20 per cent of the lands in the vicinity prescribed by the pertinent general law and the municipal ordinance, that the general law provided that in such instance the change should be approved by three-fourths of all the members of the legislative body of the municipality, that an ordinance of the municipality provided that such change should be approved by a majority of the city commissioners, and that two of the three city commissioners voted in favor of the change. *Held:* The general law prevails over the municipal ordinance, and the proposed change not having been approved by three-fourths of the legislative body of defendant municipality, plaintiff is not entitled to *mandamus* to require the city officials to declare the property rezoned. Section 27, Chapter VII, of the Ordinances of the City of Raleigh; chapter 250 (5), Public Laws of 1923; Michie's Code, 2776 (b).

APPEAL by defendants from *Frizzelle, J.,* at October Term, 1939, of WAKE.

Defendants filed demurrer on the ground that the complaint failed to state facts sufficient to constitute a cause of action, for the reason that it appears from the complaint that it is a petition for a *mandamus* to require the officials of Raleigh to declare certain property zoned for the erection of a filling station, and that the petitioners rely upon a city ordinance relating to changes in district maps and regulations pertaining to municipal zoning, and also that at a hearing as to the zoning of the property involved there was not a three-fourths vote of the Board of Commissioners to adopt the recommendation of the Zoning Commission that the property be zoned for business, and finally that the general law provides that a three-fourths vote of the legislative body of the municipality is required to make any change in the zone maps where a protest against such change is filed by the owners of 20 per cent of the lands adjacent to and in the rear for 100 feet of the land sought to be zoned, and opposite the land sought to be zoned for a depth of 100 feet from the street frontage.

The court overruled the demurrer, and the defendants appealed to the Supreme Court, assigning error.

Briggs & West for plaintiffs, appellees.
P. H. Busbee and Little & Wilson for defendants, appellants.

SCHENCK, J. An excerpt from the minutes of the board of commissioners of the city of Raleigh at a meeting on 14 August, 1939, which is set forth in the complaint, is as follows:

"Commissioner Williamson moved that the recommendation of the Zoning Commission be adopted. Commissioner Powell seconded the motion, and upon a vote being taken, Commissioners Williamson and Powell voted in the affirmative and Mayor Andrews in the negative.

"It appearing from petitions filed with the Board of Commissioners protesting the adoption of the recommendation of the Zoning Commission, that more than 20 per cent of the adjacent property, and property in front and rear of the proposed re-zoning was represented in said protest, and that pursuant to the general law it would be necessary for a three-fourths vote of the board to adopt such recommendation, the mayor declared that the recommendation failed of adoption."

It appears from the complaint that the petitioners base their request for a *mandamus* upon section 27, Chapter VII, of the ordinances of the city of Raleigh, which reads in part:

"b. In case of a protest against an amendment, supplement, change, modification, or repeal signed by the owners of twenty per cent or more, either of the area of the lots included in such proposed change or of those immediately adjacent in the rear thereof, extending one hundred

feet therefrom, or of those directly opposite thereto, extending one hundred feet from the street frontage of such opposite lots, such amendment shall become effective by the favorable vote of a majority of all the City Commissioners."

The general law, section 5, chapter 250, Public Laws 1923 (sec. 2776 [v], N. C. Code of 1935 [Michie]), reads: "Such regulations, restrictions and boundaries may from time to time be amended, supplemented, changed, modified or repealed. In case, however, of a protest against such change signed by the owners of twenty per cent or more, either of the area of the lots included in such proposed change or of those immediately adjacent in the rear thereof extending one hundred feet therefrom, or of those directly opposite thereto extending one hundred feet from the street frontage of such opposite lots, such amendment shall not become effective except by the favorable vote of three-fourths of all the members of the legislative body of such municipality."

There is a conflict between the city ordinance and the general law, the former providing the amendment or change sought "shall become effective by the favorable vote of a majority of all the City Commissioners," and the latter provides that such amendment or change "shall not become effective except by the favorable vote of three-fourths of all the members of the legislative body of such municipality." Where there is a conflict between a city ordinance and the general law, the latter will prevail. "The power conferred upon the municipal body is presumed to be in subordination to a public law regulating the same matter for the entire State, unless a clear intent to the contrary is manifest." *S. v. Langston,* 88 N. C., 692. "Municipal ordinances are ordained for local purposes in the exercise of a delegated legislative function, and must harmonize with the general laws of the State. In case of conflict, the ordinance must yield to the State law." *S. v. Freshwater,* 183 N. C., 762, and cases there cited. See, also, *S. v. Sasseen,* 206 N. C., 644.

It appears from the complaint that the vote of the board of commissioners, the legislative body of the municipality, upon the question of zoning the property involved as business property was two favorable to the change sought and one in opposition thereto. While this was a favorable vote of a majority of all of the city commissioners, it was not a favorable vote of three-fourths of all the members of the legislative body of the municipality, and, since the general law must prevail over the city ordinance, we are impelled to hold that the demurrer should have been sustained, and, therefore, the judgment of the Superior Court is

Reversed.

STATE v. SIMON GIBSON, ALIAS COOCHIE GIBSON.

(Filed 29 November, 1939.)

1. Criminal Law § 33—Held: Subsequent confession should have been excluded under presumption that it was induced by same influence vitiating prior confession.

In this prosecution for rape, testimony of a confession made by defendant was excluded upon the ground that it was induced by hope in that defendant was told that if he confessed it would be lighter on him and that the sentences would run concurrently. Over defendant's objection a witness was permitted to testify that defendant had "repeated" the confession to him and had admitted his guilt. *Held:* The inducement that the sentences should run concurrently infers that the defendant was charged with several offenses and his admission of "guilt," without a statement of facts, does not disclose that he intended to confess guilt of the capital offense, and testimony of the second confession should have been excluded under the presumption that it was induced by the same influence motivating the original confession.

2. Same—Where prior confession is involuntary, it will be presumed that subsequent confession was induced by same influence.

Where a confession has been obtained under such circumstances or by such methods as to render it involuntary, a presumption arises which imputes the same prior influence to any subsequent confession of the same or similar facts, and while the presumption is rebuttable, the burden is on the State to overcome it, and defendant should be given an opportunity to be heard upon the competency of the subsequent confession.

3. Same: Criminal Law § 78c—Absence of motion to strike out testimony of alleged incompetent confession held not fatal to defendant's objection upon the record in this case.

Defendant objected to the admission of testimony of a subsequent confession on the ground that the subsequent confession was tainted with the same vitiating influence which induced the prior confession of similar facts excluded by the court. The State contended that the objection was not subject to review for that no motion was made to strike out the testimony. *Held:* There being facts appearing of record raising the presumption that the second confession was induced by the same influence that motivated the prior confession, entitling defendant to an opportunity to be heard on the question of its competency, a new trial is awarded upon defendant's exception notwithstanding the absence of a motion to strike out the evidence.

APPEAL by defendant from *Stevens, J.*, at September Term, 1939, of NEW HANOVER.

Criminal prosecution tried upon indictment charging the defendant with rape.

Verdict: Guilty of rape as charged in the bill of indictment.

Judgment: Death by asphyxiation.

The defendant appeals, assigning errors.

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

William L. Farmer and Addison Hewlett, Jr., for defendant.

STACY, C. J. The record discloses that the crime of which the defendant stands charged, and has been convicted, occurred on the night of 23 July, 1939, at the home of the prosecuting witness in the city of Wilmington. About a month later the defendant was arrested and taken before the prosecuting witness. "She did not absolutely identify this boy as being the man . . . at that time. . . . She looked at him, and studied him and says, 'I don't think it is him.'" The defendant was put in jail. On 24 August he made a confession in the presence of several officers, including the mayor of the city of Wilmington, and others, which, upon the *voir dire,* was found to be involuntary. The inducement, according to the defendant's contention, was, that the officers said to him after his arrest, "We have plenty on you," and suggested or made offers "that it was best to tell about everything, . . . let the sentences run concurrently, and that it would be lighter on him." *S. v. Stevenson,* 212 N. C., 648, 194 S. E., 81; *S. v. Harrison,* 115 N. C., 706, 20 S. E., 175. This alleged confession was made in the office of the mayor.

On the trial of the cause, the prosecuting witness was positive in her identification of the defendant as her assailant.

The mayor was called as a witness for the State. He was allowed to testify, over objection, that the defendant had "repeated his confession" to him that morning just before the opening of court while the defendant was in the prisoner's box. The witness testified: "He rambled about and practically denied it. . . . I said you are guilty, aren't you, and he said, 'Yes, sir,' but he said, 'There are two men in that paper.'" The jury was admonished not to consider any reference to the paper, the prior confession. The witness continued: "He did not come right out and say he denied it. . . . I saw his counsel afterwards and told him I wanted to be fair with him, and that this darky had repeated his confession to me. . . . I told Mr. Hewlett, to be perfectly frank with you, there was no question about his guilt, and I didn't see why he didn't plead insanity. Sure, I think he is of low mentality. I don't think there is any question about his guilt, and I think he ought to plead insanity."

The case is here principally upon the admission of the foregoing evidence. It is the position of the defendant that the same influence which induced the involuntary confession in the mayor's office on the morning of 24 August was still active, and caused him hopefully to "repeat" it to the mayor on the morning of the trial.

It will be observed that without stating any facts the defendant is alleged to have answered the inquiry as to his guilt in the affirmative. This involved a conclusion of law as well as one of fact. The witness was also allowed to express an opinion as to the guilt of the accused.

Moreover, it may be asked of what grade of crime did the defendant intend to say he was guilty? *S. v. Williams,* 185 N. C., 685, 116 S. E., 736. The previous inducement, according to his contention, was, "that it was best to tell about everything, . . . let the sentences run concurrently." Apparently more than a single charge had been preferred against him. Was he talking about the capital offense?

In the present state of the record, we are constrained to hold that the "repetition" of the prior involuntary confession should have been excluded upon the presumption that it had been induced by the same influence which brought about the original confession. *S. v. Drake,* 113 N. C., 624, 18 S. E., 166.

It is established by numerous decisions that where a confession has been obtained under such circumstances or by such methods as to render it involuntary, a presumption arises which imputes the same prior influence to any subsequent confession of the same or similar facts, and this presumption must be overcome before the subsequent confession can be received in evidence. *S. v. Moore,* 210 N. C., 686, 188 S. E., 421; *S. v. Drake,* 82 N. C., 592; *S. v. Lowhorne,* 66 N. C., 638; *S. v. Roberts,* 12 N. C., 259; 20 Am. Jur., 424. See *S. v. Fox,* 197 N. C., 478, 149 S. E., 735, and cases there cited. Especially is this so, when the court is then cognizant of the fact that the accused has made a prior involuntary confession. *Daniels v. State,* 78 Ga., 98, 6 Am. St. Rep., 238, and annotation at p. 249. The burden is on the prosecution to overcome this presumption. *McNish v. State,* 45 Fla., 83, 34 So., 219, 110 Am. St. Rep., 65.

To be sure, the presumption is a rebuttable one. *S. v. Moore, supra;* 20 Am. Jur., 425. But it would be error to admit the confession in evidence without giving the defendant an opportunity to be heard upon its competency. *S. v. Blake,* 198 N. C., 547, 152 S. E., 632; *S. v. Whitener,* 191 N. C., 659, 132 S. E., 603; *S. v. Alston,* 215 N. C., 713, 3 S. E. (2d), 11; *S. v. Godwin, ante,* 49, 3 S. E. (2d), 347.

It is urged, however, that no motion was made to strike out the evidence, or at least that none appears of record. *S. v. Steen,* 185 N. C., 768, 117 S. E., 793.

Speaking to a kindred, though slightly dissimilar, situation in *S. v. Anderson,* 208 N. C., 771, 182 S. E., 643, it was said: "The most serious exception appearing on the record is the one addressed to the refusal of the court to strike out the alleged confession of the defendant Howard Overman. It is true, when the alleged confession was offered in evi-

dence, its voluntariness was not questioned or determined in the manner pointed out in *S. v. Whitener,* 191 N. C., 659, 132 S. E., 603. The court was justified in admitting it at the time. And even when the testimony of D. P. Stewart later developed, there was no motion to withdraw the alleged confession from the consideration of the jury—at least none appears of record. The exception now insisted upon was taken at the close of all the evidence. The ruling might possibly be upheld upon procedural grounds, but inasmuch as the involuntariness of the alleged confession is apparent from the testimony of the State's witness, D. P. Stewart, we are disposed to disregard form for merit and to hold that the alleged confession should have been stricken out," citing in support of the position: *S. v. Livingston,* 202 N. C., 809, 164 S. E., 337; *S. v. Grier,* 203 N. C., 586, 166 S. E., 595; *S. v. Davis,* 125 N. C., 612, 34 S. E., 198; *S. v. Drake,* 113 N. C., 624, 18 S. E., 166; *S. v. Dildy,* 72 N. C., 325; *S. v. Whitfield,* 70 N. C., 356.

For the error, as indicated, a new trial must be awarded. It is so ordered.

New trial.

STATE v. LATTIMORE B. SPAULDING.

(Filed 29 November, 1939.)

Criminal Law § 41b—Testimony of witness on cross-examination by State held to connect witness with, and show interest of witness toward defendant, and therefore State was entitled to contradict the testimony.

Defendant was charged with operating a motor vehicle on a public highway while under the influence of intoxicating liquor. On cross-examination, a witness for defendant denied she had been out riding with defendant alone at night. *Held:* Testimony of a State's witness contradicting the testimony of defendant's witness on cross-examination was properly admitted under the exception to the general rule that a party is not concluded by testimony of a witness on cross-examination as to a collateral matter when the testimony on cross-examination tends to connect the witness with, or show the witness' interest toward one of the parties.

APPEAL by defendant from *Harris, J.,* at June Term, 1939, of COLUMBUS.

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

Herbert McClammy for defendant, appellant.

SCHENCK, J. The defendant was convicted of operating a motor vehicle on the public highway while under the influence of intoxicating liquor. The evidence was conflicting but the jury seems to have believed the testimony of the State's witnesses rather than that of the defendant and his witnesses. There are no exceptions to the charge.

The appellant relies upon two exceptions which appear in the record, as follows: "Counsel for the State stated to the court that this witness was offered for the purpose of contradicting Mrs. Simmons. Fred Hooks testified: I am the floor man at Lee's Warehouse. I know Spaulding. I know Mrs. Simmons. Q. Did you ever see them together— Mr. McClammy: Now, don't you answer that until the judge says you can answer it. Q. . . . at least whether they were there without anybody else in the car but Spaulding and Mrs. Simmons. Objection by defendant. Court: If you are asking that for the purpose of contradiction, with an exception by the defendant, you may answer it. Objection overruled. Defendant excepts. Exception No. 1. A. Why I couldn't say how many times I have seen them together, right many times. I would say I had seen them as late as 11:00 at night. Cross-examination. The witness was asked whether he wanted to create the impression upon that jury that the lady and Spaulding were there for immoral and an improper purpose. It was objected to by the solicitor. Mr. McClammy: You can see perfectly plain what the purpose of it is. Court: You may state whether you mean immoral purpose or not. Defendant objects. Objection overruled. Defendant excepts. A. Well, I wouldn't—I couldn't say that there was any immoral conduct in it, but I saw them, saw them together, I couldn't say what it was for, I couldn't explain that question. To this evidence, the defendant objects. Objection overruled. Defendant excepts. Exception No. 2."

We are of the opinion that the evidence assailed by the exceptions is competent in view of the testimony given on cross-examination by the defendant's witness, Mrs. Simmons, who it appears was a tenant of the defendant, as follows: "I never rode in Lee's Warehouse late at night with nobody in the car but Spaulding. I deny that I did. I don't know Mr. Judd Hooks. I deny going to Lee's Warehouse all hours of the night with no one but Spaulding, indeed I deny it. Spaulding has never been to my house at night when my husband was away, and he has never been to my house in the daytime when my husband was not at home. Spaulding has never been to my house to discuss the crops with me and my husband when he failed to find my husband, he always found him at home."

The rule is thus stated in *S. v. Jordan,* 207 N. C., 460: "The general rule is that answers made by a witness to collateral questions on cross-examination are conclusive, and that the party who draws out such

answers will not be permitted to contradict them; which rule is subject to two exceptions, first, where the question put to the witness on cross-examination tends to connect him directly with the cause or the parties, and second, where the cross-examination is as to a matter tending to show motive, temper, disposition, conduct, or interest of the witness toward the cause or parties. *S. v. Patterson,* 24 N. C., 346; *S. v. Davis,* 87 N. C., 514; *Cathey v. Shoemaker,* 119 N. C., 424; *In re Craven's Will,* 169 N. C., 561." See, also, 1 Greenleaf on Evidence (16th Ed.), sec. 450.

The testimony elicited by the cross-examination of the defendant's witness, Mrs. Simmons, is clearly within the exceptions to the general rule, and was subject to contradiction, since it clearly tends to connect the witness with the party, the defendant, and also tends to show the interest of the witness toward the party, the defendant.

In the record we find

No error.

J. T. HUNTER v. KENNETH BRUTON.

(Filed 29 November, 1939.)

Automobiles §§ 8, 18a—Whether acts of defendant when confronted with sudden emergency constituted negligence held for jury.

The evidence tended to show that plaintiff and defendant were driving their respective cars in opposite directions, that plaintiff struck a slick place in the highway, causing his car to skid to its left, strike a telephone pole on its left side of the highway, turn around and stop in a cornfield beyond the hard surface on its left side, and that defendant turned his car to the right and ran off his right side of the highway and struck plaintiff's car. There was conflict in the evidence whether plaintiff's car had been standing still only a fraction of a second or a minute and a half before it was struck by defendant's car. *Held:* Whether defendant was negligent in running off the highway to the right and striking plaintiff's car under the emergency that confronted him is a question for the jury, and an instruction to the effect that if defendant ran off the highway to his right and struck plaintiff's car, which was standing still, defendant would be guilty of negligence, is error.

APPEAL by the defendant from *Johnston, Special Judge,* at May Special Term, 1939, of MECKLENBURG. New trial.

G. T. Carswell and Joe W. Ervin for plaintiff, appellee.
Gover & Covington for defendant, appellant.

SCHENCK, J. This is an action to recover damages for personal injuries arising out of an automobile collision alleged to have been proxi-

mately caused by the negligence of the defendant. The plaintiff was driving one car and the defendant was driving the other. The plaintiff's car was being driven in a southerly direction and the defendant's car in a northerly direction. The plaintiff's car struck a slick place in the highway which caused it to run to its left across the highway, to strike a telephone pole on its left side of the highway, and to turn around and come to a stop in the cornfield on its left side of the highway. The defendant turned his car to his right off of the highway and struck the plaintiff's car. The evidence is conflicting as to how long the plaintiff's car had been at a standstill before it was stricken by the defendant's car. The plaintiff's evidence tends to show between a minute and a minute and a half, and the defendant's evidence at most "a fraction of a second."

The plaintiff's contention is that the defendant was negligent in running off of the highway on his (defendant's) right side thereof and striking the plaintiff's car, which had cleared the road and come to rest in time for the defendant to have remained on the highway and driven by him without colliding.

The defendant's contention is that he saw the plaintiff's car approaching him from the opposite direction, saw it leave its right side of the highway, cross over on its left side, and approach close enough to defendant's car to cause him to think his car would collide with plaintiff's car if he remained on the highway and that he ran his car off of the highway to his (defendant's) right in an endeavor to avoid a collision, and that plaintiff's car left the highway on plaintiff's left side thereof in front of the defendant's car and thereby caused the collision, with its consequent damage.

The question presented by these conflicting contentions, both of which are supported by evidence, is whether the defendant was negligent in leaving the highway on his right and thereby causing the collision.

The following excerpt from his Honor's charge upon the first issue is made the basis for an exceptive assignment of error:

"Now if you find, of course there being no burden upon the defendant, that the plaintiff's car got in his road of travel when the defendant was doing all he could do about it, and he couldn't help but hit it, of course the plaintiff can't recover, but if the plaintiff has satisfied you by the greater weight of the evidence, the burden being upon the plaintiff, that his car had left the road at a time when the road was clear, had switched around after hitting the telephone pole and had come to a standstill and was standing still, and the defendant ran off the road and struck him when he was standing still there in the cornfield, then you will answer that issue 'Yes.' If you fail to so find, or if your minds are equally balanced about it and you don't know how it was, you will answer it 'No.'"

We think, and so hold, that this exception is well taken, since it fails to make any reference to the time the plaintiff's car may have been "standing still" at the time of the collision. If the car had been "standing still" for only "a fraction of a second" when stricken it might not follow, certainly would not follow as a matter of law, that the defendant was negligent in running off of the highway in an endeavor to avoid the collision; and even if the plaintiff's car had been "standing still" for a minute and a half, as contended by the plaintiff, it would still be a question for the jury to determine whether the leaving of the highway by the defendant was negligence under the emergency that confronted him. "Peril and the discovery of such peril in time to avoid injury constitutes the back log of the doctrine of last clear chance." *Brogden, J.*, in *Miller v. R. R.*, 205 N. C., 17.

We hold that the trial judge ruled correctly when he refused the defendant's motion to dismiss the action properly made and renewed under C. S., 567.

For the error assigned there must be a

New trial.

STATE v. RICHARD MAYES.

(Filed 29 November, 1939.)

Criminal Law § 80—

When defendant fails to make out and serve his statement of case on appeal within the time allowed, no agreement for extension of time having been made, the motion of the Attorney-General to docket and dismiss will be allowed, Rule of Practice in the Supreme Court, No. 17, but when defendant stands convicted of a capital crime this will be done only when no error is apparent on the face of the record.

MOTION by State to docket and dismiss appeal.

Attorney-General McMullan for the State.

STACY, C. J. At the August Special Criminal Term, 1939, Mecklenburg Superior Court, the defendant herein, Richard Mayes, was tried upon indictment charging him with burglarizing the home of F. A. Fowler on the night of 25 July, 1939, which resulted in a conviction of burglary in the first degree and sentence of death as the law commands upon such verdict. *S. v. Morris*, 215 N. C., 552, 2 S. E. (2d), 554. From the judgment thus entered, the defendant gave notice of appeal to the Supreme Court and was allowed 40 days from 18 August,

1939, to make up and serve his statement of case on appeal, and the solicitor was given 20 days thereafter to prepare and file exceptions or countercase. The clerk certifies "that the appeal was not perfected within the time provided by law and no agreement made by counsel for an extension of time to file case on appeal." *S. v. Stovall,* 214 N. C., 695, 200 S. E., 426.

The time for serving statement of case on appeal has expired. *S. v. Watson,* 208 N. C., 70, 179 S. E., 455. Appeal bond of $100 was adjudged to be sufficient, but none seems to have been given.

As no error is apparent on the face of the record, the motion of the Attorney-General to docket and dismiss the appeal under Rule 17 will be allowed. *S. v. Day,* 215 N. C., 566, 2 S. E. (2d), 569.

Judgment affirmed. Appeal dismissed.

STATE v. JIM MOORE.

(Filed 29 November, 1939.)

1. Criminal Law § 80—

When defendant fails to make out and serve his statement of case on appeal within the time allowed, no agreement for extension of time having been made, the motion of the Attorney-General to docket and dismiss will be allowed, Rule of Practice in the Supreme Court, No. 17, but when defendant stands convicted of a capital crime this will be done only when no error is apparent on the face of the record.

2. Criminal Law § 76—

Defendant's application for *certiorari* denied on authority of *S. v. Moore,* 210 N. C., 686, and *held further,* the solicitor having refused to grant an extension of time to defendant to file his statement of case on appeal, and the time allowed therefor by the Court having expired, *certiorari* could not help defendant.

MOTION by State to docket and dismiss appeal. Application by defendant for *certiorari.*

Attorney-General McMullan for the State.
John J. Best for defendant.

STACY, C. J. At the July Term, 1939, Pender Superior Court, the defendant herein, Jim Moore, was tried upon indictment charging him with the murder of one John Robert Fennell, *alias* John Robert Findle, *alias* John Robert Mims, which resulted in a conviction of "First Degree

Murder as charged in the bill of indictment," and sentence of death as the law commands upon such verdict.

From the judgment thus entered, the defendant gave notice of appeal to the Supreme Court and was allowed 40 days from 20 July, 1939, to make up and serve his statement of case on appeal, and the solicitor was given the "same period of time to serve countercase." The clerk certifies that the "appeal was not perfected within the time allowed by the Court, nor fourteen days before the call of the district."

The time for serving statement of case on appeal 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,* albeit the order to this effect seems to have been made without supporting affidavit as required by C. S., 4651. *S. v. Stafford,* 203 N. C., 601, 166 S. E., 734.

In the absence of any apparent error, which the record now before us fails to disclose, the motion of the Attorney-General to docket and dismiss under Rule 17 will be allowed.

The defendant's application for *certiorari* must be denied on authority of *S. v. Moore,* 210 N. C., 686, 188 S. E., 421. He applied to the solicitor for an extension of time before it expired, but this was not granted. *Certiorari* would not help him in the circumstances. *Smith v. Smith,* 199 N. C., 463, 154 S. E., 737.

Certiorari denied.

Judgment affirmed. Appeal dismissed.

STATE v. HAYWOOD (HAZEL) MITCHELL.

(Filed 29 November, 1939.)

Criminal Law § 80—

When defendant fails to make out and serve his statement of case on appeal within the time allowed, no agreement for extension of time having been made, the motion of the Attorney-General to docket and dismiss will be allowed, Rule of Practice in the Supreme Court, No. 17, but when defendant stands convicted of a capital crime this will be done only after an inspection of the record fails to disclose error.

MOTION by State to docket and dismiss appeal.

Attorney-General McMullan for the State.

PER CURIAM. The defendant was tried at July Term, 1939, of Mecklenburg Superior Court, upon an indictment charging him with

the murder of George Green, and convicted of murder in the first degree. Judgment of death in the manner prescribed by law was thereupon rendered. The defendant gave notice of appeal to the Supreme Court and was allowed forty-five days in which to make up and serve his case on appeal, and the solicitor was allowed thirty days thereafter to make up and serve countercase or file exceptions.

The Attorney-General makes and files a motion to docket and dismiss the appeal, under Rule 17, for the reason that defendant has failed to perfect and prosecute the same, and therewith files transcript of the case and certificate of the clerk of the Superior Court of Mecklenburg County, showing that the appeal was not perfected within the time provided by law, and that no agreement for an extension of time to file case on appeal has been made. The time for serving case on appeal has expired.

The appeal must be dismissed. The Court, however, has carefully examined the record in the case as docketed in this Court and finds no error. *S. v. Goldston,* 201 N. C., 89, 158 S. E., 926; *S. v. Day,* 215 N. C., 566, 2 S. E. (2d), 569; *S. v. Mayes, ante,* 542.

Judgment affirmed. Appeal dismissed.

TOWN OF WADESBORO v. FRED J. COXE AND WIFE, ELIZABETH D. COXE, AND JAMES A. HARDISON AND WIFE, LILLIAN H. HARDISON.

(Filed 29 November, 1939.)

Appeal and Error § 2—

No appeal lies from the refusal of a motion to dismiss.

APPEAL by defendants from *Sink, J.,* at September Term, 1939, of ANSON.

Robinson, Pruette & Caudle for plaintiff, appellee.
B. M. Covington for defendants, appellants.

PER CURIAM. This is an appeal from an order denying a motion to dismiss the action. The appeal must be dismissed, since no appeal lies from a refusal to dismiss an action. *Johnson v. Ins. Co.,* 215 N. C., 120, and cases there cited.

Appeal dismissed.

KATE HARRISON EBERT v. C. C. DISHER.

(Filed 29 November, 1939.)

Appeal and Error § 50—

In this case the judgment appealed from having been modified and affirmed, it is ordered that the costs be equally divided between plaintiff and defendant. C. S., 1256.

PETITION by plaintiff Kate Harrison Ebert to rehear this case, reported *ante*, 36.

Ingle, Rucker & Ingle for petitioner.
Hastings & Booe and Peyton B. Abbott, contra.

PER CURIAM. The judgment of the Superior Court from which petitioner appealed was by this Court modified and affirmed. Petitioner asks, among other things, that the costs be not taxed against her. In this respect the petition is allowed, and the costs will be equally divided between plaintiff and defendant. C. S., 1256; *Hawkins v. Cedar Works*, 122 N. C., 87, 30 S. E., 13.

Petition allowed in part.

J. H. MOSS, ADMINISTRATRIX OF D. J. MOSS, DECEASED, v. RAYMOND BOWERS AND T. C. KIMEL.

(Filed 13 December, 1939.)

1. Appeal and Error § 40f—

In reviewing a judgment sustaining a demurrer, the Supreme Court will accept the facts alleged in the complaint as true.

2. Sheriffs § 6d—Injury inflicted by escaped prisoner held not foreseeable, and sheriff and deputy were not individually liable therefor.

This action was instituted against the sheriff and his deputy in charge of the jail in their individual capacities. The complaint alleged that the jailer, with the knowledge of the sheriff, left the jail in charge of his minor daughter, and that she, in his absence, and as the agent of defendants, wrongfully unlocked a cell door and permitted two hardened and dangerous criminals to escape, that defendants negligently failed to warn promptly the authorities of the city in which one of the criminals had his home of the fact of his escape, and that this criminal shot and killed plaintiff's intestate in said town in attempting to commit a robbery and attempting to escape from the city. *Held:* Defendants' demurrer to the

complaint was properly sustained, since the injury and death of intestate, considering the facts alleged in the light most favorable to plaintiff, was not foreseeable as the natural and probable consequences of the negligent or wrongful acts alleged.

APPEAL by plaintiff from *Olive, J.*, at June Term, 1939, of DAVIDSON. Affirmed.

The plaintiff administratrix brought this action to recover for the death of the intestate, D. J. Moss, who, it was alleged in the complaint, was murdered by one Godwin, a prisoner in the custody of the defendant sheriff in the common jail of Davidson County, and who, prior to the murder, was permitted to escape through the negligence or wrongful conduct of the sheriff.

The allegations of the complaint, and particularly the recitals of fact therein, taken as true, are to the effect that one James Godwin had been properly committed to the custody of the sheriff, to be held in the common jail of Davidson County, upon a charge of housebreaking and robbery, and felonious assault upon his grandfather; that Godwin had committed other crimes and felonies, and had felonious and criminal inclinations and propensities to commit other felonies and crimes to the full knowledge of the defendant Bowers, sheriff, and his codefendant, T. C. Kimel, who was keeper of the common jail, performing his functions under the direction and authority of the sheriff; that T. C. Kimel, the jailer and codefendant, with the knowledge of the sheriff, left the felons and criminals kept in the custody of the common jail in the care of Lula Belle Kimel, a minor daughter of the jailer, to whom was committed the keeping and custody of the common jail and the keys thereto; that the aforesaid James Godwin while in jail "made love" to the said Lula Belle Kimel and they were sweethearts; and that on account thereof Godwin was being "shown and granted favors and concessions as a felon and prisoner in said common jail by the sympathy and love and at the hands of the said Lula Belle Kimel, agent and servant, acting within the scope of her employment, power and authority, of the defendants and each of them jointly and severally as keepers of said common jail," and custodians of the said James Godwin and other felons and criminals.

It is further alleged that on 3 October, 1938, while the defendants were absent from the jail, and while the defendant, T. C. Kimel, was several miles away from the jail attending to his private affairs at his farm, the jail keys having been left with said Lula Belle Kimel, the said Lula Belle Kimel "wrongfully and unlawfully, willfully and wantonly, negligently and knowingly, unlocked the prison doors to said jail and turned over to James Godwin" a pistol and pistol cartridges and permitted and allowed said Godwin and one William Wilson to escape from the jail.

As alleged, these two escaping prisoners secretly left the jail, found a taxicab, and, at the point of a pistol, compelled the driver to take them to Lexington and thence to High Point and to the home of James Godwin in the latter city, where the escaping "felons" secured another pistol, and, continuing their excursion, bound and gagged the chauffeur of the taxicab, took his cab away from him, and drove to a point near the Adams Millis Hosiery Mills; that while engaged in an attempt to rob a man at the aforesaid place, and attempting to escape therefrom in the nighttime, at about eight o'clock, the said Godwin "wrongfully and unlawfully, willfully and wantonly, negligently and feloniously, fatally shot and wounded D. J. Moss, plaintiff's intestate, from which shot and fatal wound the said D. J. Moss died on the 4th day of October, 1938."

The complaint alleges that the escape of the prisoner, Godwin, wrongfully permitted in the manner described, was the proximate cause of the death of plaintiff's intestate, and further summarizes as the substance of the negligence charged that it was the duty of the defendants, as keepers of the common jail, "under the conditions, facts, and circumstances existing," "to exercise toward the public, and especially plaintiff's intestate, not only ordinary care but the highest degree of care, foresight and forethought, all of which defendants, and each of them, wrongfully and unlawfully, willfully and wantonly, recklessly, indifferently and negligently failed to do, perform, or execute; but on the contrary, as plaintiff alleges on information and belief, when the defendants obtained actual knowledge that their agent, servant, and assistant as keeper of said jail and said felons and prisoners therein, had unlocked the door of said jail and allowed the said James Godwin and the said William Wilson to take a loaded pistol with other pistol cartridges and escape from said jail, with knowledge of the fact that James Godwin was a desperate, vicious, wicked, and cruel criminal and felon, and that his home was in the city of High Point, did not notify the officers of the law or anyone else in or around High Point of the escape of the said Godwin and Wilson, and the facts aforesaid, until several hours after said escape and several hours after the defendants had actual knowledge of the facts, conditions, and circumstances aforesaid, and until after the said James Godwin had fatally wounded plaintiff's intestate as aforesaid."

Other allegations relate to the damages sustained by the decedent's estate.

The defendants demurred to the complaint and, from a judgment sustaining the demurrer, the plaintiff appealed.

Walser & Wright, Gaston A. Johnson, and D. H. Parsons for plaintiff, appellant.

P. V. Critcher, Martin & Brinkley, and Phillips & Bower for defendants, appellees.

SEAWELL, J. We accept the allegations of this complaint, and the facts therein set up, as true, for the purpose of passing on the demurrer. *Ins. Co. v. McCraw,* 215 N. C., 105; *Toler v. French,* 213 N. C., 360, 196 S. E., 32; *Andrews v. Oil Co.,* 204 N. C., 268, 168 S. E., 228; *Ballinger v. Thomas,* 195 N. C., 517, 142 S. E., 761. As to the factual situation thus appearing, the nearest case in point in our own reports seems to be *Sutton v. Williams,* 199 N. C., 546, 155 S. E., 160. In that case the sheriff was sued in his official capacity, with the surety on his bond, for having negligently permitted the escape of a prisoner, who, driving an automobile, with the authority and consent of the sheriff, negligently ran into a car driven by the plaintiffs in that case and seriously injured them.

From the law side, however, we get little or no aid to the decision of the case at bar. A demurrer to the complaint was sustained in the lower court upon the ground that the official bond of the sheriff was not liable under the law. The opinion of the court upheld the judgment sustaining the demurrer principally upon considerations respecting such liability.

This Court has recently had occasion to deal with the question of liability of the surety and of the sheriff in his official capacity for certain wrongful acts of the sheriff (*Price v. Honeycutt, ante,* 270), and the conclusion reached may not be thoroughly in accord with all that was said in *Sutton v. Williams, supra.* But these questions are not involved in the case at bar, since the sheriff and his deputy are not sued in their official capacity, and the surety is not a party. *Sutton v. Williams, supra,* concludes with the significant statement: "Whether the sheriff is personally liable for injury proximately resulting from the negligence of Williams is a question we are not called upon to decide. The complaint is not specific on the point whether Williams at the time of the injury was on an errand for the jailer or the sheriff; and the allegation that he drove the car with the authority and consent of the sheriff, if construed most strongly against the sheriff, would raise a question only as to his personal liability. An officer may be liable personally although not liable on his bond. *Holt v. McLean,* 75 N. C., 347."

We do not undertake to decide here whether a sheriff who has negligently or wrongfully permitted a prisoner to escape may not, under any circumstances, be held liable to a person who has received an injury at the hands of the prisoner thus enlarged. But in this case, considered as to its foreseeability, and in the most favorable light thrown on the transaction in the complaint, we do not regard the injury and death of plaintiff's intestate as being within the natural and probable consequences of the negligent or wrongful acts imputed to the sheriff and his codefendant.

Where it is apparent from the complaint that the injury complained of is too remote to be referred to the negligence of the defendant as the proximate cause, no cause of action is stated and a demurrer made in apt time will be sustained.

The judgment is

Affirmed.

C. H. PATTERSON v. J. N. BRYANT, JUNIUS D. GRIMES, C. A. TURNAGE, F. S. WORTHY AND S. B. ETHRIDGE, TRADING AS WORTHY & ETHRIDGE; S. B. ETHRIDGE, INDIVIDUALLY; J. S. HUMPHRY AND R. F. HUMPHRY, TRADING AS HUMPHRY BROTHERS, AND J. S. HUMPHRY AND R. S. HUMPHRY, INDIVIDUALLY.

(Filed 13 December, 1939.)

1. Vendor and Purchaser § 25—

The purchaser's right of action against the vendor for failure of title is not predicated upon any warranty, but the purchaser is entitled to recover upon a proper showing, even when there are no warranties in the deed, upon the broad principle that the vendor is under duty to refrain from deliberately selling the same property a second time with knowledge that he is jeopardizing the right of his purchasers.

2. Deeds § 9—

C. S., 3309, provides, for reasons of public policy, that the rights of successive grantees of the same property shall be determined by registration, and that even actual knowledge on the part of the grantee in a registered instrument of the execution of a prior unregistered deed will not defeat his title as purchaser for a valuable consideration in the absence of fraud or matters creating an estoppel.

3. Deeds § 10a—

An unregistered deed is good as between the parties and the fact that it is not registered does not affect the equities between the parties, the sole purpose of the statute being to determine and make certain the question of title.

4. Same: Equity § 2: Vendor and Purchaser § 25—

The registration laws are not for the protection of the grantor, and therefore laches on the part of his first grantee in failing to promptly record his deed is not available as an equitable defense in such grantee's action for damages for failure of title by reason of the execution by the grantor of a second deed to the same property which is first recorded.

5. Vendor and Purchaser § 25—Evidence that defendant deliberately executed two deeds to same property entitles grantee in deed secondly recorded to recovery.

Defendant conveyed certain timber by deed to plaintiff and thereafter executed deed to a third person, which deed included in its conveyance the same timber rights conveyed in prior deed. There was evidence that

defendant hesitated before executing the second deed and sought to justify his action by raising a question as to the fairness and validity of the former transaction. The second deed was first recorded. Plaintiff instituted this action for damages for failure of title. *Held:* The evidence is sufficient to sustain an inference that defendant was aware that he was twice selling the same property and receiving the purchase price from each of his grantees, and equity will not permit him to be unjustly enriched by retaining both purchase prices but will force him to make restitution to plaintiff as upon a *quasi* contract as the party injured by defendant's breach of duty in jeopardizing the rights of his grantees by executing two deeds to the same property.

APPEAL by defendant, J. N. Bryant, from *Harris, J.*, at March Term, 1939, of PENDER. Affirmed.

The plaintiff complained, and the evidence tended to show, that the defendant conveyed to him the timber located on a certain tract of land in Pender County, described in the complaint, and received the purchase price therefor. The plaintiff did not immediately cause his deed to be registered. Meantime, the defendant, for a valuable consideration, included the same timber in a deed made to other parties, who promptly registered their deed. The last mentioned deed was recorded on 7 September, 1937; ten days later the plaintiff's deed was recorded. The time given the plaintiff to cut the timber had not expired.

In the course of the trial a judgment of nonsuit was entered as to the grantees under the deed last executed, from which order the plaintiff did not appeal, and the suit proceeded against Bryant.

In the evidence supporting the contentions of the plaintiff it was developed that the defendant at the time of the execution of the second deed hesitated about making it, recalled and spoke of the transaction he had had with the plaintiff about the timber, and raised some question as to whether the deed made to the plaintiff ought to have included certain timber which he was then about to convey under the second deed, and appealed to the recollection of persons standing by to verify his impression of the transaction theretofore had with Patterson.

In his answer to the complaint the defendant Bryant alleged that he had been defrauded by the plaintiff in the inclusion in the first deed to plaintiff of the timber in dispute, and in his testimony reviewed the transaction with Patterson leading to the execution of the deed, claimed that he had been deceived as to the conditions on the land as being unfavorable to the cutting of the timber, and as to the quantity of timber in the swamp, and claimed that he only intended to give the plaintiff the right to cut not exceeding fifteen trees upon the area afterward included in the deed made to Grimes, Worthy, and others. He claimed that at the time of the execution of the deed to Patterson he was sick in bed and signed the deed only at the insistence of Patterson.

In apt time the defendant moved for judgment as of nonsuit, both at the conclusion of the plaintiff's evidence and at the conclusion of all the evidence, which motion was declined.

Upon the issues submitted to the jury a judgment was entered awarding $350.00 damages to the plaintiff in compensation for the injuries done him through the alleged wrongful acts of the defendant, from which judgment defendant appealed, assigning errors.

John J. Best for defendant, appellant.
Hackler & Allen and C. E. McCullen, Jr., for plaintiff, appellee.

SEAWELL, J. The only question argued by the defendant in this Court relates to the refusal of the trial judge to allow his motion for judgment as of nonsuit made at the conclusion of the plaintiff's evidence and renewed at the conclusion of all the evidence.

Defendant's counsel contends that the motion for judgment as of nonsuit should have been allowed (1) because there was no allegation or evidence of the breach of any covenant in the deed from defendant to plaintiff; (2) that there was no allegation or evidence of any unjust enrichment of the defendant; and (3) that there was no allegation or evidence of fraud or guilty knowledge or intentional unfair dealings on the part of the defendant. It is further pointed out that the plaintiff was negligent or guilty of laches in recording his deed, and that his loss or injury, if any, was due to that cause.

The deed does not, in fact, contain any covenants or warranties, but the rights of the plaintiff in this suit are not predicated upon a breach of any warranty in the deed, but upon a broader principle: the breach of duty which he conceives the defendant owed him of refraining from the deliberate selling of the land a second time, with the knowledge that he was jeopardizing the rights of plaintiff, and thus setting in motion a chain of events that defeated the title of the plaintiff, while it left the defendant enriched by the purchase price paid to him by the plaintiff, as well as that paid to him by his subsequent grantees of the same property.

The single question before us is whether in equity the defendant may be allowed to retain the money received as a purchase price from both of these parties, and, if not, to whom restitution should be made.

It is true in a general sense that the plaintiff lost the title to his land by his failure to record his deed promptly. For reasons of public policy, C. S., 3309, in cases coming within its purview, undertakes to determine the question of title upon the fact of registration, making the unregistered title ineffective as against a subsequent holder from the same grantor for a valuable consideration except from registration. For the

same reasons of public policy, actual knowledge on the part of the holder of the registered title of the execution of the prior deed, in the absence of fraud or matters creating an estoppel, will not avail to defeat his title as a purchaser for a valuable consideration.

The statute is intended to render titles certain and secure and to prevent confusion, mistake, and fraud growing out of the existence of unregistered and unknown titles which might defeat a subsequent purchaser for value. *Warren v. Williford,* 148 N. C., 474, 62 S. E., 697; *Weston v. Lumber Co.,* 160 N. C., 263, 75 S. E., 800. It is objective in its character and does not attempt to settle any equities which might exist between a grantor and those to whom he has sold his land, and those to whom he has resold it either mistakenly or deliberately and fraudulently. The deed made by him in the first instance is good *inter partes. Hargrove v. Adcock,* 111 N. C., 166, 16 S. E., 16; *Warren v. Williford, supra; Weston v. Lumber Co., supra.* Whether it is registered at all is of no consequence to the grantor, and the statute requiring conveyances to be registered is not for his protection, but, as stated, for protection of a subsequent purchaser with whom he has seen fit to deal; therefore, laches on the part of his first grantee in recording his deed is not available to defendant as an equitable defense. The first grantee is not bound to anticipate that the grantor would sell the property again and rush off to the registry office to forestall such a breach of faith. As between the parties, any loss sustained by the plaintiff in the transaction complained of must be regarded as the result of the defendant's conduct in dealing doubly with the plaintiff and with subsequent grantees to whom he successfully transferred the timber.

It cannot be said that the defendant was unaware of the fact that he was selling his timber a second time and a second time receiving pay for it. According to witnesses present when the deed to Grimes and others was signed, the defendant there sought to justify his action by raising a question as to the fairness and validity of the former transaction between himself and this plaintiff—hesitating to sign the deed until he could receive assurances that witnesses might remember phases of the former transaction agreeable to his present purpose. The evidence was sufficient to sustain an inference that the act was deliberate and that the defendant might at the time have known that he was violating a duty either to the plaintiff or to the persons who were then about to receive title to the land. That was a violation of duty, the consequences of which will be referred to the act of the defendant himself, without whose wrongful act the plaintiff would not have sustained his loss.

But to sustain this action it is not necessary for the plaintiff to maintain it as one of tort. If we wish to be technical about the forms of

action, which we consider wholly unnecessary in this case, it may be regarded as an action of *assumpsit,* involving the principles of *quasi* contract, which are broad enough to include practically every instance where a defendant has received money which he is "obliged by the ties of natural justice and equity to refund." 41 C. J., p. 29, note 7 (c). "A person who has been unjustly enriched at the expense of another is required to make restitution to the other." Restatement of the law; Restitution. Am. Law Inst. 1937, p. 27.

According to the facts found by the jury, the plaintiff has paid to the defendant a sum of money for which he received no value. The defendant has in his hands this money, as well as the price paid to him for the same thing by his subsequent grantees. Equity will not permit him to retain both. Restitution must be made to the plaintiff, whose present condition is, in part at least, due to the conduct of the defendant. In this case the amount of restitution was properly left to the jury, upon the evidence.

The judgment is

Affirmed.

JAMES OSCAR THOMPSON v. VIRGINIA AND CAROLINA SOUTHERN RAILROAD COMPANY, A CORPORATION.

(Filed 13 December, 1939.)

1. Abatement and Revival § 17—

Where it does not appear upon the face of the complaint that a prior action is pending between the parties, the objection may be raised by answer, C. S., 517, treated as a plea in abatement.

2. Abatement and Revival § 7: Master and Servant § 44—

Where it appears that an injured employee's action against the third person tort-feasor is instituted prior to the institution of an action by the compensation insurance carrier against the tort-feasor, chapter 449, Public Laws 1935, Michie's Code, sec. 8081 (r), defendant's plea in abatement in the employee's action on the ground of the pendency of a prior action cannot be sustained.

3. Pleadings § 14—

When defendant demurs *ore tenus* on the ground that the court is without jurisdiction, and this defect does not appear upon the face of the complaint, the court may consider the facts alleged in the answer and the evidence heard by it upon defendant's motion to dismiss.

4. Master and Servant § 44—Employee may maintain action in his own name against third person tort-feasor when no award of compensation has been made to employee.

This action was instituted by an employee against a third person tort-feasor. It appeared that an award for medical expenses had been made

on petition of the doctor, but no claim for compensation had been filed by the employee against his employer and that no compensation for the injury had been awarded him, and that the time for filing claim therefor had expired, so that no future claim by subrogation could accrue in favor of the employer or insurer against the third person tort-feasor. It further appeared that the insurance carrier subsequently instituted action against the third person tort-feasor to recover the amount paid by the insurer under the award of medical expenses. *Held:* The third person tort-feasor is liable in damages for any negligent injury inflicted by it and is not interested in the form of the action except to the extent of seeing that it may not be twice vexed nor more than one recovery allowed, nor is it concerned with the method of distribution of any recovery, and therefore it is not entitled to dismissal of the employee's previously instituted action. Whether, and if so, by what method, the insurance carrier can be reimbursed out of the recovery for the amount paid by it for medical expenses *held* not presently presented, but the trial court has power, by proper order, to protect the interests of all parties before the court.

APPEAL by plaintiff from *Burney, J.*, at May Term, 1939, of ROBESON. Reversed.

McKinnon, Nance & Seawell for plaintiff.
McLean & Stacy for defendant.

DEVIN, J. Plaintiff instituted his action against defendant Railroad Company for damages for a personal injury alleged to have been caused him by the negligence of the defendant. He alleged that while he was in a boxcar on defendant's track, at work for his employer, the R. J. Reynolds Tobacco Company, the boxcar was violently struck by one of defendant's locomotives, negligently operated, and he suffered a physical injury to his head and body, for which he asks damages in the sum of $3,000. The injury occurred 23 August, 1938, and summons was issued 19 October, 1938.

Defendant answered, denying the allegations of negligence, pleading contributory negligence, and further alleged that plaintiff was an employee of R. J. Reynolds Tobacco Company, and that both he and his employer had accepted the provisions of the North Carolina Workmen's Compensation Act, and that plaintiff's claim should have been filed with the Industrial Commission, which had exclusive jurisdiction of the matters complained of. The answer was verified 9 November, 1938. In March, 1939, defendant filed an amended answer alleging that plaintiff's claim had been heard and adjudicated by the Industrial Commission, and that an award thereon had been paid by the employer's insurance carrier, and that the insurance carrier, the Maryland Casualty Company, had instituted suit against defendant on behalf of itself and the plaintiff to recover damages for the injury under the provisions of ch. 449, Public Laws 1933 (Michie's N. C. Code, sec. 8081 [r]).

At the hearing defendant demurred to the complaint on the ground that the injury complained of was due to an accident arising out of and in the course of plaintiff's employment by R. J. Reynolds Tobacco Company, and that following a hearing had before the Industrial Commission upon the report of the plaintiff's employer, and an award made thereon, a suit had been instituted against the defendant by the Maryland Casualty Company, employer's insurance carrier, upon the same cause of action, which was now pending, and defendant moved to dismiss the action.

In support of this demurrer and motion the court heard evidence offered by defendant and made certain findings, and adjudged that the motion of defendant be allowed and dismissed the action.

The defendant's demurrer, interposed on the ground that there was another action pending between the same parties for the same cause, related to matters which do not appear on the face of the complaint. But this objection may be raised by answer (C. S., 517), treated as a plea in abatement. *Lineberger v. Gastonia,* 196 N. C., 445, 146 S. E., 79. However, the record discloses that plaintiff's action was begun 19 October, 1938, and that the action of the Maryland Casualty Company against defendant was not instituted until 15 February, 1939. Hence, the defendant's motion based upon this ground alone could not avail. *Pettigrew v. McCoin,* 165 N. C., 472, 81 S. E., 701; *Allen v. Salley,* 179 N. C., 147, 101 S. E., 545; *Bank v. Broadhurst,* 197 N. C., 365, 148 S. E., 452; *Bowling v. Bank,* 209 N. C., 463, 184 S. E., 13.

Treating defendant's motion as a demurrer *ore tenus* to the jurisdiction of the Superior Court, it seems that the defect complained of does not appear on the face of the complaint. The facts found by the court below were not alleged or admitted by the plaintiff. However, it may be proper to consider the matters set up in the answer, in the light of the evidence produced before the trial court, as bearing on defendant's plea that the Superior Court did not have jurisdiction of plaintiff's action.

The North Carolina Workmen's Compensation Act, as amended by chapter 449, Public Laws 1933, prescribes that the rights and remedies granted by the act to an employee to secure compensation for an injury by accident shall exclude all other rights and remedies as against his employer. The statute contains the further provision: "Provided, however, that in any case where such employee, his personal representative, or other person may have a right to recover damages for such injury, loss of service, or death from any person other than the employer, compensation shall be paid in accordance with the provisions of this act." The provision making the remedy against the employer under the act exclusive, does not appear in the clause relating to suits against third persons.

The jurisdictional facts, as disclosed by the testimony of the secretary of the Industrial Commission, were these: Notice of the accident was given the Commission by plaintiff's employer, but the plaintiff Thompson did not at any time make any claim before the Commission for compensation, or for a hearing, or for an award, nor was he ever present or represented at any hearing. Neither the employer nor the employee requested a hearing on compensation, nor did either employer or employee ever agree to an award. The award, dated 13 December, 1938, dealt only with medical expenses, and was made on petition of the doctor.

The Workmen's Compensation Act defines "compensation" as the "money allowance payable to an employee or his dependents as provided for in this act and includes funeral benefits provided herein."

It was alleged in the answer that the Maryland Casualty Company, the insurance carrier of the employer, paid the award for medical expenses (amounting to $114), and it appears that the Casualty Company has instituted action in its own name against the defendant Railroad Company to recover for the injury to plaintiff. The statute provides that where an employee is insured and the insurance carrier shall have paid any compensation for which the employer is liable the insurance carrier shall be subrogated to the rights of the employer and may enforce any such rights in the name of the injured employee.

It is apparent that no compensation for the injury has been claimed by the plaintiff, or awarded him by the Industrial Commission, and the mere fact that the insurance carrier, having paid the medical expenses allowed by the Commission on the doctor's petition, has instituted suit in its own name against the defendant, cannot be held to entitle the defendant Railroad Company to a dismissal of plaintiff's previously instituted action against it for damages for an injury alleged to have been caused by its negligence.

In *Brown v. R. R.*, 204 N. C., 668, 169 S. E., 419, *Brogden, J.*, speaking for the Court, makes this observation: "Manifestly the statute was designed primarily to secure prompt and reasonable compensation for an employee, and at the same time permit an employer, or his insurance carrier, who has made a settlement with the employee, to recover the amount so paid from a third party causing the injury to such employee. C. S., 8081 (r). Moreover, the statute was not designed as a city of refuge for a negligent third party."

Nor may the rule in *Hardison v. Hampton*, 203 N. C., 187, 165 S. E., 355, be invoked in support of the judgment below. It was said in that case: "When the employer has filed with the Commission a report of the accident and claim of the injured employee, the Commission has jurisdiction of the matter and the claim is filed with the Commission within the meaning of section 24." But here it affirmatively appears from

defendant's evidence that no claim was made, or attempted to be made, by or on behalf of plaintiff, or considered by the Industrial Commission, for compensation for this injury.

The defendant is not primarily concerned with the form in which this action against it, to recover damages for the injury to plaintiff, is prosecuted, except to see that it may not be twice vexed nor more than one recovery allowed. The period of twelve months within which plaintiff could file claim for compensation under the act has elapsed, and no other right of action could now accrue for the benefit of the employer, or its insurance carrier, or the plaintiff. If it be established that the defendant negligently caused plaintiff's injury, it must respond in damages, and is not concerned with the method of distribution of the recovery. In the event of recovery by plaintiff in this action, whether the insurance carrier can be reimbursed for the amount paid for medical expenses, or, if so, in what manner, is not now before us. The Court has power, by proper order, to protect the interests of all parties before the Court.

We conclude that the court below was in error in sustaining defendant's motion, and that the judgment dismissing the action must be

Reversed.

SALLIE JOHNSON AND HUSBAND, DAN J. JOHNSON, ALICE GUIN AND HUSBAND, W. C. GUIN, MARVIN JOHNSON, WILL McMILLAN, GORDON LEE McMILLAN, J. W. McMILLAN, HOYETTE McMILLAN, ALBERTA FURR AND HUSBAND, JOHN FURR, ELLEN KATE McMILLAN, SARAH MARGARET McMILLAN, EDITH McMILLAN, ROSSER McMILLAN AND ETHELEEN JOHNSON, THE LAST FOUR NAMED DEFENDANTS ARE MINORS AND ARE REPRESENTED BY THEIR NEXT FRIEND, WILL McMILLAN, v. J. C. HARDY, E. H. LORENSON, D. McCRIMMON AND ARTHUR D. GORE, TRUSTEE (ORIGINAL PARTIES DEFENDANT), AND W. DUNCAN MATTHEWS (ADDITIONAL PARTY DEFENDANT).

(Filed 13 December, 1939.)

1. Executors and Administrators § 30c: Parties § 1—Beneficiaries may maintain action for wrongful dissipation of assets against administrator and those profiting by alleged collusion.

Plaintiff beneficiaries instituted this action alleging that the administrator of the estate, pursuant to a fraudulent scheme, sold notes representing the purchase price of lands sold by testatrix prior to her death, and the deed of trust securing same, belonging to the estate, for a grossly inadequate sum, that the purchaser of the notes caused the deed of trust to be foreclosed and bid in the land at the sale and assigned his bid, and that the assignee, to whom the trustee executed deed, had full knowledge of all the facts. Plaintiffs prayed that the sale of the deed of trust and the notes secured thereby, the foreclosure and the trustee's deed, all be set

aside and that they be declared the owners of the notes and deed of trust as beneficiaries of the estate. *Held:* C. S., 135, authorizes suits by the beneficiaries of an estate as well as by creditors thereof against the personal representative for wrongful dissipation of assets of the estate, and their action to recover the assets is not precluded by the fact that the person allegedly doing the wrong causing the loss was at the time administrator of the estate, and defendant's motion to dismiss on the ground that the action was not brought in the name of the real party in interest should have been overruled.

2. Same—

In an action by the beneficiaries to recover assets of the estate alleged to have been wrongfully dissipated by defendant administrator to the profit of the other defendants alleged to have been in collusion with him, the fact that the administrator had been discharged will not preclude plaintiff's right to maintain the action for want of a personal representative to administer any recovery that might be had, since the court has power by proper action to safeguard the rights of all parties. C. S., 135.

APPEAL by plaintiffs from *Harris, J.*, at July Term, 1939, of HOKE. Reversed.

Judgment was rendered on the pleadings. After hearing the complaint and the several answers read, the court, on motion of defendants, dismissed the action because it was not prosecuted in the name of the real party in interest. Plaintiffs appealed.

Gavin & Jackson for plaintiffs, appellants.

H. W. B. Whitley and W. R. Clegg for J. C. Hardy.

H. F. Seawell, Jr., and W. Duncan Matthews for Lorenson and McCrimmon.

DEVIN, J. Plaintiffs are the heirs at law, next of kin and beneficiaries under the will of Catherine E. Johnson, who died in May, 1930. The defendant McCrimmon was appointed administrator of the estate of decedent in 1931. It was admitted that in 1930, prior to her death, Catherine E. Johnson conveyed to W. L. Jones a tract of land containing 79 acres, and that Jones and wife executed a deed of trust conveying the land to Arthur D. Gore, trustee, to secure the payment of five notes aggregating $1,500, payable to Catherine E. Johnson, representing the purchase price of the land.

The material allegations of the complaint, briefly stated, are as follows: After the death of Catherine E. Johnson, W. L. Jones, being unable to pay the debt, and without having paid anything thereon, surrendered possession of the land to the plaintiffs, who are now in possession thereof. In 1935, at the instance of defendant McCrimmon, an order of court was entered directing Arthur D. Gore, trustee, to sell the land for the payment of the debt, and, pursuant thereto, sale was made,

and plaintiff Sallie Johnson became the last and highest bidder for the land at $675, the date of the last sale being 15 February, 1936. Report of sale was filed with the court. No order was made confirming the sale or ordering resale. It is alleged that, while plaintiff's bid was pending, defendants McCrimmon and Lorenson, with the aid of defendant Matthews, who was attorney for both, colluding and conspiring together to deprive the plaintiffs of their property and rights, effected a sale by defendant McCrimmon to defendant Lorenson of the $1,500 notes and deed of trust for the wholly inadequate sum of $100; that the notes secured by the deed of trust were worth their face value and the makers were otherwise solvent; that as soon as the notes and deed of trust were thus wrongfully disposed of by defendant McCrimmon in breach of his trust and acquired by defendant Lorenson, these defendants procured the sale of the land under the deed of trust, Gore, the trustee, being imposed upon and the sale conducted by defendant Matthews; that the land was bid off at the last mentioned sale by defendant Lorenson at the purported price of $1,000, and his bid was assigned to defendant Hardy, who was a party to the scheme and who took deed to the land with knowledge of the collusion and trickery alleged, Hardy paying Lorenson $400 therefor; that defendant Hardy is now seeking to eject the plaintiffs from the land under the deed so obtained, and has cut and removed $400 worth of timber from the land.

The defendant Arthur Gore admitted in his answer that he signed the deed to defendant Hardy "at the request and under the advice of W. D. Matthews, the attorney who handled said foreclosure sale; but that this defendant (Gore) neither individually nor as trustee ever undertook in any way or manner to conduct any of the proceedings effecting the conveyance of the land, nor handled any of the cash purported to have been obtained for either said land or any personalty involved therein."

Plaintiffs allege that the debts of the estate were of insignificant amount, and that there were other assets sufficient to have paid them. The plaintiffs allege further that by the fraud and collusion between defendants McCrimmon and Lorenson, aided by defendant Matthews and participated in by defendant Hardy, they have been wrongfully deprived of $1,500 worth of property, to which, as distributees and beneficiaries of Catherine E. Johnson, they were justly entitled. Plaintiffs pray that the purported sale of the notes and deed of trust be declared void and of no effect, and that plaintiffs be declared the owners of and entitled to same; that the purported sale of the land and deed signed by Gore, trustee, be declared void and set aside, and that defendants be restrained from proceeding thereunder.

Upon these allegations in the complaint and admissions in the answer, we think the court below was in error in dismissing the action. The

statute, C. S., 135, contains this provision: "In addition to the remedy by special proceeding, actions against executors, administrators, collectors and guardians may be brought originally to the Superior Court at term time; and in all such cases it is competent for the court in which said actions are pending to order an account to be taken by such person or persons as said court may designate, and to adjudge the application or distribution of the fund ascertained, or to grant other relief, as the case may require."

This statute applies to suits by beneficiaries as well as by creditors. *Fisher v. Trust Co.,* 138 N. C., 90, 50 S. E., 592. It was said in *Leach v. Page,* 211 N. C., 622, 191 S. E., 349: "There is under our system of code pleading, nothing to prevent the beneficiaries from bringing action in the Superior Court. C. S., 135. The distributees of an estate may bring suit originally in the Superior Court against the administrator for an accounting and for breach of his bond."

The plaintiffs should not be debarred from bringing this suit to assert their rights and to prevent further wrongs because the person, whose wrongdoing is alleged to have caused the loss complained of, was at the time the administrator of the estate. The purpose of this suit is to require the restoration to them, or for their benefit, of property alleged to have been wrongfully and fraudulently dissipated by defendant McCrimmon while acting as administrator, and for relief against those who in collusion with him profited thereby and obtained in an unconscionable manner property which justly belongs to the beneficiaries of the estate. *Thigpen v. Trust Co.,* 203 N. C., 291, 165 S. E., 720; *S. v. McCanless,* 193 N. C., 200, 136 S. E., 371.

It is not alleged that the defendant McCrimmon has filed his final account, though it is stated in his answer that he has been discharged. However, the plaintiffs' right to bring this action will not be denied for lack of a personal representative to administer the property if recovered. The court has power by proper action to safeguard the rights of all parties. C. S., 135; *S. v. McCanless, supra.*

While the material facts alleged by plaintiffs are denied in the answers, for the purpose of this appeal we are concerned chiefly with the allegations contained in the complaint in order to determine whether upon these allegations the action can be maintained. We conclude that the ruling of the court below must be held for error, and the judgment dismissing the action

Reversed.

HANES FUNERAL HOME, INC., v. DIXIE FIRE INSURANCE COMPANY.

(Filed 13 December, 1939.)

1. Larceny § 1—

In order to constitute larceny it is necessary that the personalty be taken under circumstances amounting to a technical trespass and that there be some asportation, and that both the taking and the carrying away be with felonious intent to steal.

2. Trial § 22b—

Upon motion to nonsuit the evidence must be considered in the light most favorable to plaintiff and he is entitled to every reasonable intendment thereon and every reasonable inference therefrom.

3. Same—

While ordinarily defendant's evidence should not be considered in passing upon his motion to dismiss as of nonsuit, unless it is favorable to plaintiff, it is properly considered when it is not in conflict with plaintiff's evidence, but is in explanation and clarification thereof.

4. Insurance § 58—Held: There was total failure of proof of theft of car and nonsuit should have been granted in action on theft policy.

Plaintiff's evidence tended to show that its car was found wrecked on the highway and that it had been taken by someone other than an employee. Defendant's evidence tended to show that the car was parked in the garage of plaintiff's president, that upon leaving town the president turned over the keys to a Negro employee to be delivered to the office, that the employee gave the keys to the president's nephew who was temporarily staying at the president's home, and that the nephew, upon discovering that his own car was not running satisfactorily, took plaintiff's car in order to meet a personal engagement in another town, and that the wreck occurred on his return trip. *Held:* Defendant's evidence, being in explanation and clarification of plaintiff's evidence, was properly considered upon defendant's motion to nonsuit, and the evidence fails to show any felonious intent in the taking of the car necessary to constitute either common law or statutory larceny under C. S., 4246, and defendant's motion to nonsuit in plaintiff's action on an automobile theft policy covering the car should have been granted.

APPEAL by defendant from *Clement, J.*, at August Term, 1939, of GUILFORD. Reversed.

Civil action on a contract of insurance to recover damages alleged to have been sustained as a result of alleged theft of a motor vehicle.

On about 1 July, 1938, the defendant issued its policy covering the plaintiff's fleet of motor vehicles, including the motor vehicle mentioned and described in the complaint, insuring against theft and any damages caused thereby.

Henry L. Hanes was the president and treasurer of plaintiff corporation. The LaSalle automobile described in the complaint and two others, when not in use, were kept in a garage at his home. On 7 October, 1938, Hanes left the LaSalle in the garage and gave the keys to the car to a Negro employee of the plaintiff to be delivered to the office. He and his wife left for a trip to New York. One L. H. Nelson, who is the nephew of Mrs. Hanes, was staying temporarily in the Hanes' home and was there while Mr. and Mrs. Hanes were on their trip to New York.

On the night of 7 October, 1938, Nelson had planned to go on his own automobile to Siler City to keep an engagement with a girl friend. He discovered that his car was not running satisfactorily. The Negro employee of the plaintiff having theretofore delivered to him the keys to the car, Nelson took the LaSalle from the garage to use on his trip. On his return he was forced off the road and the car was badly damaged and he suffered physical injuries.

It is admitted that the damage to the car was in excess of $1,000, the face amount of the policy in respect to theft. There was a verdict and judgment for the plaintiff and the defendant excepted and appealed.

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

BARNHILL, J. That the policy of insurance was issued and was in full force and effect at the time of the damage to plaintiff's car was admitted. The plaintiff offered evidence tending to show that the car was left in the garage at the home of its president; that subsequently it was found on the road between Greensboro and Siler City in a badly damaged condition, and that the damage thereto exceeded $1,000. The plaintiff then rested and the defendant moved to dismiss as of nonsuit, which motion was overruled and the defendant excepted.

The defendant then offered the testimony of L. H. Nelson, nephew of Mrs. Hanes, tending to show that he took the car for use on a trip to Siler City and the circumstances under which he took it. Thereupon, the defendant renewed his motion to dismiss as of nonsuit, which was overruled and the defendant excepted.

Was there error in the refusal of the court to dismiss the action as of nonsuit, on motion of the defendant, at the conclusion of all the evidence?

Theft is the felonious taking and removing of personal property with intent to deprive the rightful owner of it; larceny. Webster's New International Dict. (2d). Larceny is the wrongful and fra lent taking and carrying away by one person of the personal goods of a her with the felonious intent to convert them to his, the taker's, us , and make them his property without the consent of the owner. To consti-

tute larceny the property must be taken and the taking must be under such circumstances as to amount technically to a trespass; there must be some asportation or carrying away of the property; and both the taking and the carrying away must be with felonious intent—an intent to steal—existing at the time. Callahan's Cyc. Law Dict. (2d).

The evidence of the plaintiff tending to show that its automobile, which was left in a garage at the home of its president, was later found in the country between Greensboro and Siler City, standing alone and unexplained, might justify the inference that it was stolen. However, the circumstances of the taking are fully explained by the evidence of the defendant. This evidence is corroborated by testimony offered by the plaintiff that after the wreck Nelson was in a hospital in Greensboro suffering from wounds received. The explanatory evidence offered by the defendant is uncontradicted and unimpeached.

It is well established in this jurisdiction that in considering the motion to dismiss as of nonsuit the evidence must be viewed in the light most favorable to the plaintiff. He is entitled to every reasonable intendment thereon and every reasonable inference therefrom, and the evidence of the defendant, unless favorable to the plaintiff, is not to be taken into consideration, except that when such evidence is not in conflict with the plaintiff's testimony it may be used to explain or make clear that which has been offered by the plaintiff. *S. v. Fulcher,* 184 N. C., 663, 113 S. E., 769; *Harrison v. R. R.,* 194 N. C., 656, 140 S. E., 598; *Hare v. Weil,* 213 N. C., 484, 196 S. E., 869; *Sellars v. Bank,* 214 N. C., 300, 199 S. E., 266.

The testimony offered by the defendant did not tend to contradict or impeach the evidence of the plaintiff. It only served to amplify and explain the same and tended to affirm the inference to be drawn from the plaintiff's evidence that the car had been removed by someone other than an employee of the plaintiff. It is, therefore, a proper subject of consideration on the motion to nonsuit made at the conclusion of all the testimony. When so considered the evidence fails to disclose any unlawful and felonious intent on the part of Nelson in taking and using the car, without which there could be no theft. As to this there is a total failure of proof.

But the plaintiff contends and earnestly insists that the conduct of Nelson constituted a violation of C. S., 4262, commonly referred to as the Temporary Larceny Statute. If we concede that the policy of insurance against theft includes and embraces statutory larceny such as is defined by this section of the Code, it will not avail the plaintiff. To constitute this offense it must likewise appear that the taking was not only secretly and against the will of the owner of the property but that it was also with an unlawful and felonious intent, for a felonious

intent is an essential element of larceny, as defined in this statute, as well as at common law.

There was error in the refusal of the court below to grant the motion of the defendant to dismiss the action as of nonsuit at the conclusion of all the evidence.

Reversed.

W. F. WILLIAMS AND WIFE, MARY ELIZABETH WILLIAMS, v. S. G. MCPHERSON.

(Filed 13 December, 1939.)

Wills § 33a—Devise held to be in fee and restraint on alienation thereto attached is void.

The language of the will in question was "I also leave to my son" certain realty, "said property never to be sold, bought or exchanged" except among the testator's heirs. *Held:* The word "leave" is construed to mean "devise," so that the first quoted phrase conveys an unrestricted devise of real estate which vests the fee in the devisee under C. S., 4162, and the restraint on alienation thereto attached is void, and therefore the devisee takes the fee simple absolute in the property.

APPEAL by defendant from *Thompson, J.,* at November Term, 1939, of PASQUOTANK.

Controversy without action under C. S., 626.

The controversy arises on these facts: Plaintiffs have contracted to sell at agreed price, and to convey in fee simple by warranty deed to defendant a certain lot of land in Elizabeth City, North Carolina, designated as No. 518 N. Poindexter Street, formerly as No. 218 Poindexter Street. Plaintiff W. F. Williams claims fee simple title to said lot under that portion of the will of T. W. Williams which reads:

"2. I also leave to my son William F. Williams at the death of his mother, Meddie T. Williams, the original part of my resident No. 218 Poindexter Street now occupied by myself, said property never to be sold, bought, transferred or exchanged only among Williams' heirs."

T. W. Williams left surviving four children, including William F. Williams, who is the plaintiff W. F. Williams, each of whom is now living and has children. Meddie T. Williams is now dead.

Defendant contends that the said portion of will of T. W. Williams does not vest in W. F. Williams an indefeasible fee simple title to said lot, and, therefore, refuses to accept deed therefor and to pay the purchase price.

The court, being of opinion that the will of T. W. Williams, Sr., and particularly the paragraph designated as "2," devises to William F.

Williams an indefeasible fee simple title to the property in question, and that the attempted restraint upon alienation is void, so entered judgment and decreed specific performance, from which defendant appeals to the Supreme Court and assigns error.

J. Henry LeRoy for plaintiffs, appellees.
W. I. Halstead for defendant, appellant.

WINBORNE, J. The judgment below is in keeping with well settled principles of law. The statute, C. S., 4162, provides that when real estate is devised to a person, "the same shall be held and construed to be a devise in fee simple, unless such devise shall, in plain and expressed words, show, or it shall be plainly intended by the will, or some part thereof, that the testator intended to convey an estate of less dignity." Under this statute an unrestricted devise of real estate vests the fee. *Roane v. Robinson,* 189 N. C., 628, 127 S. E., 626; *Lineberger v. Phillips,* 198 N. C., 661, 153 S. E., 118; *Hambright v. Carroll,* 204 N. C., 496, 168 S. E., 817.

Under this statute, as applied in decisions of this Court, the words in the instant case, "I leave to my son William F. Williams . . the original part of my residence, No. 218 Poindexter Street, now occupied by myself," standing alone, constitute an unrestricted devise to William F. Williams. The word "leave" in the connection there used means "to bequeath or devise." Webster so defines it, and illustrates the meaning as: "he left a legacy to his niece." Here this is the natural and customary meaning. Such meaning is to be given the word, unless it clearly appears that some other permissible meaning is intended. *Goode v. Hearne,* 180 N. C., 475, 105 S. E., 5.

The principle that a restraint upon alienation is contrary to public policy and void is well recognized and applied in numerous decisions of this Court, among which are these: *Dick v. Pitchford,* 21 N. C., 480; *Wool v. Fleetwood,* 136 N. C., 460, 48 S. E., 785; *Christmas v. Winston,* 152 N. C., 48, 67 S. E., 58; *Trust Co. v. Nicholson,* 162 N. C., 257, 78 S. E., 152; *Lee v. Oates,* 171 N. C., 717, 88 S. E., 889; *Brooks v. Griffin,* 177 N. C., 7, 97 S. E., 730; *Stokes v. Dixon,* 182 N. C., 323, 108 S. E., 913; *Pilley v. Sullivan,* 182 N. C., 493, 109 S. E., 359.

In the case in hand, the clause "said property never to be sold, bought or transferred only to Williams' heirs" is such a restraint upon alienation as makes it void as contrary to public policy.

Therefore, stripped of this void clause, the remaining words vest in William F. Williams an estate in fee.

The judgment below is

Affirmed.

MRS. HATTIE HORTON v. CAROLINA COACH COMPANY AND JIMMIE PIERCE.

(Filed 13 December, 1939.)

1. Appeal and Error § 6a—

Where the court, in the absence of the jury, announces it would not allow recovery both for breach of contract and in tort, and plaintiff elects to sue in tort, defendant's objection to the court's action in trying the case upon the theory of a tort comes too late when not made until after verdict, it being incumbent upon defendant to have objected at the time.

2. Carriers § 21a—

The duty of a common carrier is to go as far as human care and foresight permits in providing safe conveyance for its passengers.

3. Appeal and Error § 39e—

The failure of the court to charge that the recovery of future damages is limited to the present cash value thereof will not be held prejudicial error when there is no allegation, evidence or contention of prospective injury, and the mention thereof is a mere oversight in the general statement of the court upon the issue of damages.

4. Carriers § 21f: Damages § 7—Plaintiff's evidence held to justify submission of issues relating to punitive damages.

Plaintiff's evidence tending to show that she was caused to alight from defendants' bus with a small child and baggage in a lonely place before the bus had reached the destination for which she had purchased a ticket, and that before she had time to collect her wits the bus was driven away, and that the bus driver was rude in his manner, tends to establish willful injury or gross negligence entitling plaintiff to the submission of issues relating to punitive, as well as compensatory, damages.

STACY, C. J., BARNHILL and WINBORNE, JJ., are of the opinion that the judgment should be modified and the award of punitive damages disallowed.

APPEAL by defendants from *Gwyn, J.*, at June Extra Civil Term, 1939, of MECKLENBURG. No error.

This is an action to recover damages for the wrongful and negligent act of the defendants in putting the plaintiff, a passenger, off of the defendants' bus, a common carrier, at another place than that designated on the ticket purchased by the plaintiff from the defendants.

The plaintiff alleged and offered evidence tending to prove that she bought a ticket from the defendants from Charlotte to Tramway, and boarded the bus of the defendant Carolina Coach Company at Charlotte, and delivered the ticket to the defendant Pierce, who was driving said bus, and told him that she wanted to get off at Tramway; that when the bus arrived at Double Tree, she was told that she was at Tramway and

at this point alighted from the bus with her four-year-old child and baggage, and that the bus left her immediately; that Double Tree is 2½ miles from Tramway and is a sparsely populated community; that she was compelled to walk a half mile over a lonely road and carry her child and baggage before she was picked up by a passing automobile and carried to her destination in Tramway; that the causing of the plaintiff to alight from the bus 2½ miles short of the destination mentioned on the ticket bought by her from the defendants was accomplished in a negligent, malicious and insulting manner; that she suffered physical and mental anguish as a result of her treatment.

The defendants' evidence tended to show that Tramway is no more than "an area or vicinity or neighborhood" and contains no fixed place at which the buses stopped, and that when the bus upon which the plaintiff was riding reached the cross roads where plaintiff alighted she looked out of the window and said that that was the place at which she wanted to be put off of the bus, and that in accord with her expressed wish the bus was stopped and plaintiff allowed to alight; that all was accomplished in an orderly and careful manner, free from any negligence, malice or rudeness.

The jury returned the following verdict:

"1. Was the plaintiff injured by the negligence of the defendants, as alleged in the complaint. Answer: 'Yes.'

"2. If so, what actual damages is the plaintiff entitled to recover of the defendants? Answer: '$300.00.'

"3. Were the acts of the defendants malicious, or willful and wanton, as alleged in the complaint? Answer: 'Yes.'

"4. If so, what punitive damages, if any, is the plaintiff entitled to recover? Answer: '$75.00.'"

From judgment predicated upon the verdict the defendants appealed, assigning errors.

John Newitt for plaintiff, appellee.

E. McA. Currie and Smith, Leach & Anderson for defendants, appellants.

SCHENCK, J. The appellants assign as error the court's action in trying the case upon the theory of a tort rather than that of a breach of contract. This assignment is untenable for the reason that at the close of the evidence the court announced, in the absence of the jury, that it would not allow the plaintiff to recover upon the theory of both breach of contract and upon an action sounding in tort, and plaintiff stated she would elect to proceed upon the theory of a tort. No exception to this

action of the court was taken at the time by the defendants, and such exception comes too late after verdict.

The exceptions to portions of the charge to the effect that the duty a common carrier owes to a passenger is that as far as human care and foresight could go he must provide safe conveyance, are untenable, since the charge is in accord with the decisions of this Court. *Hollingsworth v. Skelding,* 142 N. C., 246; *Perry v. Sykes,* 215 N. C., 39.

The appellants preserved exception to the following excerpt from the charge: "Where the plaintiff is entitled to recover for the wrongful act of the defendant, she is entitled to recover one compensation, in a lump sum, for all injuries, past, present and prospective, which proximately flow from the defendants' wrongful act." This exception is based upon the court's failure to instruct the jury that any damage which might accrue in the future was limited to the present cash value thereof. This exception would be well taken had there been any contention that the plaintiff had suffered prospective injuries, but since there was neither allegation nor evidence of prospective injury, and no contention presented to the jury of prospective injury, we think the mention of "injuries . . . prospective" was a mere *lapsus linguæ,* and harmless.

The defendants except to the submission of the issues relative to punitive damages. These exceptions are untenable for the reason that the issues arise upon the pleadings, and the evidence when viewed in the light most favorable to the plaintiff supports them. The evidence, when so viewed, tends to show that the plaintiff was caused to alight from the bus with a small child and baggage, in a lonely place, and before she had time to collect her wits the bus was hurriedly driven away and that the bus driver was rude in his manner.

If the tort is the result of simple negligence, damages will be restricted to such as are compensatory, but if it was willful, or committed with such circumstances as show gross negligence, punitive damages may be given. *Purcell v. R. R.,* 108 N. C., 414; *Ammons v. R. R.,* 140 N. C., 196.

In the record we find

No error.

STACY, C. J., BARNHILL and WINBORNE, JJ., are of the opinion that the judgment should be modified and the award of punitive damages disallowed.

STATE v. C. T. HARGROVE.

(Filed 13 December, 1939.)

1. **Criminal Law § 77c—**

When the judge's charge is not in the record it will be presumed that the jury was properly instructed as to all phases of the case, both with respect to the law and the evidence.

2. **Homicide § 25—Evidence held sufficient to be submitted to the jury and sustain verdict of guilty of second degree murder.**

Evidence on the part of the State tending to show that defendant, in an altercation between him and his son, repeatedly struck his son with the butt of a pistol, with expert testimony that the wounds thus inflicted would have rendered the son unconscious and unable to walk, and that such wounds caused death, *is held* sufficient to be submitted to the jury and sustain their verdict of guilty of murder in the second degree, notwithstanding defendant's evidence that subsequent to the encounter his son was seen walking along the highway and was struck by a truck driven by another, resulting in fatal injury, the conflicting evidence as to the cause of death raising an issue of fact for the determination of the jury.

3. **Criminal Law § 81c—**

The fact that some leading questions were asked witnesses upon the trial does not entitle defendant to a new trial when he is not prejudiced thereby.

4. **Criminal Law § 41b—**

The State may cross-examine defendant's character witnesses to show the extent of their knowledge of defendant and to show that his general reputation was not good in some respects.

APPEAL by defendant from *Stevens, J.*, at August Term, 1939, of COLUMBUS. No error.

The defendant was convicted of murder in the second degree, and, from judgment imposing prison sentence pursuant to the verdict, he appeals.

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

Luther Britt, S. Bun Frink, and Greer & Greer for defendant.

DEVIN, J. The appellant assigns as error the denial of his motion for judgment as of nonsuit entered at the close of the State's evidence and renewed at the close of all the evidence.

An examination of the evidence as disclosed by the record leads us to the conclusion that the case was properly submitted to the jury. *S. v. Coffey,* 210 N. C., 561, 187 S. E., 754; *S. v. Bridgers,* 172 N. C., 879,

89 S. E., 804. As the judge's charge was not sent up, it must be presumed that the jury was properly instructed by the trial judge as to all phases of the case, both with respect to the law and the evidence. *Calhoun v. Light Co., ante,* 256.

There was evidence tending to show that the deceased was a son of the defendant; that the defendant and a woman named Medlin were at a filling station at night, drinking; that deceased and others were present; that a quarrel arose between defendant and deceased about the woman who was with the defendant; that the defendant had a pistol; that shortly afterwards the defendant was seen pursuing the deceased out in the road, the defendant striking the deceased with the pistol three or four times on his head; that the deceased was knocked down, and that the defendant stamped on his chest, and then drove away in his truck. There was evidence that the deceased was taken to the hospital unconscious, and remained so for five weeks until he died; that he had wounds on his head caused by some blunt instrument, sufficient to cause death, his collar bone was broken, and there were other lacerations and bruises; that on his head was a wound "five inches long, extending from his forehead up over the right ear back to the cephalical region," and two other small lacerations on his head. He died from meningitis caused from wounds on his head. It was testified by the examining physician that in his opinion, from the nature of the wounds on his head, he would not have been able to walk any distance, and that a blow of that kind would have caused unconsciousness.

The defendant offered evidence tending to show that some time later on that night the deceased was seen walking along the road, apparently unhurt; that he obtained a ride in an automobile for several miles and then got out; that still later, while lying in the road, he was run over by the truck of the defendant (then being driven by another), and blood was observed in the road at that point; that deceased was then unconscious and was removed to the hospital. The defendant contended that the death was due solely to being run over by the truck.

While it is difficult to reconcile the conflict in the testimony, this was a matter for the triers of the fact. There being evidence sufficient to sustain the State's case that the deceased came to his death as a result of an intentional and wrongful assault made upon him by defendant, the verdict and judgment will not be disturbed on that score.

Appellant noted numerous exceptions to the rulings of the trial court in the reception and exclusion of testimony, but upon examination we find these without substantial merit. The fact that some questions were leading would not warrant a new trial unless found prejudicial, which is not the case here. *S. v. Noland,* 204 N. C., 329, 168 S. E., 412; *S. v. Buck,* 191 N. C., 528, 132 S. E., 151. Appellant's exceptions to ques-

tions propounded by the solicitor on cross-examination of some of the defendant's character witnesses cannot be sustained. It was competent to cross-examine these witnesses as to the extent of their knowledge of the defendant, and to show that his general reputation was not good in some respects. *S. v. Hairston,* 121 N. C., 579, 28 S. E., 492; *S. v. Holly,* 155 N. C., 485, 71 S. E., 450; *S. v. Wilson,* 158 N. C., 599, 73 S. E., 812; *S. v. Cathey,* 170 N. C., 794, 87 S. E., 532; *S. v. Burton,* 172 N. C., 939 (942), 90 S. E., 561; *S. v. Nance,* 195 N. C., 47, 141 S. E., 468.

We conclude that in the trial there was

No error.

STATE v. BULLY RODGERS, PETER LOCKLEAR AND WEALTHY LOWRY.

(Filed 13 December, 1939.)

1. Burglary § 2—

Evidence that defendants encountered the owner of a dwelling house immediately outside of the house at nighttime, and marched him into the house at the point of firearms and stole money which was hidden in the house, is sufficient to be submitted to the jury on the charge of second degree burglary, the method of entry being a constructive "breaking." C. S., 4232.

2. Criminal Law §§ 52a, 52b—

Defendants' contention that their motion to nonsuit should have been allowed because the only evidence tending to identify them as the perpetrators of the crime charged was the testimony of a witness of little education, slight intelligence and uncertain memory, is properly denied, the credibility of the State's witness being a question for the jury, the competency of the witness not being challenged.

APPEAL by defendants from *Burgwyn, Special Judge,* at May Criminal Term, 1939, of ROBESON.

Criminal prosecution tried upon indictment charging the defendants, in one count, with conspiracy to steal and assault; in a second count, with burglary; in a third count, with murder; and, in a fourth count, with robbery with firearms.

The record discloses that Tom Moore, a man about sixty years of age, lived alone in a farmhouse in Robeson County. Harvey Smith was with him in his home on the night of 11 January, 1939. They left the sitting room about 8:30 p.m. and went out the back door to a pump to get a bucket of water. As they were returning with the water, three

armed men, Bully Rodgers and Peter Locklear each with a pistol and Wealthy Lowry with a shotgun, crawled from under the corner of the house, covered Moore and Smith with their firearms, told them to hold up their hands, marched them around at the point of their guns and into the house where they tortured Moore by burning his feet in the fire and threatening to kill both of them if they did not tell where Moore's money was. They searched the house, found Moore's pocketbook containing $19.00, which they took, and then forced Moore and Smith to go into an old smokehouse in the yard, locked the door and left them there.

It took Moore and Smith about twenty-five minutes to get out of the smokehouse, which they did by prising the door off the hinges. Moore was taken to the hospital and died of pneumonia about ten days later.

Verdict: Guilty of conspiracy as charged in the first count; guilty of burglary in the second degree; guilty of robbery with firearms as charged in the fourth count. Not guilty of burglary in the first degree and not guilty of murder as charged in the third count.

Judgments imposed separately as follows:

1. Wealthy Lowry imprisonment for not less than 5 nor more than 10 years on the first count; not less than 15 nor more than 25 years on the second count; and not less than 10 nor more than 15 years on the fourth count. The last two sentences to run concurrently and to commence at the expiration of the first.

2. Bully Rodgers imprisonment for not less than 5 nor more than 10 years on the first count; not less than 25 nor more than 40 years on the second count; and not less than 15 nor more than 20 years on the fourth count. The last two sentences to run concurrently and to commence at the expiration of the first.

3. Peter Locklear imprisonment for not less than 5 nor more than 10 years on the first count; not less than 40 nor more than 50 years on the second count; and not less than 25 nor more than 30 years on the fourth count. The last two sentences to run concurrently.

The defendants appeal, assigning errors.

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

D. M. Stringfield, E. J. Britt, and L. J. Britt for defendants Locklear and Lowry.

J. E. Carpenter for defendant Rodgers.

STACY, C. J. The appeal presents no serious exceptive assignment of error so far as concerns the trial on the first and fourth counts in the bill.

The defendants by their motion to nonsuit on the second count challenge the sufficiency of the evidence to warrant a verdict of burglary in the second degree. C. S., 4232. They say there was no "breaking" such as is required in burglary. *S. v. Morris,* 215 N. C., 552, 2 S. E. (2d), 554. The evidence was properly submitted to the jury on the theory of a constructive breaking under authority of *S. v. Foster,* 129 N. C., 704, 40 S. E., 209. There it was said: "We also hold that Alexander's being carried into his sleeping apartment by force, and under the influence of a loaded pistol bearing upon him, was a breaking—a constructive breaking—as we do not understand that the statute of 1889 makes any change in the law as to the mode of breaking." This fits the present case. Annotation: 139 Am. St. Rep., 1046; 9 Am. Jur., 243.

The defendants denied any participation in the offenses charged against them, offered evidence tending to show that they were elsewhere at the time of the commission of the crimes, and insisted that as the only evidence tending to identify them as the guilty parties came from Harvey Smith, a witness of little education, slight intelligence and uncertain memory, the motions to nonsuit should be sustained and the indictments dismissed. The case of *S. v. Whiteside,* 204 N. C., 710, 169 S. E., 711, which dealt with a similar situation, is authority for the court's ruling on the demurrers to the evidence. The credibility of the State's principal witness was for the twelve. *S. v. Beal,* 199 N. C., 278, 154 S. E., 604. His competency to testify was not challenged.

A careful perusal of the record leaves us with the impression that the verdict and judgments should be upheld.

No error.

STATE v. ERNIE ANDREWS.

(Filed 13 December, 1939.)

1. Criminal Law § 52b—

Upon motion to nonsuit, the evidence must be considered in the light most favorable to the State, and if there is any substantial evidence to support the charge contained in the bill of indictment the motion is properly denied.

2. Conspiracy § 3—

A criminal conspiracy is an agreement between two or more persons to do an unlawful act or to do a lawful thing in an unlawful way or by unlawful means, and the illegal agreement being the crime, the failure of one of the conspirators to participate personally in the overt act is immaterial upon the question of his guilt of conspiracy.

3. Conspiracy § 6—

A criminal conspiracy need not be proven by direct testimony but may be established by proof of facts and circumstances from which it may be legitimately inferred.

4. Same: Criminal Law § 52a—Evidence held sufficient for jury in this prosecution for criminal conspiracy.

Evidence that the appealing defendant, the perpetrators of the crime, and all the other defendants were well acquainted, that the property stolen was transported in appealing defendant's car, and that appealing defendant in company with several of the other defendants had several times prior to the larceny visited and investigated the building from which the goods were stolen, with evidence of other incriminating circumstances, *is held* sufficient to be submitted to the jury upon the question of appealing defendant's guilt of criminal conspiracy, notwithstanding other testimony tending to exculpate him, the credibility of the evidence and the inferences properly to be drawn from the facts in evidence, being for the jury.

APPEAL by defendant Andrews from *Bobbitt, J.*, at June Term, 1939, of RANDOLPH. No error.

The defendant Ernie Andrews was indicted with Thurman King and Wiley Haithcock for conspiracy by and between themselves, and with Ernest Curl, McBee Moore, and Cal Ferguson, to break and enter the house of one Wiley Spencer, with intent to steal therefrom. The three last named pleaded guilty to the charge of larceny, and testified for the State. There was verdict of guilty of conspiracy as charged against the three first named, and from judgment imposing sentence defendant Andrews appealed.

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

John J. Henderson and Cooper A. Hall for defendant.

DEVIN, J. The validity of the trial and conviction of the appealing defendant is assailed chiefly on the ground that the evidence was not sufficient to warrant its submission to the jury, and that his motion for judgment as of nonsuit should have been allowed.

Under the established rule to be applied to the consideration of this motion, the evidence must be viewed in the light most favorable to the State, and if there was any substantial evidence to support the charge contained in the bill of indictment, the ruling of the court below must be upheld. *S. v. Anderson,* 208 N. C., 771, 182 S. E., 643; *S. v. Rountree,* 181 N. C., 535, 106 S. E., 669.

The evidence for the State tended to show that property, consisting of 76 cases of whiskey valued at $1,400, was stolen on the night of

5 January, 1939, from the building of Spencer in Randolph County; that the defendants King and Haithcock, together with Curl, Moore, and Ferguson, actively participated in the larceny; that they traveled to the scene in two automobiles belonging to defendant Andrews, and the stolen property was transported in these automobiles to the place of defendant Andrews, who has a cafe and service station or garage near Graham in Alamance County. Andrews was not personally present but was in the State of Virginia at the time.

The witness Moore testified that two weeks before, at the request of Andrews, he went with Andrews in the latter's automobile to Spencer's place; that defendant King was there also; that King knocked on the door, came back and told Andrews that there was a lady there. Andrews and the witness then returned to Graham. This witness further testified that a week later he went with Andrews and Haithcock again to Spencer's place in Andrews' automobile. King and another man also came "in a black Ford." Andrews drove his car by the side of Spencer's house. Something was said about a light over the back window. Haithcock got out and went to the back door and reported the door was locked. "Andrews told him not to fool with it," and they drove back to Graham. This witness also testified that on this occasion "Mr. Andrews parked the car, and a fellow driving a Ford said he wasn't going to let the car stay there because they would know of you. He was talking to Mr. Andrews."

The witness Curl testified that after he was arrested and put in jail he saw defendant Andrews, a week later. "I sent him a telegram to bring me some clothes. When he came he wanted to know where the liquor was that King and I put away." There was also evidence that Andrews visited witness Moore in jail, gave him a small amount of money, and told him not to say anything about his being "up there at Spencer's." The participants in the larceny of the property had known defendant Andrews for a number of years. Several of them previously had been employed by him, and Curl, who drove one of the automobiles used in transporting the stolen property to Graham, was sleeping at Andrews' place.

In *S. v. Whiteside,* 204 N. C., 710, 169 S. E., 711, a criminal conspiracy was defined as follows: "A conspiracy is the unlawful concurrence of two or more persons in a wicked scheme—the combination or agreement to do an unlawful thing or to do a lawful thing in an unlawful way or by unlawful means. *S. v. Ritter,* 197 N. C., 113, 147 S. E., 733. Indeed, the conspiracy is the crime and not its execution. *S. v. Wrenn,* 198 N. C., 260, 151 S. E., 261." "As soon as the union of wills for the unlawful purpose is perfected, the offense of conspiracy is complete." *S. v. Knotts,* 168 N. C., 173, 83 S. E., 972.

The fact that the appealing defendant did not personally participate in the overt act is not material if it be established by competent evidence that he entered into an unlawful confederation for the criminal purpose alleged. The existence of the unlawful agreement need not be proven by direct testimony. It may be inferred from other facts, and the conditions and circumstances surrounding. 11 Am. Jur., 548, 570. "The results accomplished, the divergence of those results from the course which would ordinarily be expected, the situation of the parties and their antecedent relations to each other, together with the surrounding circumstances, and the inferences legitimately deducible therefrom, furnish, in the absence of direct proof, and often in the teeth of positive testimony to the contrary, ample ground for concluding that a conspiracy exists." *S. v. Whiteside, supra; S. v. Anderson,* 208 N. C., 771 (787); *S. v. Shipman,* 202 N. C., 518, 163 S. E., 657; *S. v. Ritter,* 199 N. C., 116, 154 S. E., 62.

While in the instant case some of the testimony of the State's witnesses, elicited on cross-examination, tended to exculpate the appealing defendant, upon consideration of the whole case we think the evidence sufficient to require its submission to the jury. The credibility of the witnesses, and the inferences properly to be drawn from the facts in evidence, were matters within the province of the jury.

The appellant's assignments of error, based upon the rulings of the court below in the admission of testimony, we find without substantial merit. *S. v. Ritter,* 199 N. C., 116, 154 S. E., 62; *S. v. Batts,* 210 N. C., 659, 188 S. E., 99. Nor can the exceptions to the judge's charge be sustained.

We reach the conclusion that in the trial there was

No error.

ANN PARKER v. MARK R. WITTY AND ERNEST CURTIS, BY HIS GUARDIAN AD LITEM, D. E. CURTIS, AND D. E. CURTIS.

(Filed 13 December, 1939.)

Automobiles § 21—Allegations held not to disclose intervening negligence insulating demurring defendants' negligence as a matter of law.

The complaint in this action alleged that plaintiff was riding as a guest in a car that was being pushed by another car, that the defendant who was guiding or driving the car was under the influence of liquor and was driving on the left of the center of the street, without proper control and

lookout, and that the car collided with another automobile driven by another defendant who was operating his car while under the influence of liquor, at an excessive speed, and on the wrong side of the street. *Held:* The allegations of negligence on the part of the driver of the other car does not disclose, as a matter of law, intervening negligence insulating the alleged negligence of the driver of the car in which plaintiff was riding, and the demurrer of the owner and the driver of the car in which plaintiff was riding was properly overruled.

APPEAL by defendants Ernest Curtis and D. E. Curtis from *Clement, J.*, at October Term, 1939, of GUILFORD. Affirmed.

Moseley & Holt and Herbert S. Falk for plaintiff, appellee.
Smith, Wharton & Hudgins for defendants, appellants.

SCHENCK, J. This is an appeal from a judgment overruling demurrer of the defendants Ernest Curtis and D. E. Curtis.

The allegations of the complaint are to the effect that the plaintiff was riding as a guest in an automobile owned by the defendant D. E. Curtis, when operated by his son and agent Ernest Curtis; that the Curtis car was being driven in a northerly direction on Asheboro Street in the city of Greensboro and collided with an automobile driven by the defendant Witty in a southerly direction on said street; that the Curtis car was not running under its own power but was being pushed from the rear by an automobile driven by one Roy Bunting while being guided by Ernest Curtis, and that upon going around a curve in the street the Curtis car was guided over the center of the street to its left of the center thereof, that the Witty car, approaching from the opposite direction was driven by the defendant Witty, under the influence of intoxicating liquor, over the center of the street to its left of the center thereof, and that the two cars collided with great force, thereby proximately causing injury to the plaintiff; that the driver of the Curtis car, the defendant Ernest Curtis, failed to have proper control of his car, was operating said car while under the influence of intoxicating liquor, and failed to keep a proper lookout for other vehicles approaching from the opposite direction.

We are of the opinion, and so hold, that the allegations of negligence on the part of Ernest Curtis, driver of the Curtis car, are sufficient to overthrow the demurrer of the defendants Ernest Curtis and D. E. Curtis. It cannot be held as a matter of law that the alleged negligence of the defendant Witty in operating his car while under the influence of liquor, at an excessive speed on the left side of the street insulated the alleged negligence of the defendant Ernest Curtis in driving his car under the influence of liquor, and on the left of the center of the street, without proper control and lookout. Whether the negligence of the defendant Witty insulated the negligence of the demurring defendants

and became the sole proximate cause or was merely one of the concurrent proximate causes of the plaintiff's injury is a question to be determined by the jury upon the evidence adduced and under proper instructions from the court.

The judgment of the Superior Court is

Affirmed.

MRS. JOHN BECK v. LEXINGTON COCA-COLA BOTTLING COMPANY.

(Filed 13 December, 1939.)

1. Pleadings § 23—

The trial court has discretionary power to permit the amendment of a bill of particulars after the granting of a new trial by the Supreme Court, and ordinarily no appeal will lie from the exercise of such discretionary power, the amendment of the bill of particulars being governed by the general rules relating to the amendment of pleadings.

2. Courts § 1a—

The general rule is that the fact that a court of general jurisdiction has acted in the matter raises a *prima facie* presumption of rightful jurisdiction, but when the court's authority to act is limited, the converse will be presumed, and it must affirmatively appear that the court's acts are within the limited authority.

3. Pleadings § 23—Court may permit amendment to pleadings only when it has authority to hear motions in civil actions.

The Superior Court has authority to hear motions in civil actions at criminal terms only after due notice to the adverse party, C. S., 1443, 1444, and therefore when it does not affirmatively appear that due notice was given of plaintiff's motion to be allowed to amend, the granting of the motion at a term of court for criminal cases only will be held for error as being presumptively outside the authority of the court.

APPEAL by defendant from *Clement, J.*, at August Criminal Term, 1939, of DAVIDSON.

Civil action to recover damages for injuries resulting from alleged actionable negligence.

On former appeal to this Court a new trial was granted on account of the admission of evidence at variance with bill of particulars filed pursuant to order of court. 214 N. C., 567, 199 S. E., 924.

Thereafter, at the August Criminal Term of Superior Court of Davidson County, "upon motion of plaintiff, and for good cause shown," the court entered order permitting plaintiff to amend complaint and bill of particulars so as to conform to the evidence for the admission of which the new trial was granted.

Defendant excepted, and appeals to the Supreme Court and assigns error.

S. E. Raper and Phillips & Bower for plaintiff, appellee.
Don A. Walser for defendant, appellant.

WINBORNE, J. Defendant challenges the order of the court below permitting amendment of the complaint and bill of particulars mainly upon two grounds: (1) That the court did not have authority to permit an amendment of the bill of particulars. (2) That if the court possessed such authority, it could not be exercised at the criminal term of court in question.

With the first, we do not agree. But as to the second, upon the record on this appeal, we think the position is well taken.

(1) The amendment of bills of particulars is governed by the general rules as to amendment of pleadings. The question of allowing such amendment is ordinarily addressed to the discretion of the trial judge (49 C. J., 641—21 R. C. L., 481), from the exercise of which, nothing else appearing, there is no appeal. (2) But the court can only act in such matters at a time when it has the authority to hear motions in civil actions.

In the case in hand, the August Criminal Term of the Superior Court of Davidson County is authorized to be held for the trial of criminal cases only. The Legislature has so enacted. Public Laws 1923, ch. 169, amending Public Laws 1913, ch. 196—C. S., 1443. But the general statute, C. S., 1444, provides that "at criminal terms of court . . . motions in civil actions may be heard upon due notice . . ." McIntosh P. & P., 46; *Hatch v. R. R.,* 183 N. C., 617, 112 S. E., 529; *Dawkins v. Phillips,* 185 N. C., 608, 116 S. E., 723. However, the authority thus given is limited to motions heard after due notice to the opposition. The record here fails to show that any notice was given to defendant, unless from the fact that the court entered the order and the defendant excepted thereto it be assumed that the provisions of the statute were observed. The general rule is that "a *prima facie* presumption of rightful jurisdiction arises from the fact that a court of general jurisdiction has acted in the matter." *S. v. Adams,* 213 N. C., 243, 195 S. E., 833; *Graham v. Floyd,* 214 N. C., 77, 197 S. E., 873. Yet, where its authority to act is limited, "everything will be presumed to be without the jurisdiction which does not distinctly appear to be within it." *Truelove v. Parker,* 191 N. C., 430, 132 S. E., 295.

Therefore, since it does not affirmatively appear that notice was given as required by the statute, the judgment below is

Reversed.

H. K. HELMS v. EMERGENCY CROP & SEED LOAN OFFICE—FARM CREDIT ADMINISTRATION.

(Filed 13 December, 1939.)

1. United States § 4—

The Emergency Crop and Seed Loan Office, a branch of the Farm Credit Administration, is an agency of the United States Government, and enjoys sovereign immunity, and may be sued, if at all, only in accordance with the acts of Congress regulating such suits, U. S. C. A. Title 28, sections 761, 762, 763.

2. Constitutional Law § 6a—

The propriety of permitting suits against a Federal agency whose activities result in numerous contractual relationships with citizens of the State is a question for the lawmaking body, and the courts must grant it sovereign immunity against suit in the State courts except in accordance with acts of Congress.

APPEAL by defendant from *Sink, J.*, at August Term, 1939, of UNION. Reversed.

Vann & Milliken for plaintiff, appellee.

Marcus Erwin, United States Attorney, W. M. Nicholson, Assistant United States Attorney, W. R. Francis, Assistant United States Attorney, and Maurice W. Hibschman for defendant, appellant.

SEAWELL, J. The plaintiff brought this suit to recover damages for the conversion by the defendant of 500 pounds of lint cotton, upon which he alleges he had a rent lien, under the laws of North Carolina, superior to any title which the defendant might assert.

Defendant filed no answer and a judgment by default and inquiry was rendered by the clerk of the Superior Court on 26 April, 1937. Thereafter, defendant's attorney, before the issue as to damages had been submitted, entered a special appearance and moved that the judgment be vacated and the cause dismissed, for that the defendant, Emergency Crop & Seed Loan Office, is an agency of the Farm Credit Administration, an agency of the United States, created by executive order, and cannot be legally sued without its consent, pursuant to an Act of Congress, and that plaintiff's action is without permission or authority; and for that the suit was not instituted nor service had in accordance with the laws of the United States.

After finding pertinent facts, Judge Hoyle Sink, at term time, entered a judgment denying defendant's motion, and, thereupon, caused a jury to be impaneled and the amount of damages ascertained. The jury gave

a verdict for $75.00, the value of the cotton, and judgment was entered accordingly, from which defendant appealed, assigning as error the refusal to allow the motion to dismiss, as above summarized.

The Act of Congress under which the Emergency Crop & Seed Loan Office, a branch of the Farm Credit Administration, was created by presidential edict, makes no provision by which it may be sued in the courts of this State. It is, however, an agency of the United States Government and enjoys the immunity against suit in the State courts that attends the Sovereign. *North Dakota—Montana Wheat Growers Assn.*, 66 Fed. (2d), p. 573; *Buckley v. United States,* 196 Fed., p. 430; *Cohens v. Virginia,* 6 Wheat., 266, 54 L. Ed., 257. If the suit may be brought at all, it must be brought in accordance with the Acts of Congress regulating such suits. U. S. C. A., Title 28, sections 761, 762, 763.

The want of reciprocity in securing relief for wrongs committed by an agency given such wide power of dealing with the citizens of the State—and almost certain to complicate the rights of others—is a subject that might appeal to the lawmaking bodies, but one over which this Court has no jurisdiction. *United States v. Wickensham,* 10 Fed., p. 505. The propriety of adjustment of matters of this kind through administrative process or other methods which the Government may have seen fit to provide is not subject to criticism here.

This Court is without power to aid the plaintiff, and the judgment of the court below is

Reversed.

R. T. WILLIAMS v. D. U. BRUTON.

(Filed 13 December, 1939.)

1. Pleadings § 20—

A demurrer will not lie to a bill of particulars, the remedy, if the bill of particulars is insufficient, being an application to the judge to make it more definite.

2. Contracts § 21: Agriculture § 7e—Allegations held sufficient to state cause of action in favor of tenant for breach of contract to divide tobacco allotment.

This action was instituted before a justice of the peace without written pleadings. Upon defendant's motion made in the Superior Court on appeal, to limit plaintiff's proof to his allegations, plaintiff "alleged" that he was a tenant of defendant under a contract providing that he was to have one-half the tobacco poundage allotted to the acreage cultivated by him, that the tobacco raised thereon was less than the allotment, that he had made demand on defendant for the value of one-half of the unused allotment and that the demand had been refused. *Held:* If the "allega-

tions" be considered as a complaint, it avers the contract, its breach, and consequent damages, and defendant's demurrer thereto should have been overruled.

3. Pleadings § 20—

Upon demurrer, the complaint will be liberally construed in favor of plaintiff.

APPEAL by plaintiff from *Burney, J.*, at May Term, 1939, of ROBESON.

McKinnon, Nance & Seawell for plaintiff, appellant.
F. D. Hackett for defendant, appellee.

SCHENCK, J. This is an action instituted before a justice of the peace and heard upon appeal by the defendant to the Superior Court. No pleadings other than the summons was filed before the justice of the peace. The summons designates this as "a civil action for the recovery of ninety-three dollars and ninety-five cents ($93.95) and interest . . . due by the defendant to the plaintiff under contract to perform farm labor . . ."

The record in the Superior Court is as follows:

"Defendant moves to require the defendant (plaintiff) to limit his proof to his allegations. Mr. R. T. Williams alleges that in 1938 he was tenant for Mr. D. U. Bruton; that he went upon Mr. Bruton's farm as Mr. Bruton's tenant, under a contract entered into between himself and Mr. D. U. Bruton. Plaintiff alleges further that the terms of the contract were that he was to have half of the acreage allotment in tobacco, which was allotted to Mr. D. U. Bruton on this farm, and that he was to have half of the poundage allotment allotted to Mr. Bruton as landlord. That when the acreage allotment was given, Mr. D. U. Bruton was allotted 10½ acres of tobacco; that there were two tenants on Mr. Bruton's farm, Mr. Williams and a tenant named Scott; that Mr. Bruton allotted one-half of the tobacco acreage allotment to R. T. Williams and one-half to Scott. That when the tobacco poundage allotment was given, Mr. D. U. Bruton was allotted 16,190 pounds on the basis of 10½-acre allotment. That Mr. R. T. Williams, on his 5¼ acres of tobacco grew and sold 4,336 pounds. That his half of the total poundage allotment for his share was one-half of the 16,190 pounds, or 8,095 pounds. That after having sold the 4,336 pounds of tobacco, there was left as his and Mr. Bruton's, his landlord, part of the allotment 3,759 pounds; that of this 3,759 pounds, R. T. Williams' half amounted to 1,879 pounds. That the market value of poundage card in 1938 was five cents a pound. That, therefore, the 1,879 pounds owing to plaintiff was worth $93.95. That this amount was owing under the

terms of the contract between R. T. Williams and D. U. Bruton. That the amount has been requested and has never been paid.

"By counsel for defendant: 'I desire to demur *ore tenus* for that it does not state a cause of action.'

"By Court: Sustained."

Whereupon judgment was entered wherein it is found that "this being in the nature of a bill of particulars," it is adjudged that the demurrer thereto be sustained and the action dismissed at the cost of the plaintiff.

If the "allegations" filed by the plaintiff in response to the motion of the defendant be construed as a bill of particulars a demurrer thereto did not lie. If a bill of particulars is insufficient the remedy is an application to the judge to make it more definite, and not by demurrer. *Townsend v. Williams,* 117 N. C., 330.

If the "allegations" be considered as a complaint, we are of the opinion that when construed liberally in favor of the plaintiff as a complaint must be on a demurrer, the demurrer *ore tenus* upon the ground that it does not state facts sufficient to state a cause of action cannot be sustained. The contract, its breach and consequent damage are alleged, whether such can be proved is for determination upon the evidence adduced.

The judgment of the Superior Court is

Reversed.

MRS. ANNIE W. PARROTT, ADMINISTRATRIX OF THE ESTATE OF HELEN L. PARROTT, DECEASED, v. IRVING KANTOR AND ALBERT GRANT,

and

J. E. MARTIN, ADMINISTRATOR OF THE ESTATE OF AGNES LEE MARTIN, DECEASED, v. IRVING KANTOR AND ALBERT GRANT.

(Filed 13 December, 1939.)

1. Automobiles § 23—

The owner of an automobile is not liable for its negligent operation by another merely by reason of ownership, but the owner may be held liable under the doctrine of *respondeat superior* only if the relationship of master and servant exists between him and the driver at the time of, and in respect to, the very transaction resulting in injury.

2. Master and Servant § 21b—Master is liable for torts committed by his servant while acting in course of his employment.

A servant is acting within the course of his employment so as to render his master liable for his torts under the doctrine of *respondeat superior* if, at the time, the servant is engaged in the performance of duties he is employed to perform and is acting in furtherance of his master's business,

and while every deviation from the strict execution of his duty will not relieve the master of liability, the master cannot be held liable for torts committed by the servant while acting without authority and not in the performance of his duties, but wholly in pursuit of his private and personal ends.

3. Same: Automobiles § 24b—Master is not liable for tort committed by servant while returning to employment after complete departure therefrom.

A servant driving his master's automobile in the course of his employment is not required to take the most direct practical route, and the relationship is not interrupted by a detour in reason, but when the servant makes a complete departure from the course of his employment in deviating from his route solely for his personal ends, the relationship is not reestablished until he returns to the place where the deviation occurred, or to some place where he should be in the performance of his duty, and the master is not liable for the servant's negligent operation of the automobile while on his way back to resume his duties after such complete departure.

4. Same—Held: Court correctly denied nonsuit on issue of master's liability, but should have given requested instruction that master would not be liable if servant was returning to duties after complete departure.

The evidence tended to show that defendant employer instructed his employee to transport some passengers to another city, and to return and park the car at a designated spot, that the employee, after returning to the city, went by his parents' home in the northern part of the city for his own purposes, and that the accident in suit occurred after he had left his parents' home and was returning the car to the designated parking place. There was evidence supporting the inference that in returning to the city the employee had a choice of ways, one of which might reasonably take him by his parents' home, and evidence that in returning to the city he came within the vicinity where he was directed to park the car, and that then he deviated for his own purposes in going by his parents' home. *Held:* The evidence is sufficient to be submitted to the jury on the issue of the employer's liability, and defendant employer's motion to nonsuit and motion for a directed verdict on the issue was properly denied, but the failure of the court to give instructions requested by the employer to the effect that he would not be liable if the employee completely departed from his employment for personal reasons, and if the accident occurred while he was returning to the place where he left the course of his employment, is reversible error.

CLARKSON, J., dissenting.

APPEAL by defendant Irving Kantor from *Gwyn, J.*, at May Civil Term, 1939, of MECKLENBURG.

Two civil actions from alleged wrongful death resulting from the same accident, C. S., 160 and 161, consolidated for the purpose of trial only, and tried upon separate issues.

The intestates of plaintiff in each action, while together riding a bicycle on N. Brevard Street in the city of Charlotte, were stricken and

killed by an automobile on 21 August, 1936. Plaintiffs each allege wrongful death of intestate, respectively, resulting from actionable negligence of defendant Albert Grant, in the operation of the automobile which struck intestates, and that the automobile was owned by defendant Irving Kantor and, at the time, was being operated by defendant Albert Grant with the consent and permission, and as agent and servant of said Irving Kantor. Defendant Irving Kantor, answering for himself alone, denies the material allegations. Defendant Albert Grant has not filed answer.

Upon the trial below, in addition to issues as to negligence of defendant Albert Grant, and of damages, the court submitted this as the second issue in each case:

"II. If so, was Albert Grant, at the time of the alleged injury and death of the plaintiff's intestate, the agent and employee of the defendant Irving Kantor, and at said time acting within the scope of his employment?"

Bearing upon said second issue, several persons who stated that they were present in the criminal court at the trial of Albert Grant, were examined as witnesses for plaintiff. The following covers the scope of their testimony in this respect:

J. E. Martin, father of Agnes Lee Martin, testified: That he heard both Mr. Kantor and Albert Grant testify; that Mr. Kantor testified that "he got this boy, Albert Grant, to drive two passengers to Spartanburg to catch an airplane. It was . . . Mr. Kantor's car. . . . He said he told Albert Grant to bring the car back and park it at the rear of 115½ S. Church Street, at the sporting goods place, and . . . to turn the key over to the man in charge . . ." On cross-examination the witness Martin further testified: "Spartanburg is about 72 miles south of Charlotte. . . . 115½ S. Church Street is on the first block of Church Street south of Trade Street. My daughter was killed north of Charlotte, about 2 miles from the Square." Then, without objection by defendant Kantor, the witness further testified that Grant testified "that he went to North Charlotte to see his people, his family—mother and father. Grant's family lived up there. . . . I don't know whether he went out there before he went back or not. . . . My understanding was that Grant had went around by North Charlotte and was coming in. It wouldn't be necessary to go through North Charlotte to go to Spartanburg, but he could have. He had been to Spartanburg, but he was coming back in, as I understand. It would not have been necessary to come from Spartanburg by way of North Charlotte." Then, on redirect examination, the same witness testified without objection: "At the time he ran over the children he was coming in to put the car where he was instructed to put it, at the rear of that

sport goods place. . . . He testified that he was on the way to put the car behind the Sportland as he was instructed to do."

Mrs. W. C. Parrott, mother of Helen L. Parrott, deceased, testified that she heard Mr. Kantor testify that "it was his automobile. . . . He said he had Albert Grant to take two friends of his to Spartanburg, to catch a plane at that time, that Albert Grant was employed by him."

Mrs. W. W. Timmin, upon redirect examination, in answer to question—"Did you hear Grant state at the time he hit these children where he was going?" replied, "Well, he was going, he went to North Charlotte when he got back to town, I reckon." Then in answer to the question—"At the time he hit the children, which way was he going?" she replied: "He was going towards town. At the time he hit the children he was going to put the car behind the 'Sport.' He was on his way to do that at the time he hit the children." Then on recross-examination she testified: "He (Grant) said he went to North Charlotte to see his people, and that he was on his way back from North Charlotte when he ran over those children."

C. A. Parrott testified that "Albert Grant said he was coming to put the car up where he told him to leave it, behind the Sportland." On cross-examination this witness was asked: Q. But he said he had already taken the passengers down to Spartanburg and came back, didn't he? A. No reply. Q. Did he say that. A. He said he had taken them to Spartanburg, yes. Q. Well, he had to get back from Spartanburg, didn't he, before he could go up to North Charlotte? A. Yes, sir."

The jury answered the issues as to negligence and the second issue, "Yes," and assessed damages. From adverse judgments thereon, defendant Irving Kantor appeals to Supreme Court and assigns error.

G. T. Carswell and Joe W. Ervin for plaintiffs, appellees.
W. C. Davis for defendant, appellant, Kantor.

WINBORNE, J. The appellant stresses for error these assignments:

1. The refusal of the court below to grant (a) his motion for judgment as of nonsuit made in apt time as required by statute, C. S., 567, and (b) his request for peremptory instruction for negative answer to the second issue.

2. If there be no error in the ruling in either of those respects, the refusal of the court to give this special instruction requested in apt time: "If you find from the evidence and its greater weight that the defendant, Albert Grant, was instructed by his codefendant, Irving Kantor, to take two passengers from the city of Charlotte to the airport in Spartanburg, South Carolina, and return the car to the city of Charlotte and park same in the vacant lot at No. 115½ South Church Street, and you

should further find that the said Grant, after taking the persons to Spartanburg, returned to Charlotte, and instead of parking the car at the designated point, went on his own mission to North Charlotte for the purpose of visiting his family and ran over and killed plaintiff's intestate on his way back to the city of Charlotte, you will answer the second issue 'No,' and even though you should find from the evidence and the greater weight that he was on his way at the time of the injury and subsequent death of plaintiff's intestate to park the said car at the said designated point, it will be your duty and the court so charges you to answer the second issue 'No.'"

Upon the evidence disclosed in the record we are of opinion and hold that the court properly ruled with respect to both the motion for judgment as of nonsuit and the request for peremptory instruction, but that there is error in the refusal to give the quoted special instruction as requested.

The underlying question raised by these assignments is whether the servant, Grant, was acting within the scope of his employment by the defendant, Kantor, at the time of the injuries resulting in the death of intestates.

The owner of an automobile is not liable for personal injuries caused by it merely because of its ownership. *Linville v. Nissen,* 162 N. C., 95, 77 S. E., 1096; *Martin v. Bus Line,* 197 N. C., 720, 150 S. E., 501. The liability, if any, of the owner of an automobile operated by another rests solely upon the doctrine of *respondeat superior. Leary v. Bank,* 215 N. C., 501, 2 S. E. (2d), 570. This doctrine applies only when the relation of master and servant is shown "to exist between the wrongdoer and the person sought to be charged for the result of the wrong at the time and in respect to the very transaction out of which the injury arose." *Linville v. Nissen, supra; Martin v. Bus Line, supra; Liverman v. Cline,* 212 N. C., 43, 192 S. E., 849.

The rule is well established that the master is responsible for the negligence of his servant which results in injury to a third person when the servant is acting in the scope of his employment or about the master's business.

The rule is also well settled that the master is not responsible for the tort of his servant when done without his authority and not for the purpose of executing his orders, or while doing his work, but wholly for the servant's own purposes and in pursuit of his private or personal ends. *Dover v. Mfg. Co.,* 157 N. C., 324, 72 S. E., 1067; *Bucken v. R. R.,* 157 N. C., 443, 73 S. E., 137.

A servant is acting in the course of his employment, when he is engaged in that which he was employed to do, and is at the time about his master's business. He is not acting in the course of his employment

if he is engaged in some pursuit of his own. Not every deviation from the strict execution of his duty is such an interruption of the course of employment as to suspend the master's responsibility, but, if there is a total departure from the course of the master's business, the master is not answerable for the servant's conduct." Tiffany on Agency, p. 270; *Robertson v. Power Co.,* 204 N. C., 359, 168 S. E., 415.

With respect to departure from employment, without consent of owner, "the general rule is that a servant in charge of his master's automobile, who, though originally bound upon a mission for his master, completely forsakes his employment and goes upon an errand exclusively his own, and while so engaged commits a tort, does not thereby render the master answerable for such tort under the rule of *respondeat superior.*" 5 Blashfield's Cyc. of Automobile Law and Practice, section 3029.

The question of owner's liability for injury by automobile while being used by a servant for his own pleasure or purpose has been the subject of decisions by courts of many jurisdictions. These decisions are by no means harmonious under varying circumstances. See Annotations, 22 A. L. R., 1404; 45 A. L. R., 482; 68 A. L. R., 1055; 80 A. L. R., 727; 122 A. L. R., 863. The trend of judicial decisions, however, is that the departure commences when the servant definitely deviates from the course or place where in the performance of his duty he should be. While there is conflict of authority on the subject, better reason supports the view that after a servant has deviated from his employment, for purposes of his own, the relation of master and servant is not restored until he returns to the path of duty, where the deviation occurred, or to some place, where in the performance of his duty, he should be.

Blashfield, in section 3051, Vol. 5, page 212, speaking with respect to returning from deviation, says: "The majority rule, and probably the better view, is that the relation of master and servant is not restored until he has return to the place where the deviation occurred, or to a corresponding place, some place where in the performance of his duty he should be," citing decisions of courts in many states. In *Humphrey v. Hogan,* 104 S. W. (2d), 767, the Supreme Court of Missouri says that the weight of authority is well stated in this section. See, also, Annotations, 22 A. L. R., 1414; 45 A. L. R., 487; 68 A. L. R., 1056; 80 A. L. R., 728.

In *Graves v. Utica Candy Co.,* 209 App. Div., 193, 204 N. Y. S., 682, it was held that when the driver returned from his regular trip and went down the street on which his employer's place of business was located and got to a point where he could have driven into his employer's garage, but failed to do so, from that moment he abandoned his employer's service, and his trip twenty-six miles north of his employer's place of business and his return trip, occurred after he had abandoned his duty

to his employer, were wholly without his scope of employment, and the employer was not liable for injuries arising out of the accident, notwithstanding the fact that at the time of the accident the driver was on his way back to his employer's garage.

In *Virginia Ice & Freezing Co. v. Coffin,* 166 Va., 154, 184 S. E., 214, the Court said: "Of course a servant is not required to return by air line from an errand performed, nor must he adopt the shortest practicable route. A detour in reason does not change his status, but an abrupt and unmistakable departure for some purpose of his own does." In this case where a truck driver had been instructed to make a delivery and return to his employer's factory and on his return trip had reached a point three or four blocks distant from the plant when he started to a point thirty-five blocks away in order to pay a personal bill, an accident occurring after he had proceeded about twenty blocks on such journey, the Court held that the relation of master and servant was suspended.

In *Dairy Products Co. v. Defrates,* 125 S. W. (2d), 282, 122 A. L. R., 854, the Texas Court said: "The test of liability is whether he was engaged in his master's business and not whether he purposed to resume it. It is equally true that Henderson owed the duty to his master of returning the car and resuming his employment and, while returning to the zone of his employment, he was discharging that duty, but that fact does not fix liability against the master. It was Henderson's own wrong in driving away that created the duty to return, and in returning he was but undoing that wrong. The return was referable to, and an incident of the departure. He was no more engaged in his master's business while returning to, than while departing from his path of duty."

Upon the evidence presented on this record we cannot hold as a matter of law that the driver of the automobile was at the time of the accident completely without the scope of his employment. The evidence is susceptible of the inference that in returning from Spartanburg the driver of the automobile had the choice of ways, one of which might reasonably take him by the home of his father and mother in going to the place where he was directed to park the automobile. The evidence is also susceptible of the view that in returning from Spartanburg the driver of the automobile came within the zone of the terminus of his employment, that is, in the vicinity of the place where he was directed to park the car, and that he then, for purposes of his own, drove the automobile two miles in the northern direction to the home of his father and mother, and that at the time of the accident he was returning from this, his personal mission. If the jury should accept the latter view, then the moment that the driver turned aside from his duty to drive the automobile to the place where he was directed to park, he departed from his

employment and remained outside of it until he returned to the point of departure. Until he reached that point, he was only returning to his employment.

The decision in *Martin v. Bus Line, supra,* in the light of similarity of facts, tends to support these principles.

We are not unmindful of what is said in *Lazarus v. Grocery Co.,* 201 N. C., 817, 161 S. E., 553, with respect to deviation by the driver from his master's business. Affirmance there of the judgment below was specifically based on the authority of *Jeffrey v. Mfg. Co.,* 197 N. C., 724, 150 S. E., 503. We find upon adverting to the record in the *Lazarus case, supra,* that there was judgment of nonsuit on the trial in the general county court of Buncombe County. The Superior Court, in its appellate capacity, being of opinion that there was sufficient evidence to take the case to the jury, reversed the judgment of nonsuit. Then, on appeal to this Court while defendant presented as the questions involved its contention that the servant had completely departed from the scope of his employment and was engaged on his own business and for his personal ends, the plaintiff made two contentions: (1) That there was sufficient evidence to make out a *prima facie* case for the plaintiff under decision in the *Jeffreys case, supra;* and (2) that, conceding that the servant had deviated from his employment, he was at the time returning to his employment. With respect to the first contention, the plaintiffs in their brief undertook to array in parallel the evidence in the instant case and the evidence in the *Jeffreys case, supra.* This Court agreed with plaintiff's first contention, saying: "The evidence should, therefore, have been submitted to the jury." Then the Court stated that the evidence offered by defendant did not show such a deviation by the driver of the truck from defendant's business as relieved it from liability to plaintiff as a matter of law under the principle of *respondeat superior.* The statement which follows to the effect that although the driver of the truck had deviated from the route over which he was directed by defendant to drive, he was returning to this route at the time of injury to plaintiff by his negligence, was not necessary to the decision, and must be considered an incidental remark.

For reasons indicated there will be a

New trial.

CLARKSON, J., dissenting: I am unable to agree with the result reached by the majority.

In the entire record—in the pleadings, admission of evidence, issues, instructions of the judge, the verdict, and the judgment—this Court has been unable to find positive error; only a negative error of omission rather than one of commission (a failure to give a requested special

instruction) has been pointed out as reversible error. "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 appear not only that the ruling complained of is erroneous, but also that it is material and prejudicial, amounting to the denial of some substantial right. *In re Ross,* 182 N. C., 477; *Burris v. Litaker,* 181 N. C., 376." *Wilson v. Lumber Co.,* 186 N. C., 56 (57), quoted with approval in *Collins v. Lamb,* 215 N. C., 719 (720). This Court is without power to review the facts found properly by a jury (*Wheeler v. Gibbon,* 126 N. C., 811), unless there has been (1) an error of law (2) prejudicial to the appealing party, the judgment should be affirmed.

The pertinent portion of the instruction, which is quoted in full in the majority opinion, was to the effect that if the jury found that Grant "returned to Charlotte, and instead of parking the car at the designated point, went on his own mission . . . and ran over and killed plaintiffs' intestates on his way back to the city of Charlotte, . . . even though . . . he was on his way at the time of the injury . . . to park the said car at the said designated point," it would be the jury's duty to free defendant Kantor of liability. Since it is not denied that Grant had returned to Charlotte and was returning from a visit to his family when plaintiffs' intestates were killed, such an instruction would have eliminated the jury's consideration of plaintiffs' theory of liability. The trial judge, realizing this, in my opinion correctly refused to give this instruction. An analysis of the trial theories of the prosecution and defense demonstrates the correctness of the trial judge's ruling.

Plaintiffs insisted upon the correctness of two legal propositions, under either of which they would be entitled to recover: (1) That if Grant returned to Charlotte by turning aside from the most direct route to the designated parking place and did so for the purpose of visiting his family, the relationship of master and servant continued undisturbed until after plaintiffs' intestates were injured; (2) that even if Grant "returned to Charlotte and instead of parking the car at the designated point, went on his own mission . . . and ran over and killed plaintiffs' intestates . . . on his way back . . . to park said car," the master-servant relationship, though broken by his departure on a mission of his own, was restored when he resumed his trip for the purpose of returning the car to the proper parking point. There is considerable authority to support both theories of plaintiffs. The first of these theories is not directly challenged here nor discussed by the majority opinion. It is because the granting of the special instruction approved by the majority would remove from the jury's consideration this primary theory of plaintiffs' case that I feel compelled to dissent. The majority view in the instant case rejects the second of plaintiffs'

theories, thus sharply modifying if not entirely abandoning the earlier North Carolina rule. (See *Duncan v. Overton,* 182 N. C., 80, at p. 82, and *Lazarus v. Grocery Co.,* 201 N. C., 817; 5 Blashfield, Cyclopedia of Automobile Law and Practice, section 3052, n. 13; 7-8 Huddy, Cyclopedia of Automobile Law, section 96, n, 94, both Blashfield and Huddy citing the *Lazarus case, supra,* as settling the North Carolina rule contrary to the majority opinion in the instant case. See, also, *Jeffrey v. Mfg. Co.,* 197 N. C., 724.) Although I have some misgivings concerning the extent to which the instant majority opinion weakens, and brands as *dicta,* that portion of the *Lazarus case, supra,* to the effect that the master-servant relationship exists while a driver who has deviated from a direct route is returning to that route, I prefer to rest my dissent largely upon the much stronger ground that, in view of plaintiffs' trial theories, the granting of the special instruction requested would have been reversible error.

The judge, in charging the jury, stated: "The plaintiffs in each instance say and contend that, prior to the injury and death, he (Grant) had never taken the car back to the place to which he was directed to take it, but that he had returned to Charlotte and while in Charlotte and on a byway, on his return, he stopped to see some of his people in North Charlotte, and that, having seen his people, he was returning by way of Brevard Street to the place called 'Sportland,' and that it was on his return to 'Sportland' to leave the car . . .; that he was engaged in the performance of the thing that he was employed to do; that he was carrying the car to 'Sportland'; that he had not taken the car to 'Sportland' prior to that time; that there were a number of streets and avenues by which to approach the place called 'Sportland' in the city; that in completing the job which he was given to complete, the plaintiffs contend and say that he was not only the agent of defendant, Irving Kantor, but that at the time he was acting within the scope of his employment and in the completion of work entrusted to him to do." The trial judge likewise charged, "Now, if the plaintiffs, in each instance, have satisfied you, by the greater weight of the evidence, that Irving Kantor employed Albert Grant to drive his automobile to Spartanburg, South Carolina, to take passengers and to return the car and place it at 'Sportland' and deliver the key to some person; that he carried the passengers to Spartanburg and returned with the car, and that upon his return he stopped by the home of some of his people in North Charlotte; that he left North Charlotte and was driving along Brevard Street toward the place called 'Sportland,' and that, so returning, he was engaged in the performance of what he was employed to do, and that such method of return could fairly and reasonably be deemed a proper means of performing the work or duties entrusted to him, then, the court charges you, that it

would be your duty to answer the second issue 'Yes,' in such instance, or in both cases, if the plaintiffs, in both cases, have so satisfied you, by the greater weight of the evidence."

These two excerpts from the charge were excepted to by defendant and argued in the brief of defendant. It is submitted that they were correct and that the propositions of law involved therein were without error. This likewise appears to be the majority view, as the majority opinion not only does not point out error in these portions of the charge, but specifically declares that the trial judge was correct in refusing to give a peremptory instruction to the effect that Grant, at the time of injury to plaintiffs' intestates, was not acting within the scope of employment as servant of Kantor. Permitting the jury to consider the matters referred to in the above excerpts from the charge would have been inconsistent with the granting of the special instruction which the majority view approves, for the reason that the special instruction is, in effect, a peremptory instruction to find against plaintiffs on plaintiffs' primary theory, to wit, that Grant, after returning to Charlotte, never so far deviated from the scope of his employment as to terminate the master-servant relationship. In my opinion, the trial judge was correct in refusing to give both the peremptory instruction as to the second issue and the special instruction which was practically equivalent to a peremptory instruction against the plaintiffs. In my opinion, the trial judge correctly submitted to the jury both the plaintiffs' and the defendant's theories, the plaintiffs' theory being that Grant's deviation from his duty as Kantor's servant was so incidental that the master-servant relationship was not disturbed (*Duncan v. Overton, supra*), and the defendant's theory being that Grant's deviation from instructions was sufficient to constitute an independent mission of his own completely outside the scope of his employment and, as such, insulated defendant against liability (*Martin v. Bus Line,* 197 N. C., 720).

In addition to the North Carolina authorities cited above in support of plaintiffs' position, the text authorities generally are to the same effect. "A mere deviation from the directed route, or the direct and usual route, does not constitute *per se* an abandonment of the master's business, so as to relieve the master from liability for the negligence of the servant in driving. The fact that the deviation is made for a purely personal reason does not necessarily change this rule. Whether the extent of his departure from the area of his service was so unreasonable as to make of his act of deviation an independent journey of his own rather than a mere detour, or one incidental to his employment, is a question of degree, and ordinarily one of fact, unless the deviation is so great, or the conduct so extreme, as to take the servant outside the scope of his employment and make his conduct a complete departure instead

of a deviation still incidental to his employment." 5 Blashfield, Cyclopedia of Automobile Law and Practice, s. 3030. "A mere disregard of instructions and slight deviation from the line of the chauffeur's duty, does not necessarily amount to a departure from employment, nor relieve the master from responsibility for his negligence, even though the route selected is not the shortest possible one." 7-8 Huddy, Cyclopedia of Automobile Law, 9th Ed., s. 95. "To relieve the employer from liability, the deviation must be so substantial as to amount to a departure from the service, and must be for purposes entirely personal to the employee. . . . 'In cases where the deviation is slight, and not unusual, the court may, and often will, as matter of law, determine that the servant was still executing his master's business. So, too, where the deviation is very marked and unusual, the court in like manner may determine that the servant was not on the master's business at all, but on his own. Cases falling between these extremes will be regarded as involving merely a question of fact, to be left to the jury.'" 4 Berry, Automobiles, 7th Ed., pp. 620-621. To the same effect is Michie, The Law of Automobiles, N. C. Ed., s. 132. "A slight deviation, even on his own business, while on an errand for the master, will not render the chauffeur any the less the agent of the master, especially where the master's implied consent could be inferred." Babbitt, Motor Vehicle Law, 4th Ed., s. 1281. To the same general effect as the authorities cited above are 42 C. J., pp. 1110-1111, and 5 Am. Jur., pp. 714-715.

To summarize, the authority in support of the submission of plaintiffs' theory that Grant's deviation from employment did not destroy the master-servant relationship is ample and is impliedly approved by the majority opinion; hence, it would have been error, in my opinion, to have given the special instructions which the majority opinion approve. All of the evidence indicated that Grant returned to Charlotte and, before parking the car as he had been instructed, visited his family; hence, to have charged the jury that if it found that Grant returned to Charlotte and instead of parking the car went on a mission of his own, the jury must answer the second issue "No," would have been a peremptory instruction to find against the plaintiff. If the majority view is correct in stating that plaintiff made out a case for the jury, I am unable to perceive how a peremptory instruction to find against plaintiff can be approved. The case was, it seems to me, clearly one for the jury. The jury has passed upon the issues of fact and found for the plaintiffs; accordingly, in my opinion, the judgment should be affirmed.

CITY OF FAYETTEVILLE v. SPUR DISTRIBUTING COMPANY, INC.

(Filed 13 December, 1939.)

1. Municipal Corporations § 37—Municipal ordinance regulating storage of gasoline in fire district held to relate to public safety.

A municipal ordinance prohibiting storage of gasoline within the fire district of the city in tanks with a capacity greater than 4,500 gallons bears sufficient relationship to the public safety to come within the police power of the municipality, C. S., ch. 56; Michie's Code, 2673, 2676, 2776 (r), at least for the purpose of sustaining a finding to that effect upon the hearing of an order to show cause why a temporary order restraining the violation of the ordinance should not be continued to the hearing.

2. Pleadings § 29: Appeal and Error § 40b—

A motion to strike certain allegations from a pleading is made as a matter of right if made in apt time, and at other times it is addressed to the discretion of the court, but in both instances it is subject to review, since the power of the court must be exercised in accordance with legal principles and established procedure.

3. Same—

In a proceeding to enjoin a violation of a municipal ordinance regulating the storage of gasoline within the fire district of the city, the granting of a motion to strike allegations from the answer as to what had been permitted in this respect by other cities, will not be held for error, since the granting of the motion does not prejudice defendant or deprive it of any defense it might have.

4. Municipal Corporations § 40—

The fact that the violation of a municipal ordinance is made a misdemeanor does not preclude the municipality from enjoining its violation when the ordinance relates to the public safety, health or welfare, since in such instance prosecutions for its violation may not afford an adequate remedy, and the injunctive relief will lie, not for the purpose of preventing a crime, but to maintain a right.

5. Municipal Corporations § 36—

The fact that an ordinance is enacted under the police power of a municipality establishes *prima facie* that the acts prohibited are nuisances, the resort to the police power being an inferential declaration to this effect.

6. Municipal Corporations § 40—

The provision of section 8, chapter 250, Public Laws of 1923 (Michie's Code, 2776 [y]), confers jurisdiction upon the courts beyond the scope of the ordinary equity jurisdiction in enjoining the creation of a nuisance and provides a statutory injunction to prevent the violation of municipal ordinances enacted in the exercise of the police power.

7. Same—Municipality may enjoin violation of its ordinance even though the act prohibited is not a nuisance per se.

The right of a municipality to enjoin the violation of an ordinance is not limited to instances in which the act prohibited is a nuisance *per se*,

but the question is whether the act or thing prohibited is a nuisance in fact under the existing conditions, so as to give the court jurisdiction to grant the relief sought under the provisions of Michie's Code, 2776 (y), and an ordinance prohibiting the storage of gasoline within the fire district of the city in quantities in excess of 4,500 gallons bears a sufficient relationship to the public safety to warrant the court in continuing a temporary order restraining the violation of the ordinance to the final hearing, at which time the question of whether the particular act contemplated by defendant involves the public safety so as to bring it within the legitimate scope of municipal regulation may be determined.

APPEAL by defendant from *Burney, J.*, at Chambers, June Term, 1939, of CUMBERLAND. Affirmed.

The plaintiff brought this action against the defendant to permanently enjoin the latter from constructing and establishing a gas storage tank of 15,000 gallons capacity in the city fire district, contrary to the city ordinance.

It is alleged in the complaint that the proposed site of the storage tank is not only within the fire district but in a very populous part of the city, and that its installation and maintenance "will create a most dangerous public nuisance and will seriously impair the safety of the citizens using this arterial highway and street and imperil the lives of the multitude of citizens frequenting the theatre, hospital and other points where great throngs gather and which are situated in and near this location." It is further alleged that the site upon which the defendant wishes to locate the tank has been set apart by particular description and recognized by the State Fire Insurance Department and rating bureau of the fire insurance companies doing business in the State as being a high-class business district with special restrictions and regulations as to fire insurance rates and costs to insurers, and that the location of the tank at this point will of itself create a particularly dangerous hazard to the business district of the entire city, and that the storage of inflammables therein "will become immediately a most dangerous nuisance to both persons and property and make fire control in the business district most difficult and uncertain." It is further alleged that the presence, use, and maintenance of any storage tank of 10,000 gallons or more capacity "would create a most dangerous nuisance, unwarranted by circumstances and not in any manner contemplated by the zoning regulations of the city or authorized within the fire limits for fire control authorities."

It is further alleged "that an ordinance of the city of Fayetteville prohibits the use of tanks for gasoline storage within the fire district limits of a capacity greater than 4,500 gallons upon any one location."

The Spur Distributing Company, defendant, answered admitting only the formal allegations of the complaint and the fact that it was the

intention of the defendant to "erect, operate and maintain on the location described in the complaint, a retail service station; and to that end will install, in accordance with the rules, regulations and specifications of the National Board of Fire Underwriters, and in conformity with any and all State regulations, a modern and scientifically constructed underground tank, with the latest approved safety appliances, for the storage of gasoline, with a capacity of 15,000 gallons," which gasoline tank is to be filled by unloading and piping directly from a tank car stationed on a spur track of the Atlantic Coast Line Railroad Company, near the proposed site for said filling station.

The answer denies that the construction and maintenance of these facilities for the handling of gasoline would bring about a dangerous condition or constitute a nuisance, and points out that the method of handling the gasoline would reduce a hazard now existing because of the method of unloading and operation of other filling stations within the fire limits.

Defendant further alleges that subsequent to the issue to it of a building permit for the construction, maintenance, and operation of a filling station, the board of aldermen of the city "adopted an ordinance which undertakes to prohibit the use of tanks for the storage of gasoline within the fire district of the city of Fayetteville with a storage capacity greater than 4,500 gallons," a copy of which is attached to the answer. The defendant complains that the ordinance, with amendments thereto, is unconstitutional and void as being based upon no reasonable grounds, but predicated upon conjecture and apprehension of danger without adequate foundation in fact. It is alleged that the ordinance, as amended, is "unreasonable, arbitrary, discriminatory and capricious; and deprives this answering defendant of conducting a lawful business; and unlawfully deprives this answering defendant of the use and occupancy of its property, without due process of law; and denies this answering defendant equal protection of the law, in contravention of Amendment 14, Section I, of the Constitution of the United States, and the amendments thereto; and Article I, section 17, of the Constitution of the State of North Carolina."

The defendant further alleges that it is now operating about 250 retail service stations in 19 states, in congested areas, and gives a list of such stations, with their locations, within the State of North Carolina.

The exhibits attached to the answer include the ordinance, amendments thereto, building permit, and City Engineer's Certificate.

Upon the hearing, the defendant moved to dismiss the action for the following reasons, which we give in summary: First, that the acts set forth in the complaint, if true, are made a misdemeanor by the provisions of the city ordinance adopted 1 May, 1939, and amended 8 May,

1939; second, that the acts complained of, as appear from the face of the complaint, would be a violation of the ordinance against the storing of gasoline within the fire limits of the city in tanks of more than 4,500 gallon capacity, and that since this ordinance provides that the violations of the same shall be punishable as misdemeanors, the acts complained of would constitute criminal offenses and cannot be enjoined; and, third, that it appears upon the face of the complaint that the plaintiff has a complete and adequate remedy at law, and, therefore, cannot invoke the intervention of a court of equity.

This motion was overruled, and defendant excepted.

Plaintiff moved to strike out the first paragraph of defendant's second and further defense. Motion was allowed and defendant excepted.

The court, thereupon, heard evidence of the plaintiff and defendant addressed to allegations in the complaint and answer, upon which evidence, and upon formal admissions in the pleadings, the judge made pertinent findings of fact and conclusions of law, among which are the following: "That the handling, storing and conveying from tank cars by pipe of gasoline in large quantities of 15,000 gallons is dangerous, and while not a nuisance *per se* might easily become one from the way the said tank was stored, or the way that the gasoline in such large quantities, to wit, 15,000 gallons, would be piped or transferred to said tank."

Upon the evidence and the facts found, the judge continued the injunction to the hearing, and from this judgment the defendant appealed, assigning errors.

D. M. Stringfield and G. S. Quillin for plaintiff, appellee.
Tompkins & Tompkins and Rose & Lyon for defendant, appellant.

SEAWELL, J. The defendant did not argue, either in the brief or in the oral argument, the constitutional questions raised in its answer relating to the propriety of the exercise of the police power in the regulation of its business. Inasmuch, however, as this question may have some bearing upon other matters involved, we may say that the power of a municipality to make proper ordinances for the protection of the health, safety, and welfare of the people is derived from chapter 56 of the Consolidated Statutes, relating to municipal corporations, and C. S., secs. 2673, 2676, and 2776 (r), (Michie's Code), may be considered as pertinent. In this instance the existence of a danger to the public, enhanced by the proposed location of the storage tank in a congested area within the fire district in the business part of the city, would sustain a finding, at least for the purpose of passing on the order to show cause, that the business is affected with a public interest justifying resort to the police power in its regulation, and that the restrictions

provided in the statute have a proper relation to the evil sought to be remedied. *Nebbia v. New York,* 291 U. S., 502, 78 L. Ed., 940; *Shuford v. Waynesville,* 214 N. C., 135, 198 S. E., 585.

The defendant bases its argument for reversal upon three propositions: First, that a municipal corporation has no power to invoke the extraordinary remedy of injunction to prevent a threatened violation of one of its ordinances; second, that the court committed error in striking from defendant's answer the second paragraph relating to use and maintenance of similar stations and equipment in other North Carolina cities; and, third, that the court cannot enjoin an alleged public nuisance when the apprehended injury is at most contingent and speculative and the condition complained of is not a nuisance *per se.*

For a more convenient discussion we take up first the order striking out part of defendant's answer. Such an order, made in apt time, is a matter of right, and at other times it is within the discretion of the court. *Patterson v. R. R.,* 214 N. C., 38, 43, 198 S. E., 364. In both instances it is subject to review, of course, since the power of the court must be exercised in accordance with legal principles and established procedure. In the particular case we do not regard the matters alleged in the stricken paragraph as being relevant to the development of the case, since they refer only to what has been permitted, or what has been done in other cities in the State, and no inference could be drawn from such fact other than that which might appeal to the tolerance of officials, rather than to the enforcement of law. At any rate, we cannot see that the defendant is prejudiced by the elimination of this paragraph or deprived of any defense it might make. *Pemberton v. Greensboro,* 203 N. C., 514, 515, 172 S. E., 196.

Second. Ordinarily, injunction will not lie to prevent the perpetration of a crime. The criminal laws which come into action when intention has ripened into an overt act are deemed sufficient. The criminal law, however, deals with crime as crime—as an offense against the sovereignty of the whole State—and does not look to any objective other than the correction or reformation of the criminal or his removal from the zone of his pernicious influence so that society may no longer be molested with his criminal outbreaks, and the deterring effects of his conviction and punishment upon others like minded. It is not intended, nor is it adequate, to protect society or the individuals or groups within it, or persons within a congested territory, from acts which expose them to special danger or which constitute a menace to the safety, health, and welfare of the community, although indeed these acts may incidentally become violations of law. In order to adequately deal with these evils a resort to the police power should mean more than merely setting in

motion that highly specialized vehicle of its exercise—the criminal law—since in many instances this must be found inadequate to sustain the power.

The fact that an act from which such injury may come, either to a private citizen or to the public at large, is denounced either in an ordinance or in the law as criminal does not immunize its author from other appropriate remedy. Thus, trespass upon land is an indictable offense, but injunction may be maintained to prevent a continuing trespass. Equity is invoked, not to prevent a crime, but to maintain a right.

Third. If in its attempt to enforce its ordinances relating to important subjects of this kind the municipality must be confined to civil actions for collection of the meager penalties prescribed by the ordinances, or to prosecutions under the State criminal law—which, indeed, any citizen might set in motion—where punishment is usually confined to the amount named in the penalty, it must be obvious that such a method will be adequate only when applied to the violation of minor regulations. The subject with which we are dealing—zoning ordinances and similar regulations—has presented a fruitful field of controversy, in which municipalities have experienced great difficulty in enforcement. A number of states have enabling statutes authorizing municipalities to resort to injunction in aid of the enforcement of ordinances of this kind. *Lexington v. Governor* (Mass.), 3 N. E. (2d), 19.

In the 1923 statute (chapter 250, Public Laws of 1923; Michie's Code of 1935, sections 2776 [r], *et seq.*), conferring on municipalities the powers here sought to be exercised by the plaintiff city, similar permission is given to them to resort to the courts for aid in enforcement of appropriate ordinances and for restraint of prohibited acts. Section 8, Session Law cited; Michie's Code, section 2776 (y): "Remedies. In case any building or structure is erected, constructed, reconstructed, altered, repaired, converted, or maintained, or any building, structure or land is used in violation of this article or of any ordinance or other regulation made under authority conferred thereby, the proper local authorities of the municipality, in addition to other remedies, may institute any appropriate action or proceedings to prevent such unlawful erection, construction, reconstruction, alteration, repair, conversion, maintenance or use, to restrain, correct or abate such violation, to prevent the occupancy of said building, structure or land, or to prevent any illegal act, conduct, business, or use in or about such premises."

Indeed, it has been held that a municipality may resort to injunction for enforcement of its ordinances on subjects of this kind without the necessity of an enabling act. McQuillin on Municipal Corporations (2nd Ed.), section 852, *et seq.; ib.*, section 1911; *Lake Charles v. Lake Charles Railway L. & W. Co.*, 144 La., 217, 80 So., 260-262; *Detroit*

Building Commission v. Kunin, 181 Mich., 604, 148 N. W., 207, 210. See also: 43 C. J., section 524, p. 405.

We are aware that the right of the municipality to resort to the State court for injunction in aid of its ordinances has been questioned in *Clinton v. Oil Co.,* 193 N. C., 432, 436, 137 S. E., 183, and in *Elizabeth City v. Aydlett,* 198 N. C., 585, 587, 152 S. E., 681. Neither of these cases, however, was decided on that point, and the statute to which we have referred was not then called to the attention of the Court. See pertinent observation of *Mr. Justice Stacy* in his concurring opinion in *Elizabeth City v. Aydlett, supra,* at bottom of page 588. It may also be said that the statute was not cited in the argument of the case at bar.

There can be no doubt that this statute authorizes the present proceeding; and it may be found to enlarge the scope of the ordinary equity jurisdiction, or to provide a statutory injunction to be applied to acts and conditions ordinarily considered as being beyond equity interference. This much must be kept in mind: The jurisdiction derives from the statute and is not made to depend wholly on a state of facts ordinarily warranting the equity jurisdiction in restraint of nuisances. Since it is directed toward the enforcement of specified municipal powers, it may occur in administration also that the particular power to be aided has no relation to nuisances in the ordinary sense, or to the rules of equity jurisdiction regarding their prevention or abatement; or, if the subject relates to a nuisance, it seems clear that the statute, not the common law, must control the court in the exercise of the jurisdiction which it gives, in as far as it speaks.

The courts have been inclined to pay great deference to municipal ordinances declaring certain acts to be nuisances, and it has been held that the prohibition by ordinances of certain acts, in the exercise of the power to enact ordinances for the welfare of the people, may be regarded inferentially as such a declaration. McQuillin, Municipal Corporations, sections 957, 958, *et seq.* Where the statute in that respect is not arbitrary on its face, it should be considered as, *prima facie,* investing the act or thing with such character. *State v. Trenton,* 53 N. J. Law, 132, 20 Atl., 1076. The question presented is not whether the act or thing is within the category of things which are obviously nuisances, or which have at one time or another been traditionally so regarded, but a question as to whether or not the act or thing is a nuisance in fact under the conditions found. *Shreveport v. Leiderkrantz Society,* 130 La., 802, 58 So., 578.

With regard to the power of municipalities expressed in zoning and similar acts prohibiting the carrying on of certain businesses or activities within a specified area, that power has not usually been limited in its exercise to instances where the facilities, businesses, or activities pres-

ently constitute a nuisance *per se.* While there are cases to the contrary, those so holding will usually be found to have turned upon the fact that the evidence is only speculative and uncertain as to whether the thing will ever become a nuisance. For illustration, while a livery stable has been held by the Supreme Court of the United States and other courts not to be a nuisance *per se* (*Ex Parte Lacey,* 108 Cal., 326, 41 Pac., 411; *St. Louis v. Russell,* 116 Mo., 248, 249, 22 S. W., 470), it has "long been recognized as a subject necessarily within reasonable police regulation." McQuillin, section 965, and cases cited. So, "an automobile garage is not necessarily a nuisance *per se,* though it may be so conducted as to become such, hence its location, erection, and conduct is plainly within the police power." *Ib.,* section 966. There are instances innumerable where the assertion of the police power through a proper ordinance similar to the one under consideration has been upheld as valid, although the thing sought to be prevented or abated as a nuisance is not so *per se,* but may become so because of the location of the property or the conditions surrounding the business.

In the case at bar we are not faced with any uncertainty. The defendant admits that it intends to install tanks holding 15,000 gallons of gasoline, piping it from the spur track of the railroad in one of the most populous centers of the city, in close proximity to hospitals and hotels, and within the fire district, in contravention of the ordinance, and asks the city to wait until it shall have become a nuisance *per se,* according to traditional classification.

Both *Clinton v. Oil Co., supra,* and *Elizabeth City v. Aydlett, supra,* and cases of a like kind, have been urged upon us as concluding the rights of plaintiff in the case at bar, since they are construed as holding that a filling station is not a nuisance *per se,* and, therefore, not a proper subject for a valid city ordinance restricting use of property. It is pointed out that all these filling stations have tanks for the storage of gasoline. The distinction upon which this ordinance bases its classification regards the storage of gasoline in large quantities as constituting the evil, and we cannot say, as the matter has been presented to us in this case, that the classification is arbitrary. Apart from this, the proposition that a municipality may not, by a proper zoning ordinance equally applicable to all persons and subjects within the restricted area, prohibit the erection and maintenance of filling stations in such particular locality, on the ground that they are not nuisances *per se,* and that the ordinance constitutes an unconstitutional restriction upon the use of property, is not tenable. At least, this Court has not proceeded on that principle for a long time. *S. v. Johnson,* 114 N. C., 846, 19 S. E., 599; *Ahoskie v. Moye,* 200 N. C., 11, 156 S. E., 130; *Shuford v. Waynesville, supra.*

The subject with which the ordinance deals is treated as a nuisance, but it has been pronounced by the court who heard the case as dangerous to the safety of the public, and we do not think that in reaching it the Court is at this time bound by the doctrine of noninterference until the condition has established itself as a nuisance *per se*.

On the hearing upon the merits, the character of the facilities sought to be installed and maintained by the defendant, the method of storing and handling the gasoline, the danger involved, and other matters which might bring it within the legitimate scope of municipal regulation, or exclude it therefrom, may be more definitely determined. At present, we are only concerned with the question whether or not the plaintiff has made a sufficient showing to justify the Court in continuing the restraining order until the hearing on the merits. We think it has.

The judgment refusing to dismiss the action and continuing the injunction to the hearing is

Affirmed.

E. C. CODY, G. W. CODY, HATTIE CODY, GLENN CODY, JOHN CODY, LONAZELLE BREWER, GURNEY BREWER, IRENE CODY, BY HER NEXT FRIEND, HATTIE CODY, v. WILL ENGLAND.

(Filed 13 December, 1939.)

1. Trial § 37—

A verdict must be certain and responsive to the issues, and should establish facts sufficient to enable the court to proceed to judgment, and when its terms construed with reference to the pleadings, evidence and charge of the court remain ambiguous and uncertain, a new trial should be granted.

2. Trial §§ 37, 50b: Trespass to Try Title § 3—Held: Plaintiffs' motion to set aside verdict because of its ambiguity should have been granted.

The parties to this action claimed under their respective State grants, and the controversy involved the establishment of the boundary between the respective tracts rather than title to the lands covered by the grants. A court map introduced in evidence showed the boundaries of the respective tracts as contended by the parties by green and red lines respectively. By separate answers to the issues, the jury found that the parties had title to the lands embraced in their respective grants but located the lands of both plaintiffs and defendant on the map as the area bounded by the red lines. The courses and distances of the red lines were not shown on the map, and both the surveyor who drew the map and another surveyor testified that the red lines were not correctly placed on the map, and resort to defendant's grant could not supply the deficiency because defendant contended that the courses and distances given in the grant were controlled by the calls therein to natural objects. *Held:* The verdict construed with reference to the pleadings, evidence, and charge of the

court is contradictory, ambiguous, and uncertain, and is insufficient to support the judgment in defendant's favor on his counterclaim for trespass in cutting and removing timber, and plaintiffs' motion to set aside the verdict should have been granted.

APPEAL by plaintiffs from *Nettles, J.*, at June Term, 1939, of GRAHAM.

Civil action to recover damages for alleged trespass.

For the purposes of the trial of this case the uncontroverted facts are these: (1) The plaintiffs own the land covered by State Survey No. 69, Grant No. 2275, and Entry 2335, Grant No. 2684. (2) The defendant owns the land covered by Entry 4341, Grant No. 2609. (3) The second corner of Grant 2275, a hickory, and the beginning corner of Grant 2684, a hickory, are the same and marked on the court map A-1. The southern boundary line of Grant 2275 is the northern boundary line of Grant 2609.

Plaintiffs allege ownership of a boundary of land comprising the descriptions in Grants 2275 and 2684, and contend that the said grants adjoin, and are in shape of parallelograms. They further contend that Grant 2684 is located by running the calls, with proper variation, east 160 poles, then south 300 poles, then west 160 poles, and then north 300 poles. They further contend that Grant 2275 is located by running the calls, with proper variation, beginning on a white oak and hickory, east 138 poles to a hickory, which is the beginning corner of Grant 2684, then south 162 poles, then west 138 poles, and then north to the beginning. They further contend that from the hickory, the second corner of Grant 2275, and the beginning corner of Grant 2684, the east line of Grant 2275 for its full length and the west line of Grant 2684 running north are in common; and that the southeast corner of Grant 2275 is in the west line of Grant 2684. They further contend that Grant 2609 begins in the south line of Grant 2275 and runs east 66 poles to the west line of Grant 2684 at the southeast corner of Grant 2275; that the next call in Grant 2609 runs south with the said line of Grant 2684, 97 poles to a post in the line of Entry 1087, then with that line north 45 west 98 poles to a corner of said grant, then with the same south 45 west 102 poles, then north 100 poles to the southwest corner of Grant 2275, and then east 72 poles to the beginning.

Plaintiffs further contend that as Grants 2275 and 2684 are thus located, the defendant has unlawfully trespassed thereon by cutting timber, and pray judgment for damages.

Defendant, on the other hand, contends that Grant 2684 is not in shape of parallelogram; that the corner, a beech, now gone, called for at the end of the first line is not at the point reached by running the line

according to course, on proper variation, and distance specified in the grant; that in order to reach the location of the natural object called for, the line should be run on a course north of east, a distance greater than called for; that then continuing the second and third calls, the point reached is not south of the beginning; that hence the last line of said grant is on northwest course; that as a result there is a boundary of land between the last line thus run and the last line as contended for by plaintiffs; that the boundary between the lines of those last contentions is covered by Grant 2609; and that plaintiffs have committed acts of trespass thereon by cutting timber to his damage for which he counterclaims.

These issues were submitted to and answered by the jury as follows:

"1. Are the plaintiffs the owners of and entitled to the possession of the lands described in State Survey No. 69, Grant No. 2275, and Entry No. 2335, Grant 2684? Answer: 'Yes.'

"2. How are said tracts of land located on the court map? Answer: 'By the red lines of the court map.'

"3. Has the defendant trespassed on said lands? Answer: 'No.'

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

"5. Is the defendant the owner of the land described in and embraced in Grant 2609, Entry No. 4341? Answer: 'Yes.'

"6. How is said grant located on the court map? Answer: 'By the red lines of the court map.'

"7. Has the plaintiff trespassed on said land? Answer: 'Yes.'

"8. What damage, if any, is the defendant entitled to recover of the plaintiffs? Answer: 'Six hundred ($600.00) dollars.'"

Plaintiffs moved to set aside the verdict and for a new trial. Motion overruled. Exception.

Bearing upon the sufficiency of the verdict, it appears that:

The evidence tends to show that the court map was drawn by two surveyors, W. A. Adams and Roy Sherrill, appointed by the court for that purpose.

The evidence further tends to show that in making the map Adams platted Grants 2275, 2684, and 2609 and Entry 1087 in accordance with plaintiffs' contention, and traced in green color all the lines except the lines representing the first and last calls of Grant 2275, and indicated the corners mainly by capital letters. As thus indicated on the court map the corners of the grants are: For Grant 2684 the letters A, B, C, and D; for Grant 2275 "hickory and white oak," A, F, and J; for Grant 2609 BO-E, F, G, H, I, and J; and for Entry 1087, drawn in shape of square, the letters G, H, and I at points of contact with Grant 2609.

The evidence further tends to show that Sherrill platted the same grants to show their locations as the defendant contends, and traced the corresponding lines of such location in red color, with figures to indicate the corners. As thus indicated on the court map the corners of grants are: For Grant 2684 the figures 1, 2, 3 and 4; for Grant 2275 "hickory and white oak," and the figures 1, 6, 16, and 10; for Grant 2609 the figures BO-5, 16, 6, 4, 7, 8, 9 and 10; and for Entry 1087 the figures 7, 8 and 9, at points of contact with Grant 2609.

The course and distance is not shown on the map with respect to any line in either contention. The red lines on the map, as explained in the testimony of witnesses, represent the defendant's contention of the location of Grants 2684 and 2609 and Entry 1087, and the southern line of Grant 2275.

On the trial below Surveyor Sherrill testifying as witness for defendant, said in substance that after the map was made he found that the red line from A-1, the beginning corner of Grant 2684, to the figure 2 "is a little too far north of what it should be"; that from the point B, at the end of line A-1—B, "to the red line is 62 feet from where it should be to beech. My line may show it to be 200 feet. . . . My line at the figure 3 is probably out just the same amount. That would pull my red line 200 feet nearer the blue line at the bottom. There wouldn't be much difference between the blue and red on the ground." It appears that the witness, in speaking of blue lines, refers to the green lines.

Another surveyor, J. Arthur Rogers, as witness for defendant, testified: "This plat is not correct so far as figure 2 is concerned. It is not properly placed on the map. By placing a scale stick across there and drawing a line from it to where figure 2 should be, it would cut off 160 or 170 feet. By adding 170 feet to the other end of the red line it would make it scale about right. Add that to the south end of the line at figure 4, exactly what you drop off at figure 2, it would take you where I would mark W."

The court signed judgment in which it is decreed that: "The plaintiffs are the owners of and entitled to the possession of the land bounded by the lines as shown on the court map as follows:

"Beginning at 'hickory, white oak,' the Northwest corner of State Survey No. 69, Grant No. 2275, and runs East with the North boundary line of State Survey No. 69 to 'Hickory 1-A,' the Northeast corner of State Survey No. 69, and Northwest corner of Entry No. 2335, Grant No. 2684; then East with the 'red line to figure 2' on the court map; then South with the red line to figure '3' on the Court map; then West with the 'red line to figure 4' then Northerly with the 'red line,' the East boundary of the portion shaded in yellow on the Court map to

figure '6' then West with the 'red line' passing points designated '16' and '5' respectively to a point designated figure '10-J' on the Court map, the Southwest corner of State Survey No. 69, Grant No. 2275; then North to the beginning, hickory white oak corner, the Northwest corner of said State Survey No. 69."

The court further decreed "That the defendant is the owner and entitled to the possession of the land bounded by the red lines of the Court map, as follows:

"Beginning at a point designated on the map '10-J' the Southwest corner of State Survey No. 69, Grant No. 2275, and Northwest corner of Grant No. 2609, and running east with the red line with the South boundary line of State Survey No. 69, Grant No. 2275, passing point 'B. O. 5' and point '16' respectively to a point designated on the Court map at figure '6' then South with the red line along the East boundary of area shaded in yellow on the Court map, and with the West boundary line of Entry No. 2335, Grant No. 2684 as designated on the Court map to a point designated figure '4' then West with the red lines along the South boundary of said area shaded in yellow to point '7' in the Northeast boundary of Entry No. 1087, Grant No. 2683; then with the Northeast boundary line of said Entry No. 1087 with the red line to the 'maple figure 8' the North corner of said Entry No. 1087 then Southwest with the Northwest boundary line of said Entry No. 1087 with the red line on the Court map to Figure '9'; then with the red line North to point '10-J' the Southwest corner of State Survey No. 69, the place of beginning."

The court further adjudged that defendant recover of plaintiffs the sum of six hundred dollars, and that the plaintiffs be taxed with the costs.

To the signing of the judgment plaintiffs excepted and appeal to the Supreme Court, and assign error.

McKinley Edwards and R. L. Phillips for plaintiffs, appellants.

T. M. Jenkins, Morphew & Morphew, and J. N. Moody for defendant, appellee.

WINBORNE, J. While the plaintiffs bring forward and press for error numerous exceptive assignments, we think it appropriate to advert only to the exceptions to the refusal of the court to set aside the verdict and to the judgment. These are well taken and must be sustained.

The controversy is one of location of the boundaries of the land in question, rather than of title to such lands as are covered by the grants under which the respective parties claim. Such title is not controverted. The second and sixth issues relate to location. The answer to the third,

fourth, seventh and eighth issues are dependent upon the answers to the second and sixth. Plaintiffs attack the verdict for that the answers to the issues relating to location of the lands of plaintiffs and of defendant are inconsistent and contradictory, and too uncertain and ambiguous to support the judgment and dispose of the matters in controversy. They attack the judgment for uncertainty.

As expressed in many decisions of this Court, the law is that a verdict must be certain, responsive to the issues submitted and should establish facts sufficient to enable the court to proceed to judgment and dispose of the matters in controversy. *Hilliard v. Outlaw,* 92 N. C., 266; *Emery v. R. R.,* 102 N. C., 209, 9 S. E., 139; *McAdoo v. R. R.,* 105 N. C., 140, 11 S. E., 316; *Chapman-Hunt Co. v. Board of Education,* 198 N. C., 111, 150 S. E., 713; *Plotkin v. Bond Co.,* 200 N. C., 590, 157 S. E., 870.

"A verdict finding matter uncertainly or ambiguous is insufficient, and no judgment should be given thereupon." *Crews v. Crews,* 64 N. C., 536. This may arise from the answer to the issue being indefinite. *Kornegay v. Kornegay,* 109 N. C., 188, 13 S. E., 770; *Howell v. Pate,* 181 N. C., 117, 106 S. E., 454. If ambiguous in its terms, the ambiguity may sometimes be explained and the verdict interpreted by reference to and in connection with the pleadings, the evidence and the charge of the court. *Howell v. Pate, supra; Kannan v. Assad,* 182 N. C., 77, 108 S. E., 383; *S. v. Snipes,* 185 N. C., 743, 117 S. E., 500; *S. v. Whitley,* 208 N. C., 661, 182 S. E., 338.

When so construed, "if the true intent and meaning of the verdict is found to be doubtful, uncertain and ambiguous" a *venire de novo* should be granted. *Donnell v. Greensboro,* 164 N. C., 330, 80 S. E., 377; *Sitterson v. Sitterson,* 191 N. C., 319, 131 S. E., 641; *Short v. Kaltman,* 192 N. C., 154, 134 S. E., 425; McIntosh P. & P., 675.

The verdict and judgment establishing the disputed boundaries should be so definite that the lines can be run in accordance therewith. Otherwise, the judgment would not sustain a plea of *res judicata* in a subsequent suit between the same parties, involving the same subject matter, but would only necessitate another suit to settle the same case. 9 C. J., 293, Boundaries, section 354.

When tested by these principles, the verdict in the case in hand, interpreted by reference to the pleadings, facts in evidence, the court map, and the charge of the court, is contradictory, ambiguous and uncertain, and wholly insufficient to support the judgment. The jury has answered both the second issue, which relates to the location of the lands owned by the plaintiffs, and the sixth issue, as to the location of defendant's land, in identical words: "By the red lines on the court map." The red lines on the court map cover not only Grant 2684, which the plaintiffs own, but Grant 2609, which the defendant owns, as well as Entry 1087,

the ownership of which does not appear. Nothing else appearing, by the answer to the second issue, the jury has said that the location of plaintiffs' land includes all the land within the red lines on the court map, and by the answer to the sixth issue, that the location of defendant's land includes the same. But if this contradictory and inconsistent condition on the verdict did not exist, the testimony of the surveyor who put the red lines on the map, and another, shows that the red lines indicating the location of Grant 2684 as contended by defendant are not correctly placed on the map. The courses and distances of the red lines are not shown on the map. Resort to the calls of the grant does not supply the deficiency, for the defendant contends that the first call in this grant is not controlled by the course and distance given, but that a different course and distance should be applied to arrive at the point on which the natural object called for formerly stood.

In the judgment below the verdict of the jury is apparently interpreted in relationship to the map to which the verdict refers. The map being devoid of certainty affords no basis for making certain the location of the lands in question and lends no support to the judgment.

Other assignments are not considered. Since there must be a new trial the matters to which they relate may not recur.

New trial.

STATE v. SHEPROSE HOLLAND.

(Filed 13 December, 1939.)

1. **Criminal Law §§ 52b, 78d—**

A defendant waives his exception to the overruling of his motion to dismiss as of nonsuit by failing to renew his motion at the conclusion of all the evidence.

2. **Homicide § 25—Evidence held sufficient for jury on question of defendant's guilt of murder in the first degree.**

Evidence tending to show that defendant, his wife and his step-son were living together, that defendant took out a policy of insurance on his step-son, that thereafter he told his step-son that he would not live as long as he had lived, that on the afternoon of the same day he, his wife and step-son were at the mill where he was employed, that he sent his wife away on an errand, that a short while thereafter defendant went to a nearby store and informed those there that his step-son had drowned, that the body of the child was found floating on the water, that there was no water in the lungs and no indications of drowning, but that the body showed signs that the child had been strangled to death, together with evidence of other incriminating circumstances *is held* sufficient to be submitted to the jury and sustain their verdict of guilty of murder in the first degree.

3. Criminal Law § 38a: Homicide § 23—

The trial court has discretionary power to admit in evidence drawings and photographs of the scene of the crime for the purpose of illustrating the testimony of the witnesses, and its action in admitting properly identified drawings and photographs for this purpose and excluding them as substantive evidence is not error.

4. Same: Criminal Law § 78c—

Deceased was found dead floating on a millpond. A witness was permitted to testify as to experiments made with boards thrown into the pond while the mill was in operation to determine the drift or flow of the stream. *Held:* The admissibility of the evidence of the experiment was for the determination of the court in its discretion, and upon subsequent evidence that the mill was not in operation at the time the body of deceased was found in the pond, defendant should move to strike and his failure to do so waives his exception.

5. Criminal Law § 31a—

The person embalming the body of the deceased testified that pressure had been applied on the neck below the Adam's apple requiring incisions in the neck before the tongue could be placed in proper position. The court expressly excluded the testimony by the witness as to what produced the pressure. *Held:* Defendant's objection to the admission of the testimony is untenable.

6. Criminal Law § 41f—Charge as to consideration jury should give testimony of defendant held without error.

An instruction to the effect that the law looks with suspicion on the testimony of the defendant in his own behalf, that the jury should scrutinize such testimony and take it with a degree of allowance, but that the rule which regards it with suspicion does not reject it, and that if the jury under all the facts and circumstances believes the witness has sworn to the truth that they should give his testimony as full credibility as that of any other witness, *is held* without error.

7. Homicide § 27a—

The failure of the court to define "feloniously" and "willfully" will not be held for error when its definition and explanation of the law of murder includes the meaning of these terms, certainly in the absence of a request for instructions by defendant.

APPEAL by defendant from *Williams, J.*, at July Term, 1939, of DUPLIN. No error.

Criminal prosecution tried upon indictment charging the defendant with the murder of Ray Goodman, his step-son about three years of age.

The State offered evidence tending to show:

The defendant entered into the employment of one Sutton about the first of the year, 1939, as operator of a corn mill. In March, 1939, he married one Sallie Goodman and began to live in a small house situated near the millpond. At the time of the marriage, Ray Goodman, the three-year-old son of Sallie Goodman, was living with another couple

but was taken into the home of the defendant about thirty days after the marriage. On about 28 April, defendant procured a funeral benefit policy providing for the payment of burial expenses in the case of the death of the boy; and one providing for the payment of such expenses in the case of the death of his wife. On 22 May, the defendant procured a life insurance policy on the life of Ray Goodman, in which the defendant was named as beneficiary. This policy provided for the payment of $600 in the event of the death of the insured within one year; $800 in the event of the death after one year but within two years; and for the payment of $1,000 in the event of death at any time after two years. Application for this policy was dated 1 May, 1939, and the first premium thereon was paid by the defendant. On the morning of 7 June the defendant was heard to say to the deceased, "You are not going to live as long as you have lived." On the afternoon of 7 June, 1939, the defendant, his wife and Ray Goodman were at the old mill where the defendant was working. His employer and others were at a filling station and store some distance away. The defendant sent his wife to the house to get a bucket and some lard to fry some fish. A few minutes thereafter the defendant went to the filling station and told Marcellus Sutton that Ray Goodman was in the millpond and asked him to go and get him out. Sutton went and found the deceased in the mill race floating on top of the water, lying on his back with all of his face on top of the water, his arms spread out, his mouth open, and his tongue a little out of his mouth and his eyes pushed or swelled out of his head. The body was so near to the sills or "sheets" that Sutton was able to rescue the body without getting in the water himself. After the body was rescued it was discovered that the bib to his overalls, the front part of his shirt, his face and the front part of his hair were dry and showed no appearance of having been in the water. When first seen in the water the overalls and shirt of the deceased looked as if they had air in them. When taken out of the water the deceased showed no signs of life.

When the defendant was asked whether he had funeral benefit insurance for the child he stated that he did. When asked about life insurance he denied that the life of the child was insured. There was likewise evidence that the defendant could swim but that he stated that the reason he did not take the child out of the water was because he could not swim.

When the body was taken to the funeral home the undertaker discovered that there were bruises on either side of the forehead and on either side of the neck, on the left side a good size bruise and on the right a smaller bruise just over the clavicle just below the Adam's apple, and one on the shoulder. There were three bruises under the left shoulder,

two small ones and one about the size of a silver dollar and bruises on both legs. The funeral director was unable to discover any water in the lungs. The tongue of the deceased was protruding and the undertaker had to make two slits in his neck in order to get the tongue back in his mouth.

The body was exhumed on the 9th and a *post-mortem* was had. The physicians could discover no water in the lungs. They did discover a discoloration on each side of the forehead over each eye, bruised spots on each side, midway and over the clavicle or collar bone, small bruised spots on the neck showing pressure on the external tissue and hemorrhage of the small blood vessels of the skin, showing a bruised condition same as choking just below the thyroid or Adam's apple low down just above the collar bone; small bruised spots back of the neck and on the back below the left shoulder blade, a few bruised spots—dark blue in coloration—further down on the back. The eyes were protruding, there was swelling around the eyeballs and the pupils were dilated. There was no fracture of the skull or other bones. The tongue was partially protruding, forming pressure against the teeth. There was no water in the ears, chest, abdominal cavity, throat or bronchial tubes. There was no swelling of the lungs or bronchial tubes and there was no water in either.

In the opinion of each of the physicians death was caused by strangulation by external means by force at the hands of some other person.

It was further shown that the body of a person who drowns will ordinarily sink and the body of a person put in water after death will float. It likewise appears that the defendant, on the next day, was under the influence of liquor and did not attend the funeral.

There was a verdict of guilty of murder in the first degree as charged in the bill of indictment. Judgment of death by asphyxiation was pronounced. The defendant excepted and appealed.

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

George R. Ward and Gavin & Gavin for defendant, appellant.

BARNHILL, J. When the State rested the defendant moved to dismiss as of nonsuit. The motion was overruled and the defendant excepted. The record discloses that this motion was not renewed at the conclusion of all the evidence and is, therefore, abandoned.

Counsel for the defendant insist that it is their recollection that such motion was renewed. Assuming this to be the fact, it will avail the defendant nothing. The evidence offered was amply sufficient to justify the submission of the cause to a jury.

Assignments of errors Nos. 1, 2, 4 and 7 all relate to the introduction and use in evidence of drawings and photographs of the Sutton Mill site. These exceptions cannot be sustained. The record discloses that the drawings and each of the photographs were properly identified as true representations of the location. In admitting them in evidence the court expressly limited their use for the purpose of illustrating testimony of the witnesses. It excluded them as substantive testimony.

The diagram and photographs were competent for the purposes for which they were admitted. *S. v. Spencer,* 176 N. C., 709, 97 S. E., 155; *S. v. Lutterloh,* 188 N. C., 412, 124 S. E., 752. "Such exhibits are generally used to illustrate the *locus in quo* of a crime, and the admission, not as testimony but as illustrative of testimony, rests in the discretion of the trial court." Wharton's Criminal Evidence, 11 Ed., Vol. 2, p. 1316.

Assignment of error No. 5 is directed to the alleged error of the court in permitting the witness Pierce to testify as to an experiment he made with the use of two boards thrown in the pond while the water mill was in operation, to determine the drift or flow of the stream. It did not then appear, and did not appear until the defendant testified, that the mill was not in operation at the time the body of the deceased was found in the pond. When it did so appear there was no motion to strike. Such experiments and evidence as to the result thereof are relevant. 22 C. J., 755; *Cox v. R. R.,* 126 N. C., 103; *S. v. Graham,* 74 N. C., 646. "Whether or not evidence of experiments is admissible is, under the circumstances of each case, a preliminary question for the determination of the court in the exercise of its discretion, which will not be interfered with by an appellate tribunal unless an abuse is made clearly to appear. *Blue v. R. R.,* 117 N. C., 644; *Cox v. R. R.,* 126 N. C., 103." *S. v. McLamb,* 203 N. C., 442, 166 S. E., 507. If the evidence became irrelevant upon the later showing through the defendant that the mill was not in operation on the date of the alleged homicide, defendant's failure to move to strike was, in effect, a waiver of the exception.

Exceptions to the admission of the evidence of the burial director and the embalmer over objection of defendant cannot be sustained. This witness testified to the fact of pressure below the Adam's apple which required incisions in the neck before the tongue could be placed in the proper position. The court expressly excluded any testimony on the part of this witness as to what produced the pressure.

The defendant assigns as error the following excerpt from the charge of the court, to wit: "Now, with respect to the evidence, I charge you that the law looks with suspicion upon the testimony of interested parties, or those testifying in their own behalf, and that you should carefully and cautiously scrutinize the evidence of interested witnesses, if you

find them to be interested. It is the province of the jury to consider and decide the weight to be given to such testimony, taking into consideration the conduct and deportment of the witness on the stand, his mental capacity and opportunity to know the facts and the circumstances in relation to the transaction, and the relationship in which the witness stands to the party charged. Such evidence should be taken with a degree of allowance, and not be given the same weight as that of a disinterested witness, but the rule which regards it with suspicion does not reject it, or necessarily impeach it, and if from their testimony, or from it and other facts and circumstances in the case, the jury believes such witnesses have sworn to the truth then they are entitled to as full credibility as any other witness, and you should give their testimony as much weight as you would the testimony of a disinterested witness."

Since the adoption of the statute permitting a defendant to testify in his own behalf it has been held that it is not improper, when the defendant has testified in his own behalf, for the presiding judge, in his charge, to instruct the jury that his testimony should be taken "with a grain of allowance"; *S. v. Green,* 187 N. C., 466, 122 S. E., 178; *S. v. Nat,* 51 N. C., 114; that his testimony should be received with caution and scrutinized with care; *S. v. Williams,* 185 N. C., 643, 116 S. E., 517; *S. v. Barnhill,* 186 N. C., 446, 119 S. E., 894; *S. v. Byers,* 100 N. C., 512, *supra; S. v. Lance,* 166 N. C., 411, 81 S. E., 1092; "is regarded with suspicion"; *S. v. Lee,* 121 N. C., 544; *S. v. Boon,* 82 N. C., 638; *S. v. Holloway,* 117 N. C., 730. When this is done the court should further instruct the jury, in substance, that after so weighing and considering the testimony of the defendant the jury should give his testimony such weight as it considers it is entitled to, and if the jury believes the witness it should give his testimony the same weight it would give the testimony of any other credible witness. *S. v. Holloway, supra; S. v. Collins,* 118 N. C., 1203; *S. v. McDowell,* 129 N. C., 523; *S. v. Lee, supra; S. v. Barnhill, supra; S. v. Williams, supra; S. v. Green, supra.*

There is no hard and fast form of expression or consecrated formula required but the jury may be instructed that as to the defendant the jury should scrutinize his testimony in the light of his interest in the outcome of the prosecution but that if after such scrutiny the jury believes that the witness has told the truth, it should give his testimony the same weight it would give the testimony of any other credible witness. *S. v. Green, supra.*

Counsel for the defendant concedes that the rule as stated in the foregoing excerpt from the charge has been approved by this Court with the exception of the use of the word "suspicion" in the latter portion thereof. Having instructed the jury "that the law looks with suspicion upon the testimony of interested parties, or those testifying in their own behalf,"

it was the duty of the court to qualify this statement, as it did, by stating "but the rule which regards it with suspicion does not reject it, or necessarily impeach it, and if from their testimony, or from it and other facts and circumstances in the case, the jury believes such witnesses have sworn to the truth then they are entitled to as full credibility as any other witness, and you should give their testimony as much weight as you would a disinterested witness." We cannot conceive that this was harmful to the defendant under the existing rule. It would have been error to have omitted this qualification.

The exceptions of the defendant directed to the failure of the court to define "feloniously" and "willfully" cannot be sustained. An intentional killing is a willful killing. One who in furtherance of a fixed design kills another in cold blood is guilty of a felonious killing. In fact, any intentional killing without just cause, excuse or justification is felonious. The court fully charged the jury upon the law of murder. The definitions and explanations in respect thereto included the meaning of a willful and felonious killing. We cannot conceive that it would have been helpful to the defendant for the court to proceed further to give definitions of these two words. Certainly it was not error for it to fail to do so in the absence of special prayer by the defendant.

We have carefully examined the other assignments of error contained in the record and brought forward and debated in the brief of the defendant. None of them can be sustained.

The defendant has been accorded a fair trial under a charge which is full and complete. While the defendant offered evidence which tends to contradict the testimony of the State's witnesses, it was for the jury to determine the facts. It has done so adversely to the defendant. We can find no cause for disturbing the verdict or the judgment.

No error.

S. J. ANDREWS v. W. N. PARKS AND HIS WIFE, MRS. W. N. PARKS.

(Filed 13 December, 1939.)

1. Vendor and Purchaser § 25: Trial § 27a—When purchaser is advised of former conveyance and elects to take his chance with record title, he may not recover damages for failure of title.

Defendants executed an option contract for sale of certain timber to plaintiff. Plaintiff resold the timber at a profit, but deed to plaintiff's purchaser was refused because of want of title, it appearing that defendants had conveyed the land to a third person by prior deed. Plaintiff instituted this action to recover as damages the difference between the purchase price stipulated in the option contract and the price his pur-

chaser had agreed to pay for the timber. Defendants introduced evidence to the effect that they had informed plaintiff of the prior deed and that plaintiff or his attorney had stated that plaintiff would take his chance with the record title. *Held:* If the jury should believe defendant's testimony, plaintiff would not be entitled to recover, and therefore a peremptory instruction that the jury should answer the issue of damages in a specified sum if they believed all the evidence is reversible error.

2. Vendor and Purchaser § 25—Evidence that vendors received nothing for prior conveyance held competent under facts of this case.

Where, in the purchaser's action for damages for failure of title in the vendors by reason of their prior conveyance to a third person, the vendors introduce evidence that they had informed the purchaser or his attorney of the prior conveyance and that it was made upon condition that the grantee should sell the land and divide the proceeds of sale after payment of the tax liens, it is error for the court to exclude the vendors' testimony that they had received nothing for the prior conveyance, since such evidence is consistent with their contention as to the character of their deed and tends to relieve them from the imputation of unfair dealing.

APPEAL by defendants from *Hamilton, Special Judge,* at May Term, 1939, of BLADEN. New trial.

W. H. Fisher and E. C. Robinson for plaintiff, appellee.
Fred P. Parker and Paul B. Edmundson for defendants, appellants.

SEAWELL, J. The plaintiff, Andrews, sues the defendants, W. N. Parks and wife, for a loss of profits in a timber deal growing out of an option deed made by defendants to him. Plaintiff alleges that he had sold the timber conveyed to him by defendants in this option deed to Greene Brothers Lumber Company, Inc., at an advanced price, and that defendants, having previously conveyed the timber to one B. D. Tatum, were unable to make a good title to plaintiff or his designated purchaser; that his prospective purchaser bought from Tatum, the holder under defendants' prior deed, and was, therefore, lost to him.

Upon the evidence and the instructions to the jury plaintiff recovered of the defendants $1,025.00, the difference between the option price and the price at which Greene Brothers Lumber Company agreed to buy from him.

The option deed under which the plaintiff sues was executed 12 March, 1936. The deed made by defendants to B. D. Tatum was dated 23 March, 1934, was filed for registration 3 April, 1934, and registered 4 April, 1934. In addition to this, there was evidence of a tax deed made by Bladen County to B. D. Tatum dated 4 April, 1936, and registered on 6 April, 1936, and a deed made by B. D. Tatum and wife to Greene

Brothers Lumber Company, Inc., of even date with the tax deed above referred to, that is, 4 April, 1936, and filed for registration on 6 April.

In evidence also was the deed from A. W. Parks and wife, Minnie L. Parks, to Greene Brothers Lumber Company, Inc., made in pursuance of the option deed, but never accepted by Greene Brothers Lumber Company because of the defect in the title above pointed out.

It may be inferred from the evidence that E. C. Robinson represented this plaintiff in searching the title to the property in controversy, and in certain conversations and transactions taking place between the plaintiff and the defendants, at which times Robinson was present and sometimes the spokesman. These conversations bear upon the contentions of the defendants that they had given to the plaintiff due notice as to the condition of the title and before the execution of the option deed to him.

Robinson testified that Andrews came to his office in Elizabethtown and, together, they went to the tax collector's office to identify Parks, and found the name of W. N. Parks, who had listed the land and who lived at LaGrange. He accompanied Andrews to LaGrange, and negotiations were opened for the option deed.

Robinson testified that he did not find upon the records any deed from Parks to Tatum at the time he looked at the index; that at the time of the trial the deed from Parks to Tatum had been recorded; that it was not there when he first looked at it.

With reference to the Tatum deed, the defendant, W. N. Parks, testified: "The first time I saw Mr. E. C. Robinson was at my home in the first part of 1936. Mr. Andrews came with him. He wanted me to make a price on this land and I wouldn't make any price. I asked them to make me an offer and they made me an offer of $600.00, and I told them that I couldn't say what I would do until I had looked over the land here. He later returned to my home in LaGrange. I had a conversation then with Mr. Robinson in the presence of Mr. S. J. Andrews. I told him I had made a quitclaim deed to Mr. Tatum. I told that to Mr. Robinson. I told him I made the quitclaim deed to Mr. Tatum, that I had made it in order to sell the land. I told them Mr. Tatum was to pay the taxes, was to sell the property and pay the taxes and we would divide the balance after doing that. I don't remember anybody being present at that time except Mr. Andrews and Mr. Robinson and myself. I was to estimate the timber and write them—which I did. I wrote those cards to notify them. Before I wrote the cards I told them I had promised the Greene Brothers Lumber Company that I would give them a chance at this property when I offered the property for sale and I told them I would have to notify Mr. Greene and Greene Brothers Lumber Company, and they told me they were representing Greene; Mr. Robinson told me that. Mr. Andrews was present." He further testified:

"Later Mr. Robinson returned to see me with Mr. Andrews. Mr. Robinson told me before this option was signed that he and Mr. Andrews had been down here to the register of deeds' office in Bladen County and searched the title and found there were no conveyances from me to anyone and no mortgages. This was in LaGrange. I think one time the young boy was present. The other time Mr. Andrews was present or right near. That is the time I told them about the B. D. Tatum quitclaim deed, as a result of which he told me he had searched the title and that there wasn't anything on the record at all. After telling them about the Tatum deed they said they would take a shot at what was on the record. Mr. Robinson said to make them the deed and it would be satisfactory to them. Mr. Robinson said that they would take a shot at the title, that there wasn't anything on the record at all. This was after he had made the statement about abstracting the title." And, further: "My wife and I signed this option relying upon statements made me by Mr. Robinson, and $25.00 was paid to me at the time I signed the option and I have tendered that into court." And, referring to the deed made to Greene Brothers Lumber Company, Inc., by defendants, he testified: "I relied upon the statement made to me by Mr. E. C. Robinson, in the presence of Mr. S. J. Andrews, as my authority to make this deed and had it made by my brother. I relied on those statements."

E. C. Robinson, for the plaintiff, was recalled and testified: "I say positively that I never made a statement in my life to Mr. Parks that I represented the Greene Brothers Lumber Company. At that time I had never met Mr. A. H. Greene or his brother until after this option was signed and after Mr. Andrews had been in the timber with him once or twice, and the morning that I took Mr. Andrews to Ammons to meet Mr. Greene was the first time that I ever saw the gentleman in my life, to know him. I did not tell Mr. Parks that I had looked up the title to this property and that no conveyances had been made by him. Each time Mr. Parks told us that he owned the timber himself. He did not make any statement to me about the B. D. Tatum deed. I didn't know about B. D. Tatum until this matter came up here at the last term of court, about a year ago." On previous cross-examination he had denied that the defendant had made any statement to himself and the plaintiff with regard to the Tatum deed.

Upon this evidence the trial judge instructed the jury as follows: "And the fourth issue is, 'What damages, if any, is the plaintiff entitled to recover of the defendant?' The court instructs you that under all the evidence, if you believe the evidence, it would be your duty to answer that issue $1,025.00."

In the foregoing there is evidence on the part of the defendants tending to show that a full disclosure as to the state of the title to the land

or timber in controversy was made by W. N. Parks directly to E. C. Robinson and the plaintiff during the negotiations and before the execution of the option deed on which plaintiff relies. He testified that he not only told them of the deed made to Tatum but of the terms on which Tatum held, a part of which was to free the land from the tax encumbrance out of the purchase price. The tax deed which Tatum took, in violation of his trust, if defendant is to be believed, procured apparently to put him in better position to convey to the Greene Brothers Lumber Company upon rejection of plaintiff's conveyance, had not yet been made. Defendant's evidence was to the effect that Andrews, represented by Robinson as his attorney, declared his willingness to accept an option deed from the defendant, notwithstanding information given by defendant, and take his chances with the Tatum conveyance. "That they would take a shot at the title."

Defendant stated: "I relied upon their information as to searching the title, and, relying upon their information, signed this option dated the 13th of March, 1936, Mr. Robinson had prepared when he got here."

If the jury believed the testimony of Parks, plaintiff insisted upon taking the conveyance with his eyes open and, presently advised by his attorney at law, determined to "take a shot at the title," taking such title as he might get under the deed, and, therefore, could not recover anything in this action. If, on the contrary, the jury should believe the testimony of Robinson and the plaintiff, to the effect that defendant said nothing at all about the Tatum deed or any encumbrance upon the property, this circumstance, at least, would not be in the way of his recovery. Upon this contradictory state of the evidence it was error to instruct the jury that, "under all the evidence, if they believed the evidence, it would be their duty to answer the issue as to damages $1,025.00." *Fertilizer Works v. Cox,* 187 N. C., 654, 122 S. E., 479; *S. v. Murphrey,* 186 N. C., 113, 118 S. E., 894; *Bank v. Wester,* 188 N. C., 374, 376, 124 S. E., 155; *Sterling Mills v. Milling Co.,* 184 N. C., 461, 463, 114 S. E., 756.

We think, also, under the circumstances of this case, it was error to exclude the proposed testimony of defendant that he had received nothing for the Tatum deed. The evidence was consistent with his contention as to the character of that deed, and at least tended to relieve the defendant from the imputation of unfair dealing, which would arise from his attempt to profit by selling the same timber twice. Except for its relevancy and importance in that respect, its introduction doubtless would not have been challenged. While it does not appear from the evidence whether the trust reposed in Tatum was coupled with an interest and irrevocable, the fact that it had remained unperformed by Tatum, and that defendant had received no benefit from it, affords some

explanation of his willingness to enter into the option contract at the insistence of plaintiff, after having fully explained the extent to which he was obligated under the Tatum deed.

For these errors the defendants are entitled to a new trial, and it is so ordered.

New trial.

STATE v. MARION ALLEN AND H. F. LAMBERT.

(Filed 13 December, 1939.)

1. Mines and Minerals § 6—

A lease of oil lands for a period of five years and as long thereafter as oil or gas in paying quantities is produced from the land by the lessee, conveys real property.

2. Corporations § 13b: Constitutional Law § 7—

The regulation of the sale of securities for the protection of the public is within the police power of the State.

3. Corporations § 13b: Statutes § 8—

The penal provision of the Capital Issues Law, chapter 149, Public Laws of 1927, making the sale of securities in violation thereof a felony, must be strictly construed and the terms of the statute cannot be extended beyond the plain implication of the words used.

4. Corporations § 13b—

In a prosecution for violation of the Capital Issues Law the fact that the property sold is of little value is irrelevant to the question of whether the property is a security as defined by the statute.

5. Same—An oil lease amounting to sale of mineral rights held not a security as defined by Capital Issues Law.

Defendants were indicted for carrying on the business of dealers in securities without being registered and with the sale of unregistered securities in violation of the Capital Issues Law, chapter 149, Public Laws of 1927. The evidence tended to show that defendants had sold or assigned a lease of oil lands, which lease by its terms amounted to a conveyance of real estate. *Held:* The oil lease is not a "certificate of interest in an oil, gas or mining lease" or any other security as that term is defined in the act, and defendants' motion to nonsuit should have been sustained.

APPEAL by defendants from *Phillips, J.*, at July Term, 1939, of STANLY. Reversed.

The defendants were indicted for violation of the North Carolina Capital Issues Law, ch. 149, Public Laws 1927. The bill charged them with carrying on the business of dealers in securities without being

registered as such, and with the sale of securities without having had same registered as required by the act. From judgment imposing prison sentence predicated on verdict of guilty, the defendants appealed.

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

R. H. McNeill and J. H. Matthews for defendants.

DEVIN, J. The transactions with respect to which the defendants were indicted involved the sale or assignment of oil and gas leases on certain lands in the State of New Mexico, and the determinative question presented by the appeal is whether these lease assignments are embraced within the definition of "securities" contained in the North Carolina Capital Issues Law.

This statute defines the securities which come within the purview of the act as follows:

"The term 'securities' or 'security' shall include any note, stock certificate, stock, treasury stock, bond, debenture, evidence of indebtedness, transferable certificate or (of) interest or participation, certificate of interest in a profit-sharing agreement, certificate of interest in oil, gas or mining lease, collateral trust certificate, any transferable share, investment contract, or beneficial interest in or title to property or profits or any other instrument commonly known as security." By chapter 432, Public Laws 1933, this definition was enlarged to embrace other matters not pertinent here.

The statute further provides that whoever shall sell a security defined, without having registered himself and the security in the manner prescribed by the act, shall be guilty of a felony.

The bill of indictment did not specify the security with sale of which the defendants were charged, nor was a bill of particulars requested, but it was conceded that, among the definitions of securities set out in the statute, the one applicable to the transaction here was "certificate of interest in an oil, gas or mining lease."

The proof was that the witness, Mrs. Palmer, had purchased or contracted to purchase from the defendants the assignment to her of an oil and gas lease executed and duly probated by Rolph Gallinger and wife, conveying to her a subdivision of 40 acres (particularly described) in oil and gas lease No. B-7578, made by the State of New Mexico to Rolph Gallinger, dated 4 May, 1938, the land situated in Chaves County, New Mexico. The lease by the State of New Mexico to Gallinger granted 1,004.69 acres and specifically included the 40 acres described in the assignment to the witness, and contained the following *habendum* clause: "To have and to hold said land, and all the rights and privileges granted hereunder, to and unto the lessee for a primary term of

five years from the date hereof, and as long thereafter as oil and gas in paying quantities, or either of them is produced from said land by the lessee."

There was also another assignment of oil and gas lease purchased by the witness. The second one was executed to her by Harry W. Wright and wife, describing 40 acres of land in Chaves County, New Mexico, and was identical in form with the Gallinger conveyance. Wright's lease from the State of New Mexico contained a grant of 800 acres, including the 40 acres specifically described in the assignment to the witness, with the same *habendum* clause quoted above. The defendants were attempting to deliver these lease assignments when they were arrested. There was no contention that the paper writings referred to were registered under the act or that they were within any of the exempted classes.

The Supreme Court of New Mexico has several times construed oil leases similar in form to those in evidence here. It was said in *Staplin v. Vesely,* 41 N. M., 543 (decided in 1937): "An oil lease is not what is ordinarily denominated a lease, it is a sale of an interest in land." *Jones-Noland Drilling Co. v. Bixby,* 34 N. M., 413. In *Terry v. Humphreys,* 27 N. M., 564, it was held that an oil or gas lease for a period of five years, or as long as oil or gas in paying quantities is produced from the land, conveys real property. In *Guffey v. Smith,* 237 U. S., 101, where an Illinois oil lease couched in same terms as shown here was construed, it was said: "It is settled by the decisions of the Supreme Court of Illinois that an oil and gas lease, like that of complainants, passes to the lessee, his heirs and assigns, a present vested right—'a freehold interest'—in the premises, and that this interest is taxable as real property." *Bruner v. Hicks,* 230 Ill., 536. To the same effect is the holding in *Roberts v. Carbon Co.,* 78 Fed. (2), 39, and *Commissioner of Internal Revenue v. Wilson,* 76 Fed. (2), 766, with respect to oil leases in Louisiana and Texas. Also *Dabney v. Edwards,* 53 Pac. (2), 962, decided by the Supreme Court of California in 1935, and *Dabney-Johnston Oil Co. v. Walden,* 52 Pac. (2), 237. It was said in a recent case by the Court of Appeals of Kentucky: "It is also settled that an oil and gas lease creates an interest in real estate and is governed by the principles of law applicable to the land." *Piney Oil & Gas Co. v. Allen,* 32 S. W. (2), 325.

While the technical nature of the property sold or assigned, whether realty or personalty, is not necessarily determinative of the question whether the security comes within the definitions contained in the statute, it may afford some aid in ascertaining the intent and meaning of the Legislature in the use of the language in which the act is framed. The act is denominated "Capital Issues Law," and *ex vi termini* refers primarily to certificates of shares of stock in corporations. The subject

matter is the regulation of sales of securities, ordinarily denoting evidences of debt or of property, but the word has a flexible meaning, and the statute extends the definition to comprehend not only stocks and bonds, and certificates of participation in profit-sharing agreements, but also other named forms of investment and interests, including "certificate of interest in an oil, gas or mining lease." That is as far as the language of the statute enlarges the definition of the word used as applicable to the evidence here.

While it is clearly within the police power of the State to constrain the conduct of those who deal in securities, to the end that the public be protected against the imposition of unsubstantial schemes and securities based upon them (*Hall v. Gerger-Jones Co.*, 242 U. S., 539), the penal provisions of the statute making violation thereof a felony must be construed strictly, and the terms of the statute cannot be extended beyond the plain implication of the words used. The penal provisions of the Capital Issues Law were considered by this Court in *S. v. Heath,* 199 N. C., 135, 153 S. E., 855. Heath was charged with selling a certificate of interest in a profit-sharing agreement or investment contract, without registration. The proof showed an agreement to participate in the receipts from a realty transfer system sought to be inaugurated in certain counties. In upholding a special verdict of not guilty, *Adams, J.*, speaking for the Court, uses this language: "If a person shall sell any security 'embraced and referred to' in the act without having it registered as therein provided, he shall be deemed guilty of a felony. The statute containing this provision is penal. That penal statutes must be construed strictly is a fundamental rule. The forbidden act must come clearly within the prohibition of the statute, for the scope of a penal statute will not ordinarily be enlarged by construction to take in offenses not clearly described; and any doubt on this point will be resolved in favor of the defendant." This rule of construction is supported by what was said by *Stacy, C. J.*, speaking for the Court, in *S. v. Whitehurst,* 212 N. C., 300, 193 S. E., 657.

In *Caskie v. Corp. Com.*, 145 Va., 459, 134 S. E., 583, the Supreme Court of Virginia declined to extend the definition of securities under the Virginia statute then in force to include sales of lots in another state by the owners of the land.

The Assistant Attorney-General, who argued this case for the State, cited, in support of his contention that the verdict and judgment should be upheld, the cases of *Atwood v. State,* 135 Texas Court of Criminal Appeals, 543, 121 S. W. (2), 353; *State v. Pullen,* 58 R. I., 294, 192 Atlantic, 473; and *Muse v. State* (Texas), but upon examination we think the facts in those cases are distinguishable from those in the instant case.

In *Atwood v. State, supra,* the appellant there was convicted under the Texas statute, which includes among the definitions of securities required to be registered, "Any instrument representing any interest in or under any oil, gas or mining lease, fee or title." This clause, which was made the principal basis of the decision upholding the conviction (pages 359-360), does not appear in the North Carolina statute. In the recent case of *Muse v. State* (Texas), decided 18 October, 1939, the holding in *Atwood v. State, supra,* was reaffirmed.

In *State v. Pullen,* 58 R. I., 294, the Supreme Court of Rhode Island considered a state of facts somewhat similar to that presented here, in an equitable proceeding to restrain respondent from selling, without registration, oil and gas royalties growing out of an oil lease on land in the State of Texas. It was there decided that the royalties constituted an investment by the purchaser in a share of the oil produced by the lessee of land described (⅛ of $\frac{1}{400}$th interest), and came within the statute requiring registration of a security defined by Rhode Island General Laws 1923, ch. 273, *inter alia,* as "certificate of interest in a profit-sharing agreement, certificate of interest in an oil, gas or mining lease."

In *Ryan v. State,* 128 Fla., 1, the State sought by civil action to restrain appellant from selling "partnership profit-sharing agreements" relating to oil land in the State of Florida. While the appeal was disposed of on other grounds, it was said the "bill of complaint alleges grounds for the equitable remedy sought."

The decision of the question presented by the appeal in the case at bar may not be made to turn upon the fact appearing in evidence that the oil leases sold by the defendants were of little value, and that the probability of profit therefrom was remote, or that the defendants subsequently, pursuant to agreement in the original contract of sale, refunded to Mrs. Palmer the money she had paid. Fraud is not presently charged in the bill. The transaction was an unsavory one and the conduct of defendants not to be condoned. But that is not the question this Court is called upon to decide. Whether the definition of securities in the statute should be amended to include sales or assignments of oil, gas or mining leases, or interests therein, is a matter for the lawmaking body and not for the Court.

Being under the necessity of construing the penal provisions of the capital sales law strictly, we conclude that the definitions contained in the statute may not be enlarged to include within its requirements the transactions disclosed by the evidence in this case. The defendants' motion for judgment as of nonsuit should have been allowed, and the judgment of the Superior Court must be

Reversed.

STATE v. WILLIAM YOUNG AND NATHANIEL BRYANT.

(Filed 13 December, 1939.)

Criminal Law § 80—

Where defendants fail to make out and serve their statement of case on appeal, the motion of the Attorney-General to docket and dismiss, made after expiration of the time allowed for serving statement of case, will be allowed, Rule of Practice in the Supreme Court, No. 17, but when defendants have been convicted of a capital felony this will be done only after an examination of the record proper discloses no error apparent on its face.

MOTION by State to docket and dismiss appeal.

Attorney-General McMullan for the State.

PER CURIAM. At the April Criminal Term, 1939, Hoke Superior Court, the defendants herein, William Young and Nathaniel Bryant, were tried upon indictment charging them with: (1) burglarizing the dwelling house or sleeping apartment of one John Maultsby on the night of 24 March, 1939, then actually occupied by one Thomas Moore, and (2) the murder of one Thomas Moore. As to each defendant there was a verdict of guilty of burglary in the first degree, and guilty of murder in the first degree. Judgment was thereupon duly entered that each defendant suffer the penalty of death by asphyxiation, as provided by law. *S. v. Morris,* 215 N. C., 552, 2 S. E. (2d), 554; *S. v. Mayes, ante,* 542. From the judgment thus entered each defendant gave notice of appeal to the Supreme Court and each was allowed forty-five days to make up and serve his statement of case on appeal. The solicitor was given thirty days thereafter to prepare and file exceptions or counter-case. The clerk of the Superior Court of Hoke County certifies that the defendants have not perfected their appeal in said case as provided by statute. *S. v. Stovall,* 214 N. C., 695, 200 S. E., 426; *S. v. Mayes, supra.*

The time for serving statement of case on appeal has expired. *S. v. Watson,* 208 N. C., 70, 179 S. E., 455; *S. v. Mayes, supra.*

As a careful examination of the record proper discloses no apparent error on the face thereof, the motion of the Attorney-General to docket and dismiss the appeal under Rule 17 will be allowed. *S. v. Day,* 215 N. C., 566, 2 S. E. (2d), 569; *S. v. Mayes, supra.*

Judgment affirmed. Appeal dismissed.

STATE v. ROY KELLY, WADE HANFORD AND RALPH HANFORD.

(Filed 3 January, 1940.)

1. **Criminal Law § 53c—Charge on presumption of innocence and burden of proof held sufficiently full in the absence of request for special instructions.**

A charge to the effect that the defendants are presumed innocent until their guilt has been established, and that the burden is upon the State to satisfy the jury of defendants' guilt from all the evidence beyond a reasonable doubt, and that reasonable doubt does not mean a conjectural or fictitious doubt, but a doubt founded on some substantial reason growing out of the evidence, *is held* sufficiently full upon the presumption of innocence and the burden of proof in the absence of a request for more particular elaboration.

2. **Criminal Law § 53a—**

The failure of the court to charge the jury as to the credibility to be given the testimony of an accomplice, corroborated in every respect by other evidence, will not be held for error in the absence of a special request, C. S., 564, whether such charge should be given being in the sound discretion of the trial court.

3. **Same—**

The failure of the court to instruct the jury that the fact that a defendant did not testify in his own behalf raises no presumption against him, will not be held for error in the absence of a request for instructions, C. S., 564, the matter being in the sound discretion of the trial court.

4. **Homicide §§ 4d, 27c—**

A homicide committed in the perpetration or an attempt to perpetrate a robbery is murder in the first degree, notwithstanding the absence of any fixed intent to kill or any previous purpose, design or plan, C. S., 4200, and an instruction to this effect upon supporting evidence is not error.

5. **Homicide §§ 2, 27g—**

Where several persons aid and abet each other in the perpetration or attempt to perpetrate a robbery and while so engaged one of them shoots and kills an officer of the law, all being present, each is guilty of murder in the first degree and an instruction to this effect upon supporting evidence is not error.

6. **Homicide § 10—**

The burden is upon defendants to prove to the satisfaction of the jury their plea of drunkenness interposed as a defense in a prosecution for murder in the first degree.

7. **Homicide §§ 10, 16—**

Drunkenness to such a degree as to render defendant incapable of premeditation and deliberation is a defense to a charge of murder in the first degree but an intentional killing with a deadly weapon constitutes murder in the second degree, at least, notwithstanding the plea of drunkenness.

8. Homicide § 27h—Evidence held to show murder in the second degree at least, and the failure of the court to submit the question of manslaughter was not error.

The evidence tended to show that appealing defendants were members of a gang that broke in a filling station, took some oil and anti-freeze solution therefrom, that several of the gang reëntered the station to take the safe, the others being on the outside in cars to help in getting away, that officers of the law arrived and a gun battle ensued, resulting in the death of one of the gang and two officers. Defendants contended they were too drunk to know what they were doing. *Held:* Drunkenness cannot excuse defendants, but at most is a defense to the charge of first degree murder, and the evidence discloses murder in the second degree at least, and the failure of the court to submit the question of defendants' guilt of manslaughter is not error, since there is no evidence justifying submission of the question of guilt of this degree of the crime.

9. Criminal Law § 51—

An objection to the remarks of the solicitor in his argument to the jury to the effect that certain of the state's evidence was uncontradicted cannot be sustained when it appears that on each occasion the court warned the jury not to consider such statements.

10. Criminal Law §§ 41d, 78d—

An objection to the admission of impeaching evidence on the ground that the defendants had not testified or put their character in issue, is not available to defendants when it appears that the impeaching evidence related solely to the character of a participant in the crime who was not on trial, but who was killed in the gun fight ensuing when he and defendants were surprised by officers of the law.

11. Criminal Law §§ 41d, 33—The whole of a confession should be taken together and admitted in evidence in its entirety.

In this prosecution for murder committed in the perpetration of a robbery, one of defendants objected to testimony of a witness to the effect that the defendant had admitted he was an escaped prisoner and had escaped from prison with one of the other participants in the crime, the objection being entered on the ground that defendant had not testified in his own behalf or put his character in issue. It appeared that the statements were made to the witness during, and constituted a part of, a conversation with the witness in which the defendant made a voluntary confession which had been admitted in evidence. *Held:* The exception is untenable, since the whole of a confession must be considered together, and should be admitted in evidence in its entirety.

12. Criminal Law §§ 41d, 29b—Evidence of defendant's guilt of other offenses is competent for the purpose of showing intent, design or guilty knowledge constituting an element of the offense charged.

In this prosecution for murder committed in the perpetration of a robbery, one of defendants objected to testimony of a witness to the effect that the defendant had admitted he was an escaped prisoner and had escaped from prison with one of the other perpetrators of the crime, the objection being entered on the ground that defendant had not testified on his own behalf or put his character in issue. *Held:* Defendant's exception is untenable, since the testimony objected to is competent for the purpose of showing intent, design or guilty knowledge.

STATE *v.* KELLY.

APPEAL by defendants from *Sinclair, Emergency Judge,* at 17 April, 1939, Special Term, of ALAMANCE. No error.

The appealing defendants and one George Otho Smith were indicted on the following bill of indictment: "The jurors for the State upon their oath present, that Roy Kelly, George Otho Smith, Wade Hanford and Ralph Hanford, late of the County of Alamance, on the 7th day of December in the year of our Lord one thousand nine hundred and thirty-eight, with force and arms, at and in the County aforesaid, while engaged in the perpetration of the crime of store breaking and larceny, willfully, unlawfully, feloniously and with premeditation and deliberation, and of their malice aforethought, did kill and murder one M. P. Robertson, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State. W. H. Murdock, Solicitor."

The record discloses that about 2:00 o'clock a.m., on the morning of 7 December, 1938, there was an attempted and partial robbery of the Sprinkle Service Station, in Burlington, N. C., near the underpass. The building is of metal type construction, with glass front and sides. It is 38 feet paved from the edge of Trade Street to the Sprinkle Service Station. All the witnesses who testified were State's witnesses. Defendants introduced no evidence.

(1) *Roy Kelly.* Evidence in part against him: A voluntary confession made to Sergeant T. J. Davis. He stated: "I am going to get it off my chest and tell you about it and the way I tell it is the only way it can prove out in court." "He said on the night of December 6th that he, Wade Hanford and George Smith and Mary Fitts and Myra Buckner and Ralph Hanford rode from the Green Top Inn into Burlington and they went to the show, but I don't remember whether he said he and Wade went to the show, anyway he said they got together on Worth Street in Burlington and went back to the Green Top Inn where they were to meet Roy Huffman at 12:00 midnight and Roy had not got there. Right in there he said George and Ralph went away and they were to come back and he said George and Ralph came back. George Smith and Ralph Hanford at a little past 12:00 and Roy Huffman had not shown up so he got George to carry him to the Wagon Wheel about a mile and a half from the Green Top Inn to see if he could locate Roy Huffman, which they did. They went in George Smith's car. He said they found the Pontiac and that he went in the cabin and found Roy Huffman and Helen Holder and he asked Roy if he had forgotten what they were supposed to do that night and he said No, he had overslept and on the way out he got his scarf and overcoat out of his bag and went back to the Green Top Inn, and in a few minutes Roy Huffman came and the five left in the two cars going to Burlington to rob this gas

station. He did not mention the name of the gas station. He said he and Wade and Ralph and Roy Huffman had been planning to rob this station for two or three days. They came in near the Buick salesroom and stopped there to talk it over. He said they used two cars, 1937 Pontiac he was driving and 1935 Ford, Smith was driving. That they stopped and talked it over and the tools they were to break in with were in Kelly's car, the Pontiac, and they taken them out and put them in Smith's car and Roy Huffman and Ralph Hanford and Wade Hanford got in Smith's car and drove down to the place and Smith stopped on a side street near the service station and he stopped about thirty-five feet back of Smith's car. The seat in Smith's car had been loosened some time in the early evening to enable them to get the safe of the gas station in the car. He said that they knew they could not get the door shut after getting the safe in there and he was to stay back of Smith's car in case the officers got after them and he was to block the officers in case the officers drove up. He was to stay between Smith's car and the officers so the officers could not get to Smith's car, knowing the door would have to be open on Smith's car. He said they drove down there and saw Roy Huffman and Wade and Ralph get out of the car and go to the station. In a short time Roy Huffman came back to his car with some oil and anti-freeze and put it in his car and he saw one of the Hanford boys go back to George's car and put some package in there and return in the direction of the gas station. Immediately after that he said he heard the shooting and George Smith started his car and turned around in the street and drove away and he backed up into the side street and waited for a second to see if any of the rest were coming and they did not and he drove on down Main Street in Burlington. Drove back by the station and saw a man lying there with an officer's cap, and after that he went back to the Green Top Inn and saw George Smith in the act of turning around and asked him what had happened and he told him, 'You know as much about it as I do,' and they went back to Hanford's home and found Wade and Ralph and they went back and parked on the side road to try to decide what they would do with Helen Holder. Said he finally decided to go get her and he brought her back there and they all talked about what had happened and the shooting and all, and decided to separate and not be seen together, but he said he asked Wade to go with him. Wade told him no, he was going to Haw River to Minnie Goodman's, where he could establish an ironclad alibi, she would say he had been there all night, and he had not seen them since, and late that evening he carried the Holder girl back to Greensboro. He said that when the shooting started Huffman fell. One of the Hanford boys said that, I don't remember which one, and that they dropped down there and after the shooting was over they ran out

and went home. He said he had a .45 automatic and that Wade Hanford had a .32 special Smith & Wesson pistol. I think he said he had two, but I won't be positive about that. He said he didn't see any arms on the rest of them. He said that he was an escaped prisoner and escaped with Roy Huffman, to Richmond, Va., and was brought back from Richmond. He didn't say he saw them go into the filling station. He said they went to the filling station and returned there with the oil, Huffman bringing some oil and some anti-freeze to his car and one of the Hanford boys carrying some to the Smith car. . . . From the things he told me about it I can tell you where it was parked so far as I know. I would say it was about 50 or 60 yards from the station."

The court below instructed the jury not to consider the confession as evidence against any of the other defendants but only against Roy Kelly. This testimony was corroborated by George Smith, which directly involved him as being a *particeps criminus;* also by Helen Holder.

C. A. Stanford testified, in part: "I am chief of police of the city of Burlington. I received an early morning call on December 7, 1938. I dressed and went to town. I went by the police station and went on to the service station. I stayed in the police station about one minute and went to the Sprinkle Service Station, which is located on Church and Trade Streets. When I arrived at the station I saw the bodies of Officer Vaughn and Sheriff Robertson. (Witness points out on the diagram the location of the bodies.) Vaughn's body was about twenty-five feet from the door of the service station, and Robertson's body at about ten feet from the building. The door is about ten feet from the corner. I found near the body of Officer Vaughn a pistol and flashlight. His flashlight was turned on. I made an examination of the interior of the Sprinkle Service Station. In there I found the body of Roy Huffman. I did not know him at that time. It was lying between the desk and the safe. His feet were towards the desk and his head toward the safe. I found near his body a .45 automatic revolver. I have that gun with me. (Witness produces gun. Witness explains condition of the gun when he found it.) When that gun shoots the last shell in it, it stays that way (illustrates with gun). When it ejects the last shell it stands with the ejector back. Roy Huffman was lying on his left side. The gun was right at his right side by the edge of his body. I searched the body of Roy Huffman. The coroner and myself searched him together. We got twelve .45 shells that had not been fired out of his pocket. We got a pocketbook with some identification in it, but it was not Roy Huffman's pocketbook. I cannot recall the name on the identification card. We found one cartridge in the desk drawer. There was a hole in the desk drawer. That was a wooden desk drawer with heavy wooden handles. It was shot through the handle into the desk and made a dent in the side

of the drawer and it was in there. It had not gone through. There was a gallon can of anti-freeze on the desk. It was on the corner of the desk near the door where the gallon can was sitting. The can had a hole shot through it. It appeared to have gone from the inside of the building and towards Church Street. I found one bullet near the stove on the floor. It was a .45 type. I found five empty shells out of the .45 in the service station. They were scattered. Some were behind the oil. They have some oil cans sitting near the wall and some were behind that. We picked them up in different places in there. I found four .32 cartridges that had not been fired under the desk on the floor, right under the leg of the desk near the door. They had not been fired."

Wade Hanford made a voluntary statement as follows: (The court instructs the jury that this statement alleged to have been made by Wade Hanford may be considered by the jury as evidence against him, and not as evidence against any of the other defendants.) "Statement of Wade Hanford of Burlington, N. C., as told to R. B. Christian on the 23rd of January, between the hours of 3 to 5 a.m. We were talking about Roy Kelly and Wade said Kelly was talking too damn much, the long-tongued S—— of a B——. I asked him if Kelly had told anything on him. He said that Kelly had talked too damn much. I asked him if Kelly was at the filling station the night of the killing of the two officers. He said he was just above the filling station at the time of the shooting and that Kelly and Smith ran when the shooting started and left him and Ralph and Huffman at the filling station. He said Huffman was behind the desk in the filling station and he was down behind the safe door. He said Huffman was shooting at the officers. He also had two .32 S. & W. pistols, and that he had hid them before he left North Carolina. Ralph had one of these pistols the night of the shooting. He also told about Ralph wrecking a Zephyr-Lincoln on a curve while trying to make 100 miles per hour, and that this car belonged to Smith, and that he, Ralph and Smith later pulled a $4,000.00 job and Ralph gave Smith $1,000 of this and he gave Smith $500 of this $4,000 for the wrecked Zephyr-Lincoln and that was when Smith joined him and Ralph in these robberies. Wade told me about Huffman jumping up from behind the desk when he was shot and that he came out with his hands up when he saw Huffman was dead. Wade said he tried to get Huffman to talk to him but Huffman was struggling and never spoke after he was shot. When he came out of the place he saw the other officer, whose name is Bailiff, running away from the place as though going for more help. He also said that Ralph and himself walked away from the filling station after the shooting. Smith and Kelly had run off and left them and he next saw Kelly and Smith at a tourist place where they had been staying near Haw River or Burlington." "I didn't say that I wrote that down

as he stated it. I wrote it immediately. I had this pad in my car outside the hospital. I went out and got this pad and took a memorandum of what he told me. I wrote it no longer than two minutes after the statement was made. I wrote it from memory. My memory was fresher then than it is now as to what he said."

Mary Fitts testified, in part, that she knew George Smith and on Tuesday morning, 6 December, was with him. She told in detail the conduct of the parties that day. On cross-examination she testified: "I knew George Smith at Roanoke Rapids. That is his home too. I went with him. I was his sweetheart and had been going with him about a year. I had never been with him to 'Correct Time Inn' before. . . . They knew that I was George's sweetheart. They did not tell me they had arranged for George to turn State's evidence. I did not know it and did not know what arrangements had been made with my sweetheart's attorney for him to become a witness in this case. Nobody had said that to me. Have had no conversations with George Smith since then and nobody has ever mentioned it to me. The drinks referred to were whiskey. I don't remember the number of drinks of whiskey we had that night. I can't give the jury any estimate of the number. I don't know whether Ralph Hanford and Wade Hanford were drunk that night or not. *They were drinking.* I was not drunk. I don't know how many drinks it takes to make me drunk. I have never been drunk. I took about three or four drinks. I did not take any at the 'Correct Time Inn.'"

Myra Buckner testified, in part: *"I know Ralph Hanford.* I have known him about three and one-half years. Met him at his home in Burlington and have been going with him since that time. I was his sweetheart. I saw Ralph on the morning of December 6th at his home. . . . We stayed at the 'Green Top Inn' until after three and went to the 'Wagon Wheel.' Ralph Hanford, George Smith and Mary Fitts were along in George's Ford. Helen Holder, Roy Kelly and Roy Huffman joined us there. From there we went to Hillsboro. On the way we stopped at some place and picked up Wade Hanford down near Haw River. Then we went on to Hillsboro to a place where they dine and dance. All eight of us were there. Stayed there around two hours. From there we came back to the 'Green Top Inn.' I came back with Ralph Hanford, Wade Hanford and Roy Kelly in the car. The others joined us at the 'Green Top Inn'—Mary Fitts, George Smith, Helen Holder and Roy Huffman. We left 'Green Top Inn' around seven o'clock. I left with Mary Fitts, Ralph Hanford, George Smith, Wade Hanford, Roy Kelly and went to the show in Burlington. Ralph Hanford, Mary Fitts and George Smith went with me. Got out of the show about 9:30 o'clock and went to a cafe and had something to eat. Roy

Kelly and Wade Hanford joined us there. I was in George Smith's car. From there we went to the 'Green Top Inn,' arriving there a little after 10:00 o'clock and left around 11:00 o'clock. Mary Fitts, Ralph Hanford, George Smith and I left together in George Smith's car. We left Roy Kelly, Wade Hanford at the 'Green Top Inn.' We went to 'Correct Time Inn,' rented a cabin with two rooms. I occupied a room with Ralph Hanford. This cabin has one door to the front and another that goes into the garage. We all entered the same door. Ralph Hanford and George Smith left us there around 12:00 o'clock. They returned something between three and four o'clock. I let them in. We left the cabin around 10:30 and 11:00 next morning. . . . (Cross-examination.) Ralph Hanford was good and drunk that night and so was Wade. They were both drinking very much, I don't know if they were drunk."

Helen Holder was permitted to testify that Roy had been sentenced to prison and escaped and she saw him last fall, about 20 November. The court below charged that this was no evidence against the other defendants. She testified further: "Roy Kelly was with him. He came to my house in Greensboro. Kelly was with him. They were driving a 1937 Pontiac. We went to ride around Greensboro. The next time I saw Roy Huffman was four or five days later. On that occasion Roy Kelly was with him. They came to my home. I left with them then. We went to Washington, D. C. . . . I stayed with them until the 4th or 5th of December, from about the 28th or 30th of November to the first part of December. I was Roy Huffman's girl. . . . I heard Myra Buckner and Mary Fitts on the witness stand and heard them relate a trip to a dance and dine place near Hillsboro. I was on that trip. Ralph Hanford, Wade Hanford, George Smith, Mary Fitts, Myra Buckner, Roy Huffman, Roy Kelly and myself. I heard them testifying about coming back to the 'Green Top Inn' on that day after we left and came back to Hillsboro. It was about a quarter of 7:00. I left with Huffman in a 1937 Pontiac and went to the 'Wagon Wheel.' That is a dine and dance place. It has cabins. There we rented a cabin, Huffman and I. I occupied the cabin with Huffman. He left me about 12:00. He never returned. The next person I saw on that night after Roy Huffman left in the cabin at the 'Wagon Wheel' was Roy Kelly. He came out to the cabin and told me to get up and dress and I did. It was about three in the morning. . . . Kelly came back to the cabin and told me to get up and dress, and I got up and dressed and when we got to the car he told me Huffman had got shot and I asked him how he got shot and he said that he and Huffman and some other boys went to rob a place and they went in and the safe was open and the officers drove up in front and Huffman started to shooting and that Huffman got shot. Kelly and I went to some little country road around

Graham or Burlington. I don't know just where it was. There we met Ralph Hanford, Wade Hanford and George Smith. There was another automobile there but I didn't know whose it was. It was a 1935 Ford. Ralph Hanford, Wade Hanford and George Smith got out of the Ford and got in the Pontiac and we all five sat in the Pontiac and talked. I think Ralph was the first that spoke. He said he went in the place and he told it like Kelly did. The safe was open and the officers drove up in front and Huffman started shooting and the two officers fell and someone shot Huffman and he fell, and he said it was Ralph Hanford and Wade Hanford in the place and Roy Kelly was in the Pontiac. He was parked in a side street. This was Ralph talking and all of them present in the same automobile. Everyone could hear everything and everyone else talking. Smith was there. Ralph said that Roy got shot twice and he didn't fall and the third time he fell and when Roy Huffman got shot the third time it was through the left arm. Ralph said he got shot through the left arm and said that Roy fell and by that time he was dead and said they got out and got in the Ford and left. . . . After we got together in the car all the boys were telling each other to keep their mouths shut and not to talk and each one was saying he knew he would not talk and he said he thought it best to split up for a few days so that people would not see them together. . . . On these occasions when I would ride along with Huffman and Kelly I saw one gun. It was in the car. I mean pistol. It was a .45 in the pocket of the car. . . . (Cross-examination.) I am 17 years old. Live in Greensboro with my mother and father. I came to Burlington with Roy Huffman and Roy Kelly around the 3rd or 4th of December. I think it was some time the last of the week. We stayed at the 'Correct Time Inn.' I met Kelly about the 20th of November. Went to Washington and came back to my home and then came down here. We stayed all night at the 'Correct Time Inn.' There are houses there. I occupied a room with Roy Huffman. . . . Ralph in my presence said he was there and Kelly said he was in a Pontiac watching. They were talking to each other. They pleaded guilty in my presence. . . . They put me in jail in Reidsville but did not charge me with stealing chickens. They found me with the chickens. I stole somebody's chickens in Rockingham since I have been on this case. Did not tell mama about that. I was with Roy Huffman on the 6th. I meant to tell Mr. Glidewell that I was with the man that stole the chickens. I didn't steal the chickens myself. I have never been tried for anything. He was tried for it and convicted."

D. V. Bradley testified that he was proprietor of the Sprinkle Service Station. He further testified, in part: "I had in the way of merchandise motor oil and anti-freeze and a few belongings that you have to have

with a service station, such as extra hose and bulbs. Had a large desk. . . . It was there on December 7th. The door was closed when I left there on the previous night and locked. Both doors of the safe were open. The door opened to the right. We had a line of three oil drums, oil and anti-freeze. I had a little space where they sat, sitting stacked up in the corner and the anti-freeze on top of them. I left the station the night of December 6th fifteen minutes after eight o'clock. There was nobody at the station when I left. I locked the station. It has a Yale lock placed into the regular long door lock, steel lock, and this lock is manufactured in there from the cold steel company, and we lock that, and it is about an inch and a half that turns into the lock and locks the door. The door is of cold steel, double ply. I saw the building after leaving that at 8:15 the next time at 3:30 next morning. I came to it at that time. I found the door had been forced open, the officers were in the place and a number of people gathered about. The lock was in bad condition. It had been forced by a heavy bar of some description, had pried the steel holding it on each side to a bulged condition, and that wrecked the part that held the lock on the wall and door frame to one side, showing it had been forced by a heavy instrument of some type. There was a dent right across the lock that had bent the lock way in, causing the lock to give way, and another dent just above it that indicated that something behind the instrument had been used as a scotch, while pushing it in, or a bushing. Three windows were broken out. One had just a hole of a bullet through it, one was completely out, the other was about two-thirds out and powder burns on the window. I observed the merchandise that was in the building when I left there the night before and observed the merchandise that was in it when I went back the next morning. I am sure I missed one case of Penn oil and one case of Superpyro anti-freeze put up by the Firestone people. Each of those contained six gallons in quart cans. The safe is an all steel safe, a small size safe. It stands approximately three feet high. The safe is about as high as the top of that table and about 2½ feet across. It weighed 800 or 1,000 pounds. I have not seen either of the cases I missed since that time. . . . The place was lighted by two street lights about 300 feet away, also the Pickett Hosiery Mills, which has power lights in a number of windows. . . . I can see the keyhole the darkest night that comes, so that I do not have to turn on a light to see it. That is how well lit it is from the street and from the mill lights. When I got there at 3:30 these two lights were burning and burning at 8:30 when I left."

Norman Yates testified, in part: "I am nineteen years old. I live in Durham now, working there. In December, 1938, I was living at 311 Fisher Street, Burlington. At that time was working for the Melville

Dairy. I was delivery boy and salesman. Went to work at 2:00 in the morning. Went to work on the morning of December 7, 1938. I went up Fisher Street. I came from the north. I came down Trade Street to intersection of Trade Street and Garves Street. I came in on opposite side of the station. It was ten minutes until 2:00 o'clock when I got to the intersection. At the intersection I took Church Street on the side that is paved going toward the underpass. That is in the direction of the main part of Burlington, and in the direction of the Melville Dairy where I was employed. I noticed three men. One was standing at this corner of the station, one at that corner, and one at the door. Could not tell what they were doing. I know that two of them were white men. The moon was shining and they were turned one side of their faces toward me. That time I continued walking on toward the underpass on Church Street. I walked on the sidewalk. Just before I got to the underpass I scraped my foot on the sand that made a noise. I looked toward the station and when I made a noise they left their posts. This one left from this corner. They were between the air stand and these pumps. They were mumbling but I could not understand what they were saying. I continued up Church Street to the underpass and turned down Front Street and went to police headquarters and reported what I saw. I saw Sheriff Robertson, Officer Vaughn, and Officer Bailiff. After I reported what I had seen they got in an automobile and left in Sheriff Robertson's car. I don't remember who was driving. I continued on to Melville Dairy and went to work. Arrived there about five minutes after two. I was supposed to be at work at two. I learned about 5:30 o'clock that Sheriff Robertson and Officer Vaughn had been killed."

F. B. Bailiff testified, in part: "I am a police officer of the city of Burlington and was so engaged on December 7, 1938. I was working on the third shift. I went to work at 11:00 on December 6th. I was at the police station at approximately 2:00 a.m., on the morning of December 7, 1938. Sheriff Robertson and Officer Vaughn and Sergeant Ausley were there. I know Norman Yates who just left the stand. He came to the police station that morning. He said there was someone breaking the Sprinkle Service Station beyond the underpass. In consequence of that report we got in Sheriff Robertson's car and went over there. Sonny Vaughn accompanied us. We arrived at the Sprinkle Service Station a little after 2:00, I don't remember the time. We went out Church Street, right the other side of the new underpass and drove up in front of the door and me and Mr. Robertson—he got out the left side of the car and I got out on the right and Vaughn got out on the left. Mr. Robertson's car was an Oldsmobile sedan. He parked it right in front of the door. When we got there I crossed behind and went to the corner

and he went in front of the door. Vaughn was behind him. The lights were not turned off before the three of us got out of the car. I mean the car lights, headlights. There is a street light right by the stop light on the highway if I recollect. As I got behind Sheriff Robertson to get to this corner of the station I got a glimpse of two people inside the station. There was no light inside the station at that time. As we three officers approached the front of the station I think the door was open, I am pretty sure it was. Sheriff Robertson walked up into the door and I walked to the corner and when I got to the corner the light was shining good enough that I could see some fellow jerk out a gun and I hollered 'Look out' and when I did we started shooting, I mean me and the fellow inside. I don't think that Robertson or Vaughn fired a shot. There wasn't much difference who started shooting first. I shot twice and I saw some fellow fall inside the station and I looked around and saw Mr. Robertson and Vaughn falling, and I knew there was someone else in there and I ran for some help. I ran up Trade Street to the warehouse and got to a telephone and called Sergeant Ausley for some more help and the ambulance that we had two men shot. I didn't know whether they were dead or not. I had a .38 Service revolver. I fired twice. . . . I shot through the second glass, threw my gun against the glass and pulled the trigger. The man I shot and saw fall was a white man. I cannot tell how many shots were fired then. I later learned that the man I killed in the station was Roy Huffman. Robertson was shot three times and Vaughn was shot twice. I don't know whether there were any more shots fired or not. It all happened so quick. It sounded like there were two shooting the best I could tell."

W. B. Linens testified, in part: "I live in Burlington. I work for Rich and Thompson Funeral Home as an embalmer. I was called to the Sprinkle Service Station on the morning of December 7th. I went in an ambulance. I was called between 2:30 and 3:00 o'clock, I think. When we got to the Sprinkle Service Station we found Mr. Sonny Vaughn and Mr. M. P. Robertson outside the station. Robertson was to the left of the front door toward the pump, possibly ten feet from the front door. Vaughn's body was out beyond these pumps back toward the street. The coroner was not there when we got there, we called him. Did not move the bodies until after the coroner came. I would say it was 20 or 25 minutes. The men were dead when we got there. Took the bodies to our funeral home. The coroner came over and examined them. We were all there when we examined them. We embalmed them. We always do in cases like that. I helped make the chart. I observed the holes in Sheriff Robertson. We found eight holes in Sheriff Robertson's body. Eight different ones. We found they were bullet holes. . . . The shots went straight through. One hole was in the

right arm, just above the elbow and straight through the chest and came out on the left side. There was a hole in the back between the shoulders about midway, and also one on the left side just below the ribs. That is four. There was also one on the left leg, and another over here on this side. I mean on the outside of the left leg. This was superficial. That makes eight. That is all. I assisted in embalming the body of Mr. Vaughn and made an examination as to how many holes were in his body. I made a record of what I found. Here it is. I found two holes in the body and one on the finger. There was one hole here in the chest, the front part of the chest, and one about an inch below it, about an inch apart on his chest, in the middle of his chest. One on the third finger on the left hand in the first joint. It was kind of torn there. It wasn't completely off, just a little skin holding it. There were eleven shots in all in the two officers."

(2) *George Otho Smith.* The State accepted a plea of second degree murder as to George Smith. He testified in part: "I live in Roanoke Rapids. Have lived there about 25 years. I operate some trucks, dump trucks hauling gravel for the State. Have been in that business three years. Was in that business in December, 1938. I am married. Do not live with my wife; have one child. I was in Burlington on December 6, 1938, came to Burlington the night before, December 5th. I knew Wade Hanford before that time, have known him about three years. Met him in the penitentiary. I went through the walls of the penitentiary at that time. I was going to Hillsboro to a camp and I spent one night there. I was a prisoner and met Wade Hanford there. I know Ralph Hanford, met him in 1932 on the chain gang. He was on the chain gang with me at that time. I didn't know Roy Kelly. I now know Roy Kelly. . . . I went to Haw River, Myra, and Mary, Ralph and I, Roy Kelly, Roy Huffman and Helen Holder went to Haw River. It was Minnie Goodman's place. Saw Wade Hanford there. From Minnie Goodman's place we went to a place near Hillsboro where we danced. The eight of us went to Hillsboro. From Hillsboro we went back to the 'Green Top Inn.' . . . We all got together again. From there we went back to the 'Green Top Inn.' Got back there I imagine about 10:00 o'clock. That afternoon when we went over to Minnie Goodman's Wade mentioned to Roy Huffman that they might as well go down and get a safe that night and that is all that was said about it at that time. . . . Then we went to the 'Correct Time Inn,' Ralph and Myra and Mary and I. I don't know where Roy Huffman was. Kelly and Wade were at the 'Green Top Inn.' When I started to leave Wade asked me if I would come back out to the 'Green Top Inn' and I told him I would. After we had gone to the 'Correct Time Inn' I was coming back to the 'Green Top Inn.' He said to come

back about 12:00 o'clock. We got to the 'Correct Time Inn' about 11:00 o'clock and stayed until about 12:00 and then went back to the 'Green Top Inn.' Found Wade and Kelly. . . . We went to the 'Wagon Wheel,' I stopped in front of the place and he went around to the cabin and said he found Roy around there in the cabin. . . . Saw Huffman again that night, just a few minutes after we got there he came up. Wade was at the filling station. Ralph was with him. Saw Roy Kelly, we were all at the filling station—at 'Green Top Inn.' This was about a quarter of one I imagine. Roy Huffman called me out to the back of the filling station and he went out across a fence in a pasture to a stump hole and reached in and got a jar and pulled a small bottle out of the jar and said that it was nitro-glycerine, and said he wanted to use my car to go down to carry a safe from the Sprinkle Service Station. . . . When we got to the filling station he called Kelly and told him he wanted him to go down and put the safe in my car and drive his car behind so if anybody got after us, he could block the road. Kelly said all right, he would. The Hanfords were inside the filling station. The seat of my car was loosened so you could get a safe in it. . . . About that time Roy Huffman walked out of the place and came where Wade and I were talking and asked Wade if he was not going down to get the safe and he said yes he was and that is when we took the seat out of my car. We left the 'Green Top Inn' and went over to Burlington, went in about two blocks of the filling station and I told Huffman I did not know where the place was and he said that he would show me. Ralph and Huffman were with me. Wade and Slim were in a Pontiac right behind us. Slim is Kelly. Roy Huffman told me to park my car and I parked it on the side of the street and Kelly drove up and we all got in his car and we drove past the filling station and he pointed it out and said that was the place and we drove around two or three blocks and went back to my car. Then Ralph and Roy Huffman got back in the car with me and we drove down within a half block of the filling station and parked on the side of the street. . . . We parked on the right side of the street about middle ways of the block. Kelly's car about thirty feet behind mine. From the place we parked, I could see the filling station. . . . When I parked on the side of the street, Ralph and Roy got out and took their overcoats off and laid them in the car and Roy Huffman told me to be careful that the nitro-glycerine was in his overcoat pocket and they started across the street and Wade Hanford joined them. Wade was in the other car. They went straight down in front of the filling station to the front door and started to break the door in. They had a screwdriver and a small crowbar and just as they started to break the door in a man came to the corner and turned the corner, and they saw him, and ran behind the filling station. He walked along there and

almost stopped looking at them and as soon as he got past the filling station, they came back around and started to break the door in again and this fellow ran it looked to me like. I could see him when he got past the filling station and it looked like he started to run. They broke the door in and in a minute they came out with three cases of oil, one apiece, Wade, and Roy Huffman carried their cases to the Pontiac, the one Kelly was driving. Ralph Hanford brought the other case to my car. I asked him what it was and he said cylinder oil and told me to open the door and handed it to me and I put it in the back seat. I asked Ralph, 'Did you see that fellow come down the street?' and he said 'Yes' and he turned around and about that time Wade and Huffman had started back down there and by that time he started back. I told Ralph that fellow has gone after the law. I saw him running and Ralph kept on walking just like he did not hear. . . . I turned to the left and went out the highway and drove around I reckon five minutes trying to find some place to put that oil. I did not want to have it in the car. I finally found a side road and turned up and hid the oil in the woods and got the bottle of nitro-glycerine out of Huffman's pocket and put it with the oil and then I went back on this same street and then went out to the 'Green Top Inn.' I went back by the filling station. I looked down but I couldn't see anything. I went to the 'Green Top Inn' and when I turned around at the 'Green Top Inn,' Roy Kelly was driving behind me with his lights off and I stopped and he asked me didn't I hear all the shooting down there. I told him I did not. He said that after I left he backed his car up to the corner and he said he stepped out on the running board and saw an officer fall in the front of the filling station and he then drove off. . . . We drove to Ralph Hanford's home and there was a light in his room. We drove about two blocks and turned and came back and I parked in front of his home and went around to the back of the house and to his room. I could see through the window. Wade was talking to Ralph and I told them to come out and so Ralph had gone to bed. He finished putting his clothes on and came out. It must have been around 2:30 when I got to Hanford's or a quarter to three, just long enough to drive from there to the 'Green Top Inn' and back then we drove to where Kelly's car was. Kelly was with me, the four of us together. I asked Roy what had happened and all, and he told me about the officers driving up in front. He said the officers drove up in front of the place and got out of the car and started to the door up in front of the place and Huffman told them to stop. Ralph was in the car with me when he was telling me this and Wade Hanford and Roy Kelly was in the car. He said that Huffman told the officers to stop and that they kept on walking and he said all at once all of them started shooting all at the same time. He

said he did not know who shot first and when they started shooting he laid down on the floor and Wade said he laid down near the safe. . . . Wade Hanford and Ralph Hanford were in my car. We turned off on a country road and Kelly got in the car with us, and we sat there talking. I guess this was a little after three. We were all four there talking. We were trying to decide what to do with Helen Holder. Wade said he was afraid she would talk and said he thought it would be a good thing to get rid of her. He said bump her off. I told him I didn't think that would be a good idea and Kelly said if he did he didn't know where to put her and he said he didn't think Helen would say anything and he would go get her and all of us could talk to her and we agreed to that. So he went over to the 'Wagon Wheel' and got her and brought her where we were waiting and Ralph proceeded to tell her just what had happened up there and all five of us were together. Ralph said he did not shoot any. Wade said he shot three times. Ralph asked Wade what he did with the empty cartridges and Wade said he left them on the floor. Ralph told Helen what had happened at the filling station that night. I heard her testify and I have told what he said. We decided to split up at that time. . . . Wade asked me to carry him to Haw River. He said he would get Minnie Goodman to say he had been there all night. I took him to Haw River. Ralph stayed with me. Helen went with Kelly. After we carried Wade to Haw River, we went back to the 'Correct Time Inn' and spent the night—the rest of the night. It was close to five o'clock when we got back there. I spent the night there. We left 'Correct Time Inn' about eleven the next day, carried Myra home. She lives at Elon College and then we carried Mary home in Burlington, the place she had been staying. . . . I did not have a gun that night. Ralph did not have a gun. Wade had one, just one. I saw the gun. Roy Kelly had one, looked like a thirty-eight to me, revolver. The case of oil put in my car was in a paper carton. I left it in the woods. I never moved it from that place. I have seen that place since that time. After I was arrested Mr. Davis carried me there. The old case was there, but the oil was gone. Sergeant Davis was with me at the time. I pointed the place out to him as being the one." On cross-examination Smith admitted he was a married man and had one child, but had not lived with his wife for six years. That he came to Burlington to see Mary Fitts, a young girl who came from Roanoke Rapids. He was keeping her. He took her from one roadhouse to another and from one saloon to another. Did not know Roy Kelly or Ralph Hanford but entered into company with these parties. They drank four pints of whiskey from 12:00 that day to 12:00 that night. "I saw them when they went in the door the first time. I carried them down there in my car that I came from Roanoke Rapids in.

The front seat of my car was the one that was loosened. The seat was not taken out of the back, just a little pin that holds the seat steady was taken loose so it could be removed. They were intending to put the safe in it, Roy Huffman, Wade and Ralph Hanford. Kelly was not a party to that transaction at that time I don't guess. He was supposed to drive the car behind us after we put the safe on there. I don't see where I would have any more to do with it than the rest of them. They were intending to put the safe in my car, it is true. I guess I would have driven away from there with it. That is what I went down there to do. . . . Nobody made me go. They did not over-persuade me and they asked me to go there and the condition I was in I went. I had been drinking right much, all of them had been drinking, the whole crowd. The Hanford boys were drunk and I finally consented to go and use my car."

He served a road sentence for an assault on a man at a filling station and was given 18 months. He had been tried and served time for speeding and reckless driving, and six months for fighting. He knew Ralph Hanford and Wade Hanford when they were in Hillsboro Camp serving time. Was tried in Petersburg, Va., "same as they had Ralph for" and paid out; tried twice for whiskey and paid out; skipped a $250.00 bond in Virginia and another charge for whiskey. He testified further: "I said I didn't want to go to the place, we were all too drunk to go. I think something like that was said that I told them they were too drunk. . . . I did not decide that I would swear these other boys to death to save my own neck. I just decided to tell the truth regardless of what it cost. They have not promised me anything to plead guilty to murder in the second degree. They accepted it today, but did not tell me until today. I did not know that they would accept it until today. I did not know that at the psychological moment they would accept my plea and plead guilty to second degree murder. I am telling the truth. I had no promise that if I would swear against the Hanford boys they would let me plead guilty of murder in the second degree. I never heard of that. My attorney came to see me after I came back about a week after I got back to Graham. I have not talked to the solicitor or counsel at the solicitor's table. . . . My lawyer told me that they did not promise me anything. My lawyer said he was going to try to enter that plea, he didn't know whether they would accept it or not. Just a minute before he asked for it, he said he was going to ask for it and see if they would. When he got up and tendered the plea, I didn't know that they would accept it."

(3) *Wade Hanford.* Evidence, in part, against him. Testimony of George Smith that directly involved him in the robbing and killing. He made a voluntary confession to R. B. Christian. His whereabouts

the day before was testified to by Helen Holder, who also testified to the robbery and killing as related by Ralph Hanford in his presence when they all sat in the Pontiac automobile together.

(4) *Ralph Hanford.* Evidence, in part, against him. Testimony of George Smith that involved him in the robbery and killing. This testimony was corroborated by his sweetheart, Myra Buckner, as to his whereabouts the day before and just before and after the killing. Helen Holder as to the statement of Ralph Hanford in her presence as to what took place at the killing when they all sat in the Pontiac automobile together.

The jury convicted Roy Kelly, Wade Hanford and Ralph Hanford of murder in the first degree and each was sentenced to suffer death by the administration of lethal gas. The defendant George Smith was sentenced to a term of twenty-five (25) years in the State's Prison. The defendants 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.

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

B. S. Hurley and Glidewell & Glidewell for defendants.

CLARKSON, J. The alleged crime was committed in Alamance County, N. C. The court below ordered a special venire from Orange County, N. C., and defendants were tried and convicted by a jury of Orange County.

The *first* question involved, as presented by defendants: "(a) The judge's failure to charge as to the presumption of innocence; (b) to define the burden of proof and place it upon the State; (c) to give and explain the rule as to the credibility of the testimony of an accomplice; (d) and to instruct that failure to take the stand raises no presumption, and is not to be taken against the defendants."

The defendants were tried under the following statute in this State—N. C. Code, 1935 (Michie), sec. 4200: "A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death. All other kinds of murder shall be deemed murder in the second degree and shall be punished with imprisonment of not less than two nor more than thirty years in the State Prison." The court below read this section to the jury and fully charged the jury as to its meaning. A homicide com-

mitted in the perpetration of robbery is murder in the first degree. *S. v. Lane,* 166 N. C., 333; *S. v. Donnell,* 202 N. C., 782; *S. v. Glover,* 208 N. C., 68.

In the charge is the following: "Now, gentlemen of the jury, the prisoners in this case, as are the defendants in any and every criminal case tried in our courts, are presumed to be innocent until their guilt has been established, and in order to establish the guilt, the burden is upon the State to satisfy the jury from all the evidence, beyond a reasonable doubt, that they are guilty. Reasonable doubt is a legal term and has a meaning. The law does not say that the defendant has to be convicted beyond a doubt. That does not mean a conjectural or fictitious doubt. It does not mean a doubt founded upon something that you might imagine, but it means a doubt founded upon some substantial reason growing out of the evidence itself which you have heard, so in order to convict these men or any of them, it will be necessary for you to be satisfied from all the evidence beyond a reasonable doubt that they are guilty."

The defendants rely on *S. v. Hardy,* 189 N. C., 799 (805). We do not think that their position can be sustained. In *S. v. Jordan, ante,* 356 (365-6), is the following: "An examination of the numerous propositions as to which the trial judge must give instruction, without special request, shows that the duty to so instruct has arisen in two ways: First, through the operation of C. S., 564, requiring a statement of the evidence and the application of the law thereto; and, second, through precedent establishing the duty because of its substantial importance to the rights of the defendant on trial. As to the proposition last stated, we find no precedent other than *S. v. Hardy, supra,* if it be a precedent; as to the first—and the defendant claims under the statute—it is difficult to see how the duty of such an instruction can be brought within the requirements of a statute which simply says that the trial judge 'shall state in a plain and correct manner the evidence given in the case and declare and explain the law arising thereon.' A reference to the record and the briefs in the *Hardy case, supra,* discloses that the omission to instruct the jury that the failure of defendant to go on the stand was not to be taken to his prejudice is not brought up by the two exceptions taken to the judge's charge, nor was it adverted to in the briefs, and it was not, therefore, before the Court. It may be treated as a *dictum.* Treating the question raised, therefore, as a matter of first impression, it is debatable whether the judge does not do the defendant a disfavor by emphasizing the failure of the defendant to go upon the stand and, thereby, deepening an impression which is perhaps hardly ever removed by an instruction which requires a sort of mechanical control of thinking in the face of a strong natural inference. *S. v. Bynum, supra* (175 N. C., 777); *S. v. Spivey, supra* (198 N. C., 655). Upon these considerations, we think

the matter had best be left to the sound discretion of the defending attorney whether he shall forego the instruction or specially ask for it."

In *S. v. Ashburn,* 187 N. C., 717 (727), "The conviction of defendant was almost entirely on the unsupported testimony of Essie Hardy—from the entire record shown to be an accomplice." At p. 728 it is written: "In *S. v. Miller,* 97 N. C., 487, *Davis, J.,* said: 'It has been repeatedly laid down that a conviction on the testimony of an accomplice uncorroborated is legal, Roscoe's Criminal Evidence, 121; and this has been well settled as the law of this State, certainly since the cases of *S. v. Haney,* 19 N. C., 390; *S. v. Hardin, ibid.,* 407; and *S. v. Holland,* 83 N. C., 624. It is, however, almost the universal practice of the judges to instruct juries that they should be cautious in convicting upon the uncorroborated testimony of an accomplice, and *Gaston, J.,* in *S. v. Haney, supra,* says: 'The judge may caution them against reposing hasty confidence in the testimony of an accomplice. . . . Long usage, sanctioned by deliberate judicial approbation, has given to this ordinary caution a precision which makes it approach a rule of law.' If the unsupported testimony of the accomplice produce undoubting belief of the prisoner's guilt, the jury should convict.' *S. v. Register,* 133 N. C., 746; *S. v. Shaft,* 166 N. C., 407. The court below charged the law fully and cautioned the jury, 'You may convict on the unsupported testimony of an accomplice, but *"that it is dangerous and unsafe to do so."* ' 'The charge was all, and perhaps more, than the defendant was entitled to.' " The matter was in the sound discretion of the court below. There was evidence to the effect that the accomplice's testimony was corroborated in every respect.

In *S. v. Herring,* 201 N. C., 543 (551), is the following: "The courts below ordinarily in the charge to the jury apply the 'Presumption of innocence' in the interest of life and liberty, and enlarge on 'reasonable doubt,' 'fully satisfied' or 'satisfied to a moral certainty.' *S. v. Sigmon,* 190 N. C., 627-8; *S. v. Tucker,* 190 N. C., 709; *S. v. Walker,* 193 N. C., at p. 491. When instructions are prayed as to 'presumption of innocence' and to enlarge on 'reasonable doubt' it is in the sound discretion of the court below to grant the prayer. The court below told the jury 'my duty is to instruct you that it is your duty to not repose hasty confidence in the testimony of Chevis Herring. You must scrutinize the testimony of Chevis Herring carefully and cautiously,' etc. The court could have instructed the jury that the uncorroborated testimony of an accomplice, if believed by the jury beyond a reasonable doubt, is sufficient to convict, but the court below rightly gave the caution. This is in the sound discretion of the court. *S. v. Ashburn,* 187 N. C., at p. 728."

From the well settled authorities in this State, defendants' contentions cannot be sustained on any of their objections on this aspect.

The *second* question involved, as presented by defendants: "The judge's charge that it was unnecessary to find any previous purpose or plan in order to convict all of the defendants of first degree murder where the homicide was allegedly committed by one of them."

The court below charged on this aspect: "Now, gentlemen of the jury, I charge you that if you find from all the evidence, and beyond a reasonable doubt that these three defendants, or any of them, killed Sheriff Robertson by perpetrating or attempting to perpetrate robbery, that would make all three of them guilty, that is, if one actually did the shooting and the others were participating in the act of robbery. I charge you, gentlemen, that the law is this: When two or more persons aid and abet each other in the commission of a crime, all being present, all are principals and equally guilty. If you find that one of this party was committing this robbery and any of the other defendants were there present aiding and abetting and encouraging, then it would be immaterial which one actually fired the fatal shot. The man who was there aiding and abetting and participating in the robbery would be equally guilty with the man who fired the shot. . . . I charge you also that it makes no difference whether they intended to shoot the officer when they went there or not; whether it was the plan to shoot the officers is immaterial. Even though you find that they had no previous purpose and design and plan, still if they were there and perpetrated the robbery and the officer was killed in the perpetration or attempted perpetration of the robbery, that would make them all guilty regardless of who fired the shot and would make them all equally guilty and make them guilty of murder in the first degree, unless as I say you find from the evidence that they were in such drunken condition they didn't know and understand and realize what they were doing."

In *S. v. Cloninger,* 149 N. C., 567 (573), is the following: "John Cloninger and Charles Costner were aiders and abettors. There is abundant evidence to sustain a conviction where the bystander is a friend of the perpetrator, and knows that his presence will be regarded by the perpetrator as an encouragement and protection. Presence alone may be regarded as encouraging. *S. v. Jarrell,* 141 N. C., 725. To like effect is *S. v. Finley,* 118 N. C., 1161."

In *S. v. Bell,* 205 N. C., 225 (226-7), speaking to the subject, we find: "The case was tried upon the theory that if the defendants conspired to burglarize or to rob the home of George Dryman and a murder were committed by any one of the conspirators in the attempted perpetration of the burglary or robbery, each and all of the defendants would be guilty of the murder. This is a correct proposition of law. *S. v. Don-*

nell, 202 N. C., 782, 164 S. E., 362; *S. v. Miller,* 197 N. C., 445, 149 S. E., 590. It is provided by C. S., 4200, that a murder 'which shall be committed in the perpetration or attempt to perpetrate any . . . robbery, burglary or other felony, shall be deemed to be murder in the first degree.' "

In *S. v. Ray,* 212 N. C., 725 (731), it is stated: "The principle is well established that one who, being present, gives aid and comfort, counsel or encouragement to another, in the commission of a crime, is guilty as a principal. *S. v. Cloninger,* 149 N. C., 567; *S. v. Hart,* 186 N. C., 582; *S. v. Dail,* 191 N. C., 234; *S. v. Gosnell,* 208 N. C., 401."

In *S. v. Epps,* 213 N. C., 709 (713), it is said: "In *S. v. Davenport,* 156 N. C., 596 (614), is the following: 'A person aids and abets when he has "that kind of connection with the commission of a crime which, at common law, rendered the person guilty as a principal in the second degree. It consisted in being present at the time and place, and in doing some act to render aid to the actual perpetrator of the crime, though without taking a direct share in its commission." Black's Dict., p. 56, citing Blackstone, 34. An abettor is one who gives "aid and comfort," or who either commands, advises, instigates, or encourages another to commit a crime—a person who, by being present, by words or conduct, assists or incites another to commit the criminal act (Black's Dict., p. 6); or one "who so far participates in the commission of the offense as to be present for the purpose of assisting, if necessary, in such case he is liable as a principal," ' " citing numerous authorities.

Defendants' contentions cannot be sustained on this aspect.

The *third* question involved, as presented by defendants: "The judge's charge that defendants must affirmatively assume the burden of proving drunkenness and even if they did so to the satisfaction of the jury, proving lack of mental capacity to understand what they were doing, this would still make defendants guilty of murder in the second degree.

In *S. v. Cloninger, supra,* at p. 572, it is said: " 'Transitory homicidal plea' as to Will Cloninger. The presumption is that he was sane. The burden was on him to show the contrary. *S. v. Potts,* 100 N. C., 465. Will Cloninger testified: 'I guess I was unconscious. . . . I saw Mauney coming towards me, he said he was going to kill me, and I thought he was. I then struck him.' His Honor charged: 'If the person at the time of the homicidal act was in a state of mind to comprehend his relation to others, or, knowing the criminal character of the act, was conscious that he was doing wrong, he was responsible; otherwise he was not, and such would be your verdict.' This charge follows *S. v. Haywood,* 61 N. C., 376, which has been approved since on this point. *S. v. Potts,* 100 N. C., 465; *S. v. Davis,* 109 N. C., 784; *S. v. Branner, ante,* 559, and in other cases."

It is a well settled rule that "the burden rests upon the defendant to prove the defense of drunkenness to the satisfaction of the jury to mitigate the offense." *S. v. Hammonds, ante,* 67 (78). And the charge that if the jury found that these defendants were so drunk that they did not know or realize what they were doing, they would not be guilty of murder in the first degree but would be guilty of murder in the second degree has been approved in effect by this Court in the case of *S. v. Williams,* 189 N. C., 616-620. Here the Court approved the following charge in this regard: " 'Drunkenness under the law is no excuse for crime and does not relieve the person of guilt for crime entirely. But in the case of murder, if a person is so intoxicated and rendered so insensible and so irrational by intoxication of any kind, or is naturally so weak-minded from natural causes that he cannot form an intent and cannot premeditate and deliberate, then it reduces the offense from murder in the first degree to murder in the second degree.' "

The court below charged the jury: "The law presumes, gentlemen, that every man is sane and when a man comes into court and sets up a plea of drunkenness in order to excuse himself from some violation of the law, he must satisfy the jury from the evidence that he is not responsible by reason of the fact that he did not have mental capacity sufficient at the time to thoroughly know and understand what he was about and what he was doing."

Defendants object to the charge of the court with regard to the degree of proof necessary to be offered by them as to their mental capacity, to reduce the crime from murder in the first degree to murder in the second degree, and argues under these exceptions that the judge should have submitted to the jury the issue of manslaughter; and complains further that the court did not properly define murder in the first degree and murder in the second degree. The court defined murder in the first degree as follows: "Murder in the first degree not only is the unlawful, felonious, and malicious slaying of another, but a killing that has been done with premeditation and deliberation." And defined murder in the second degree as: "The unlawful and malicious killing of a human being. . . . The killing with malice, nothing else appearing, is murder in the second degree." The court further charged the jury as to murder in the second degree as follows: ". . . A killing with a deadly weapon, nothing else appearing, is at least murder in the second degree. It is not necessary to actually prove malice, if one kills another with a deadly weapon . . . the fact that a deadly weapon was used would make that murder in the second degree at least." And with regard to that portion of the charge complained of, "Unless you find from the evidence that the killing was entirely without malice," attention is called to that portion of the charge: "In order for a defendant to

reduce the crime from murder in the second degree, in order to show justifiable homicide, the burden would be upon the defendant to satisfy the jury, not by the greater weight of the evidence, nor beyond a reasonable doubt, but the burden would be upon the defendant to satisfy the jury that the killing was without malice before it could be reduced to any lower degree than murder in the second degree."

We think this charge covers the contention complained of by defendants. The court did not submit to the jury the issue of manslaughter, because there is no evidence in the record which would justify the submission of such an issue. The matter complained of is not prejudicial to the defendants.

Defendants' contentions cannot be sustained under this aspect.

The *fourth* question involved, as presented by defendants: "This contention relates to the remarks of the solicitor in his argument to the jury to the effect that certain of the State's evidence was 'uncontradicted.'" The court on each occasion warned the jury not to consider such statements and ordered the solicitor in no uncertain terms not to continue such argument. Our Court has held that such an argument to the jury is free from error when the court has properly warned the jury not to consider the same. *S. v. Weddington,* 103 N. C., 364; *S. v. Hooker,* 145 N. C., 581; *S. v. Winner,* 153 N. C., 603; *S. v. Davenport,* 156 N. C., 596. The language complained of in the case of *S. v. Hooker, supra,* at p. 584, almost the identical language was objected to. In this case the Court said: "The last exception is to the solicitor's comment that 'none of the evidence as testified to by the State's witnesses has been contradicted and no one has said that it was not true.' This could not be taken as a criticism upon the failure of the defendant to put himself upon the stand."

Defendants' contentions cannot be sustained under this aspect.

The *fifth* question involved as presented by defendants: "The judge's numerous errors in permitting testimony impeaching the character of the defendants, when defendants had neither taken the stand nor directly placed their characters in issue." All these objections relate to questions and answers concerning Roy Huffman, one of the participants in the robbery and murder. Huffman was killed in the fight at the filling station when the officers arrived; he was not on trial and evidence as to the fact that he had been a former convict cannot be taken advantage of in the way of an objection by either of these defendants.

Other contentions are to the court's permitting the solicitor for the State to ask the witness if Roy Kelly had made a statement to him as to whether or not he was an escaped prisoner, and permitting the witness to also state that Roy Kelly had informed him at this time that he had escaped from prison with Roy Huffman. Both these statements were

made to the witness T. J. Davis, the officer to whom Roy Kelly made an oral confession, and were made at the time of the confession. These declarations of the defendant made to the officer during the course of his conversation with him and at the time of the confession were properly admitted.

In the case of *S. v. Swink,* 19 N. C., 9 (13), it was said: "It is undoubtedly law that in criminal as well as civil cases the whole of an admission or declaration made by a party is to be taken together," etc.

In the case of *S. v. Edwards,* 211 N. C., 555 (556), the Court, also speaking to this subject, says: "The defendant was entitled to have the confession considered as given in its entirety, with whatever views or theories it afforded," citing authorities.

In *Burnett v. People,* 204 Ill., 208, 68 A. S. R., 206, 66 L. R. A., 304, the following instruction was held to be a correct statement of the law: " 'The court instructed the jury that where a confession of a prisoner charged with a crime is offered in evidence, the whole of the confession so offered and testified to must be taken together, as (well as) that part which makes in favor of the accused, as that part which makes against him, and if the part of the statement which is in favor of the defendant is not disproved by other testimony in the case and is not improbable or untrue, considered in connection with all the other testimony of the case, then that part of the statement is entitled to as much consideration from the jury as the parts which make against the defendant.' "

Notwithstanding the above, evidence of a former prison record, an escape from prison of the defendant is competent in this case. He had escaped from prison with Huffman, one of the parties to the crime who was killed in its commission, all his companions were ex-convicts and evidence that the defendant Kelly was an escaped prisoner and that he had escaped with Huffman, one of the perpetrators of the crime, is competent to show *"quo animo,* intent, design, or guilty knowledge, where such requirements are so connected as to throw light upon the question." *S. v. Godwin, ante,* 49.

As said in *S. v. Payne,* 213 N. C., 719 (725): "We think the evidence of the occurrences in which the defendants made their escapes singular from the State Prison and subsequent evasions of arrest are competent as tending to show the state of mind of the defendants at the time of the killing of George Penn, at the end of a running gun battle in an attempt to escape arrest by him. In their confession the defendants separately admit that they knew that an officer was pursuing them and that they heard the siren on his automobile."

We have stated the facts and law at some length, as the matter is of such grave importance. After thorough consideration of the record and

able briefs of the Attorney-General and counsel for defendants, we see no prejudicial or reversible error in the record.

The court below tried the case with care and ability; applying the law applicable to the facts, in accordance with the decisions of this Court. The court quoted the evidence and set forth the contentions of the State and of defendants accurately and without bias.

By competent evidence introduced on the trial, it was shown that the defendants and Roy Huffman (who was killed) attempted to rob the Sprinkle Service Station of a safe and committed the robbery of some oil and anti-freeze. They were all ex-convicts and all aided and abetted the robbery and attempted robbery. The plan was agreed upon by all. Two automobiles were used for the purpose—a Pontiac and a Ford—one of which had the seat loosened so that the safe which they were to take from the service station could be placed in it. The two automobiles were nearby to help and protect the robbers—one to haul the safe in and the other to watch and block the road if the officers or anyone pursued them. They had burglary tools and nitro-glycerine, which was known to all the participants. Some oil and anti-freeze were taken from the service station and placed in the cars in waiting. The robbery was a bold one, as the place was well lighted, in Burlington near the underpass. The defendants had broken the lock and gone into the station. They had weapons—one a .45 automatic revolver, and the other a .32 Smith & Wesson pistol. As they were forcing the door open they were seen by a young man employed by a dairy who was on his way to work. He reported the matter to the sheriff of the county and the sheriff and two police officers went to the scene. When they arrived men were on the inside of the service station. One of the officers fired into the service station and shot and killed one of the men (Roy Huffman). The sheriff and one of the police officers (Vaughn) were killed in the gun-battle. Twelve loaded .45 shells that had not been fired were taken from the pocket of Roy Huffman, who was killed in the station. There were five empty shells from the .45 pistol in the service station and four .32 cartridges that had not been fired. Roy Kelly did not go into the service station, but was in waiting in one of the cars outside. Wade Hanford had two .32 Smith & Wesson pistols and Ralph Hanford had one of them on the night of the shooting. They and Huffman went into the service station. When Huffman was killed, Wade Hanford said he shot three times and came out of the service station with his hands up. Wade and Ralph Hanford went away from the station after the shooting and fled.

There were eight different bullet holes in the body of Sheriff Robertson. In Vaughn's body, the police officer who was killed, there were two holes and one in his finger. There were eleven shots in all in the two officers.

All the defendants, who were ex-convicts, had sweethearts or girl friends. The evidence was to the effect that they had all been drinking and staying in tourist cabins with their sweethearts or girl friends the day before. They stayed at "The Green Top Inn," "The Correct Time Inn," "The Wagon Wheel," etc. None of these parties were working. The evidence shows that this robbery and killing was committed by men who had criminal records. It was a bold crime, in almost the heart of the town, the men "armed to the teeth" and with burglary tools. The sheriff and Officer Vaughn were killed on the battlefield of duty and law enforcement. The evidence is plenary in every respect that the defendants were guilty of the killing of these two officers. The places they habitually frequented with their sweethearts and girl friends indicate were places of vice and dives which usually are breeding places for crime. They had all been drinking. The evidence shows that the perpetrators were criminals of desperate character, moved and instigated by the devil with hearts fatally bent on mischief.

For the reasons given, we find in the record no prejudicial or reversible error.

No error.

FRANCIS BUTLER, BY HER NEXT FRIEND, MRS. L. T. JONES, v. DR. C. C. LUPTON.

(Filed 3 January, 1940.)

1. Appeal and Error § 40e—

Upon appeal from a judgment as of nonsuit, the evidence will be considered in the light most favorable to plaintiff and only the evidence favorable to plaintiff need be considered.

2. Physicians and Surgeons § 15e—Expert testimony that defendant physician failed to use accepted treatment, resulting in injury, held sufficient to take case to jury.

The evidence tended to show that plaintiff suffered a simple fracture of her leg when a log fell against her, that the skin was not broken, that she was immediately taken to defendant physician, who placed a plaster cast on each side of the fracture, applied an extension apparatus to extend the leg and set the bones, and later removed the extension apparatus and filled in the space between the two casts so that the leg was completely encased from the knee to the ankle, that immediately after the extension apparatus was applied plaintiff suffered a great deal of pain, her leg became swollen and that her toes and heel turned black and her foot became cold, that more than twenty-four hours thereafter the physician split the cast a little way from the top, that pain continued where the cast had not been split, and that more than twenty-four hours thereafter he completely removed the cast, and that a gangrene condition set in resulting in permanent injury. Plaintiff introduced an expert witness

who testified, from examination of the scar below plaintiff's knee and the condition of her leg and foot immediately before trial, to the effect that the gangrene condition with which plaintiff was suffering was the result of interference in the circulation of the blood, that the scar indicated that sufficient pressure had been placed on plaintiff's leg to interfere with the circulation, and that when the foot of a patient turns black after a cast has been placed upon the leg the accepted treatment is to immediately remove or loosen the cast. *Held:* The expert testimony condemning the treatment administered as improper is sufficient to take the case to the jury upon the question of defendant's negligence, irrespective of any inferences that may be drawn from the other evidence.

APPEAL by plaintiff from *Nimocks, J.*, at May Term, 1939, of ALAMANCE. Reversed.

This is a suit brought in behalf of the infant plaintiff to recover damages for a personal injury alleged to have been caused by the negligence and malpractice of the defendant, a practicing physician, while under his care as a patient. Under proper pleadings, and taken in the most favorable light to the plaintiff, the evidence tends to show that plaintiff, then twelve years of age and in the sixth grade, sustained a simple fracture of both bones of the right leg, some distance below the knee, caused by a log of timber falling upon it. The skin was not broken. She was carried to Dr. Lupton's Hospital in Burlington and there placed under his care. An X-ray picture was taken of the leg, at which time, in the language of the witness, "it was not hurting me much." The doctor bandaged it and put her to bed. We quote:

"Saturday night he took me in the X-ray room and set the big bone in my leg. It was not hurting me and was not swollen. He did not do anything on Sunday and my leg was not swollen or hurting me. About one-thirty on Monday afternoon he put a thin bandage on my leg and put a plaster cast from above my knee to where the break occurred, and there left an open space, and below the break put a cast on down on my foot. My leg was not swollen then. He did not do anything to my leg on Tuesday. On Wednesday afternoon about five o'clock he put a brace consisting of two iron rods down the side and two iron rings and then he had something to make it tight. He worked the screws with a wrench to tighten them. My leg was not paining me until he tightened them screws and it was not swollen. He kept coming back and tightening them. I was hurting so bad I kept crying and he would not do anything, just kept on tightening them—he did not say anything. That night he took me in the X-ray room and looked at my leg and tightened the screws some more. My leg kept hurting and swelling—I cried, but not out loud, the nurses were holding me, and gave me little pills. He took the brace off and filled in the empty space with plaster cast. I slept all next morning and saw Dr. Lupton when I awoke late that after-

noon between four and five o'clock. When I woke I could feel no pain at all. I looked at my toes and they were swollen and black spotted. Dr. Lupton came in and took me home about six o'clock. My leg began hurting about seven o'clock that night. It was swelled and the cast was hurting me. We sent for Dr. Lupton and he came about nine o'clock. He split the cast from the top down a little over the break. He did not do anything to the cast on my foot below the break. My toes were swelled and black spotted. On Friday Dr. Lupton came about five o'clock. My leg was hurting me where the cast had not been split. I was not crying much. I had no feeling in it—my toes were swelled and black spotted then. He did not do anything to my leg but look at it. We sent for him again that night, as I was suffering. He came about nine o'clock and removed all the cast from my leg. My foot was swelled and black spotted. Mrs. Hughes and Mrs. Crabtree and mother were in the room. The top of my foot was black and swelled. My leg that was broken was twice the size of my other leg. Right below my knee were blisters where these scars are now. I had never had any injury to my right leg before.

"That night blisters began forming on the heel and toe of my foot where the black spots were after the cast was removed. They were forming on Saturday and Dr. Lupton saw them and he told mother that he thought that was the natural thing for my foot to be like. The blisters burst the next day and when they burst the meat started eating off. Dr. Lupton saw me Sunday, and the blisters had burst. I was in bed with my leg on a pillow and an electric light over it. I had no feeling in my leg and it was hot. I stayed there in bed until Dr. Lupton took me back to his hospital to treat me—some time in December near Christmas. My foot was resting on a pillow and every night a violet ray lamp was put over my foot. The heel of my foot came off while I was there in his hospital. I was brought home again some time in February, 1937. The front of my foot was better. Dr. Lupton would come and dress it. One day he came and put it on the floor and mashed it. He said he thought maybe it would straighten it up, it was stiff. It started bleeding and abscesses started. This happened after I had been home a little over a month. In March I went back to Dr. Lupton's hospital and stayed there eleven weeks. My foot was in bad condition, the sores were getting worse. No other doctor saw me while I was there in the hospital. I went to Duke Hospital then. Dr. Lupton went and was there when some bones were taken from my foot. I stayed there ten days. A cast was put on my leg and I went back every month to have the cast changed. My foot was operated on at Duke Hospital twice. Dr. Lupton was present both times. My foot did not heal then. My foot was normal before the iron brace and traction was put on it,

and no difference in size from my left foot. I do not have much feeling in it now."

This evidence was corroborated by Mrs. L. T. Jones, her mother by an earlier marriage, as follows:

Francis Butler is my daughter by my first husband. On October 23, 1936, she broke her leg. We had some sills—8'x8' and 16 feet long three feet high in the back yard. She had been see-sawing on this end of the log and one end fell 16 inches, the end did not fall off, and the corner hit her leg and broke it. She called me and was sitting on the ground, the log was up against her, and I just lifted it off and took her to Dr. Lupton's office. I went back Saturday morning at nine-thirty o'clock and Dr. Lupton said it was broken. There was just a little blue place on her right leg. There was no break or cut on the skin or bruise on the foot, either the heel or top of the foot. I stayed with her until nine-thirty that night and she was not complaining of any pain that day. He had the leg bandaged, but the toes and foot looked natural. I went back Sunday and stayed all afternoon and she was not complaining of any pain. I went back again Monday afternoon and Dr. Lupton told me he had set the big bone but the little bone was off just a little bit. Francis did not seem to be suffering any pain more than kind of nervous. I did not see the cast put on this day. I went back on Tuesday afternoon and she did not complain of any pain Tuesday. I went back Wednesday afternoon and Dr. Lupton told me he was putting an iron brace on her leg. It was two iron rings, one went here below the break and one above the break. He put two iron rods, one on each side, and two screws on each end and had a pair of pliers. This was around five o'clock, and when I left at six o'clock he was beginning to turn these little taps (screws) and she was beginning to suffer and cry out before I left—asked me not to leave—and he told me to go on, that he thought he would bring her home at nine o'clock, but did not bring her until the next day at five o'clock p.m. She had not complained of any pain before he began to apply this extension or brace on her leg. I did not go back on Thursday as I was waiting every minute for him to bring her home.

"When Dr. Lupton brought her next day she was half asleep. I tried to talk to her, but she did not talk normally. She could not see well enough to tell who the children were that came in to see her. Dr. Lupton said he thought she would be all right, to go ahead and play the radio or anything. He said to keep something hot on her leg. The braces were not on her leg when he brought her home and the cast had been filled in between the other two casts at the break. He gave me a prescription for some medicine to make her sleep. She did not sleep any Thursday night at all. She complained of her foot burning and wanted

something cold on it. Dr. Lupton said apply something hot. I put towels and a hot water bottle the best I could. I called Dr. Lupton that night (Thursday) about seven o'clock and told him her foot was swollen —was burning her up—I asked him if it was natural for it to be like that—that her toes and foot were cold and black spotted, and he said it was, it was perfectly natural. He came and split the cast from the top to somewhere near the ankle and put pieces of pasteboard in there to hold it open. I mentioned the discoloration of the toes and foot to him, he looked at it, but did not say anything. He did not split the cast all the way. She did not rest any that night. Dr. Lupton came Friday morning and looked at her leg. He did not do anything. The toes were turning dark with black spots on them. Francis was complaining of her foot while he was there. I was still giving her the medicine doctor said was to make her sleep. I got this medicine on Thursday and had it when doctor came at seven o'clock that night. He told me to give her a teaspoon when he gave me the prescription but when he came back he said to give her two teaspoonsful. I did this for two days, until I gave it all to her.

"Dr. Lupton came back late Friday afternoon. I did not send for him. Her toes were discolored the same as that morning. Dr. Lupton did not say much of anything. He sat at the foot of the bed and rubbed her toes and the top of her foot, and I asked him if he did not think it would be best to take all that off (cast) and he said no, that would be all right. Her toes were cold then. I called Dr. Lupton that night three times and he came around nine o'clock that night. She was suffering and crying for him to take it off (cast).

"Her foot and toes were purple and black spotted. Mrs. Ben Hughes and Mrs. J. W. Crabtree were there when Dr. Lupton came in. This was Friday night one week after her injury. Mrs. Crabtree, Mrs. Hughes and myself had been trying to hold the cast open, the part that had been cut the night before, as it was pinching her so she couldn't hardly stand it. Dr. Lupton split the rest of the cast and took it all off. He split it with a little knife and removed the whole cast. There was a little thin bandage of gauze on the inside of the cast. I looked at Francis' leg and it was twice the size of her left leg. Her knee and all was swollen and there was a raw place right below the knee. The top of her foot was black and the heel was black, and the toes were purple with black spots. Dr. Lupton did not say anything to me about the condition of her leg. He put an electric light on it and told me when he got ready to go we would see a big difference in it by Monday. I asked him about carrying her to a hospital and whether it would be better to have a nurse, and he said no. The next I noticed was that blisters began to rise below the knee and on top of her foot and heel

where the black places were, this was on Saturday. Dr. Lupton came that morning. I kept her flat on her back with her leg and foot on a pillow for about two weeks. She did not have a cast on her leg. Dr. Lupton came again Saturday night, and the condition of her foot was the same. He rubbed her toes and the part of her foot that was not black. I don't know whether any of the blisters had broken that night exactly, but I know they would rise and break, and some Dr. Lupton would have to open and let the black blood run out. The next that developed was that the skin came off the foot, her toe nails came off, and then it began to eat and look green. He kept it painted with some kind of pink looking medicine that would paint over and you could not see the under side, and this eating of her flesh would break through, and he told me to take a piece of cotton and keep it painted over. This eating started where the blisters would burst all over her foot. Dr. Lupton came at least twice a day and did not have much to say. His treatment was different things. After we kept using this painting medicine, and I had kinda pulled the flesh back on her foot with a piece of cotton, I called him, and he told me to put hot salts applications on it, which I did as long as he told me, every hour day and night. My husband and myself sat by her bed six weeks, day and night. Dr. Lupton said he would rather have me attend her than to carry her to a hospital, said she would get better treatment. On December 10th he said he wanted to carry her back to his place and use a violet ray light on her. She stayed at his hospital until Christmas Eve night, when he brought her home, and we carried her back on Christmas Day. Dr. Lupton went to Florida and stayed ten days. His nurse gave her violet ray treatments and dressed her foot every day. I went every night to Dr. Lupton's hospital, and he dressed the foot at times when I was there and he would tell me how much better it looked and was getting. I observed that the whole part of her heel had come off and there was a raw place on top of her foot and big toe. She stayed in Dr. Lupton's hospital until the second week in February, 1937. He told me that she was getting better. Her foot was stiff and all her toes were drawn down. Dr. Lupton came and put codliver oil on the wounds and dressed them. The toes all improved but the big toe. She stayed at home until around the 25th of March, 1937, and while she was home doctor came about every other night. He told me he was taking her back to the hospital because the abscesses had formed on her foot. He would dress it when I was there, was using some kind of salve on the top to grow skin and was irrigating it with a kind of glass pump with medicine in it. Her foot had holes in it and he would put the medicine through her toes and fill the top of her foot and it would run out through her heel. On Tuesday, June 8th, Dr. Lupton, my husband and myself took her to Duke Hospital for

examination. I suggested taking her to Duke to Dr. Lupton and he said we had better let well enough alone, if I didn't she might lose her foot—the first time he had ever told me anything like that. He had always told me before that it was getting along fine, all right, and she would come home in a few days. On June 14th she was entered at Duke Hospital and was operated on the 15th. Dr. Lupton was there and Dr. Shands did the operating. She stayed ten days and I went down every night. She was brought back to her home on June 25th, and had a plaster cast on her entire leg up to above her knee. There was no extension on it. The first cast was removed at Duke Hospital in about two weeks. Dr. Lupton was there when it was removed and what I could see of it the whole foot almost was gone, the top of the whole foot. I could not see the heel the way she was lying. Another plaster cast was put on and she was brought home. This cast stayed on for about three or four weeks and was taken off at Duke Hospital. Dr. Lupton was there. Another cast was put on but I don't remember exactly how long that stayed on, but when they took it off and left it off it was the last of August, 1937. Dr. Lupton was there then and the condition of the foot on the whole top part was still bad, the heel was off. Dr. Lupton continued to come to see her for two or three times. He would come in and look at her foot. That was all there was to do. Dr. Lupton would carry her to Duke at least once a month to have her foot dressed, until February, 1938. He would dress it the other times at home. Along in January, 1938, Dr. Lupton told me he was going to have a little more work done on her foot. At Christmas they had taken X-rays and Dr. Lupton told me that there was no infection in the bone at that time. This was at Christmas, and along in January he told me he was going to have the bone scraped out, so we carried her back in February and she stayed in Duke Hospital one week and was then brought home. I dismissed Dr. Lupton the day we brought her from Duke and he has not seen her foot since then.

"I do not know of any consultation that Dr. Lupton had with any other physician from the time Francis went to his hospital in December, 1936, until I suggested taking her to Duke in June, 1937. Before he took her to his hospital in December, 1936, we told him to bring Dr. Bell to look at it and we still were not satisfied about it so we called him to bring Dr. Moore. He brought those two doctors. They talked but did not tell us anything. This was some time between October 23rd and December 10, 1936. There was no difference in the condition of her foot at the time Dr. Moore came than when Dr. Bell came. The flesh was eaten off and the toes were dark. Dr. Moore looked at her foot and told us something about it being in a bad fix. Before this injury she was not nervous at all and her health was all right. She had never had

any fracture before this occurrence on October 23, 1936. Both her legs were alike before this injury. After her injury and the treatment she received from the defendant she could not go to school for two years and was nervous. She is a lot better now. She has been going to school since October, 1938, walking on her crutches and sleeps all right. When I first took Francis to Dr. Lupton on October 23, 1936, he said: "She will be all right in a little while, a few weeks or a few days."

Dr. L. S. Booker, a witness for the plaintiff, and an admitted expert surgeon and physician, testified that he had examined the right leg of this plaintiff on the day before the trial and found just below the knee an old scar which was the result of a healed wound. The foot and leg showed that there had been extensive destruction of both the soft and bony tissues of the foot, evidence of both on top of and on the heel of the foot, and there is present ulceration and evidence of necrosis of both soft and bony tissues—in other words, "evidence of dead bone in the right foot." Witness was of the opinion that the condition was caused by interference with the circulation in the leg and foot.

Witness testified that the object in putting a ring around a plaster cast and another ring around another plaster cast, not joined together, and a brace on the side and set screws, and screwing those screws down or up is to produce "extension of the limb." Thus, two fixed points are provided, and, between the two points, necessary extension can be applied. Such extension in fractures is used for overcoming the muscle pull which tends to shorten the bones where they are broken, and to adjust broken ends of the bone. That a plaster cast was applied to the plaintiff's limb, one above the break, in order to produce such extension, and the screws were tightened so that the plaster cast above the break was pushed upward and the one below the break downward. This would necessarily produce pressure above the pressure below. "The pressure of the upper plaster cast would be against the bony structure just below the knee, and the pressure of the lower cast would be upon the top or dorsum of the foot and the heel behind. My opinion is that the scar which she presents now was due to pressure from a plaster cast, which is just below the knee on her right leg, that that amount of pressure necessary to produce that scar would have interfered with the circulation of the whole leg."

"The usual and accepted treatment of physicians and surgeons in this locality with reference to simple fracture of the leg is first to make the patient comfortable and either reduce the fracture immediately or to defer it for several days, and after the fracture of the bone or bones has been reduced, some fixation apparatus, either splint or plaster cast, is usually applied to these breaks.

"If within eight or ten hours or more after the plaster cast and exten-

sion apparatus was applied to Francis Butler's leg the toes turned spotted and black and the foot cold, that would indicate interference with the circulation in that leg. If Dr. Lupton's attention was called to the fact that black spots on the child's foot were present and that the foot was cold by the mother of the child, the accepted treatment of physicians and surgeons in this locality would have been removal of the entire cast immediately or loosened, one of the two, and elevation of the foot.

"The failure to remove something that is interfering with the circulation of the blood to the extent of causing the foot to turn black and discolor and become cold, would be a certain amount of death and destruction of tissues to the point affected. If upon the removal of the cast on Friday night by Dr. Lupton there appeared upon the top of the foot of Francis Butler a black spot and on the heel a black spot, my opinion is that the condition showed the beginning of gangrene. Gangrene is destruction or death of tissue, either the soft tissue such as skin, muscle, nerves, or the solid tissues such as bone. There are two general kinds of gangrene, dry gangrene, which is seen in elderly people, and which always occurs when the total complete circulation is severed or cut off from a part, and in certain cases of what we know as diabetes that gangrene is due to a complete severance of the circulation of that particular part. Moist gangrene or necrosis is a slower process, which is a result of a slower process of cutting off the circulation to the particular part of the body. The result in the end of both dry and moist gangrene is the same, but one is a more rapid process and the other a slower.

"Francis Butler has had and still has a gangrenous condition of the right foot, in other words, she has dead bone and affected condition with considerable dead bone in her foot at the present time. I think the foot will gradually get worse rather than better. The process will usually wind up in complete destruction of the part affected."

"I have an opinion as to how long it would take for gangrenous condition to develop after sufficient pressure has been produced on a limb, as shown by the limb of the plaintiff, to cut off pressure circulation. It is a well accepted fact that if complete circulation is cut off as long as eight hours there will be permanent destruction of the tissue to the part that has been cut off. That refers to complete obstruction, but to partial obstruction where it is not completely cut off the time for gangrenous condition, which is a death of tissue, is longer, depending upon, of course, the proportionate amount of circulation which is cut off. I mean by that, if you apply a tourniquet, such as a rubber band around your arm and leave it there eight hours tight enough to cut off circulation that long, you get permanent destruction of the tissues. If it is removed in two or three hours there is no damage to the forearm. When there is

gradual cutting off of the circulation, depending upon the amount of obstruction, you have this resulting gangrene to the part supplied by the blood.

"In my examination of Francis Butler's leg of yesterday there was apparently a good union between the fractures. The turning down of her toes is due to paralysis of certain muscles in the foot and contraction of the tendons which pull the toes down. My opinion as to the cause of that condition is pressure, and that brings about a condition in medicine known as Volkmann's contracture, which means a contracting of the tendons of the toes affected. It is a condition brought about by interference or blocking of the circulation to the muscles and tendons affected.

"If Dr. Lupton put a plaster cast on the upper and lower part of her leg, leaving a part next to the break open, and thereafter put an apparatus on her leg to push the upper part up and the lower part down, I have an opinion that its effect would cut off the circulation either completely or to a degree, I do not know of any other condition that would account for a turning down of the toes, blocking of the upper part and heel and decomposition of the foot as it later developed, except interference with the circulation of the blood to the affected foot, whether by external pressure or internal destruction or injury to the blood vessels themselves, would be the only conditions causing this condition to the foot.

"If Francis Butler had her leg broken on Friday and cast was not put on until Monday, during which time there was no swelling and no discoloration and no pain to amount to anything, and if Dr. Lupton put the pressure on those plaster casts by extension apparatus on Wednesday and on Thursday after this application was put on the toes began to show black spots, my opinion is that obstruction to the circulation was brought about by external pressure."

Dr. A. R. Shands, witness for the defendant, answered the following query as indicated: "Q. State whether or not you have an opinion satisfactory to yourself as to whether this mechanical brace used by Dr. Lupton for the purpose of holding the leg in place, as testified to by him, was proper treatment of the plaintiff at the time he used the brace. A. I would consider it a perfectly proper form of treatment to use to immobilize and hold a fracture of that type. At the time she was brought to me she had evidence by X-ray of dead bone in the lower leg and foot and I recommended that these pieces of dead bone be removed and these drainage sinuses through which pus was coming be scraped out, which was done on the 15th of June at Duke Hospital by myself." He testified that when he had examined this child she was suffering from osteomyelitis. When he examined her after her treatment by Dr. Lupton the X-ray showed a discontinuity between the ends of the leg bones.

Dr. George L. Carrington, witness for the defendant, in answer to hypothetical questions, testified that the treatment as described was proper and good. To the same effect was the testimony of Dr. R. M. Troxler, witness for the defendant. In answer to another hypothetical question, the testimony of Dr. H. B. Moore, witness for the defendant, was to the same effect, as was that also of Dr. Willard C. Goley, also a witness for the defendant.

At the conclusion of the plaintiff's evidence, and at the conclusion of all the evidence, the defendant moved for judgment as of nonsuit, which was allowed. Plaintiff's appeal is from this order.

J. Elmer Long and Clarence Ross for plaintiff, appellant.
Long, Long & Barrett and Sapp & Sapp for defendant, appellee.

SEAWELL, J. Since this case comes here upon the propriety of a judgment as of nonsuit, we have not thought it necessary to extend the record by recounting defendant's evidence, although the latter is not free from inferences favorable to the plaintiff. *Ford v. R. R.*, 209 N. C., 108, 182 S. E., 717; *Davidson v. Telegraph Co.*, 207 N. C., 790, 178 S. E., 603. It is a familiar rule that we must consider the evidence in the light most favorable to the plaintiff. *Mulford v. Hotel Co.*, 213 N. C., 603, 197 S. E., 169; *Gunn v. Taxi Co.*, 212 N. C., 540, 193 S. E., 747; *Matthews v. Cheatham*, 210 N. C., 592, 188 S. E., 87; *Smith v. Coach Line*, 191 N. C., 589, 132 S. E., 567; *Leonard v. Ins. Co.*, 212 N. C., 151, 157, 193 S. E., 166.

While we do not wish to be considered as conceding that in every case brought against a physician for malpractice plaintiff's cause must be sustained by the testimony of experts condemning the treatment received by the patient as improper (*Covington v. James*, 214 N. C., 71, 197 S. E., 701), it is unnecessary to go into that question here, or into the applicability of the doctrine of *res ipsa loquitur*, so often mooted and so often questioned. *Pendergraft v. Royster*, 203 N. C., 384, 166 S. E., 285; *Ferguson v. Glenn*, 201 N. C., 128, 159 S. E., 5; *Nash v. Royster*, 189 N. C., 408, 127 S. E., 356; *Connor v. Hayworth*, 206 N. C., 721, 175 S. E., 140. Such phases of the evidence as might renew the controversy on these questions may be disregarded for the purpose of the present decision. The testimony of experts brought in by the plaintiff, while maintaining the traditional reserve to be expected of professional men passing upon the efforts of others, was sufficiently condemnatory in inference and effect to carry the case to the jury. We do not intend by this to exclude from the jury any legitimate inferences which may be

drawn from any part of the evidence which may be permissible under the established standards of the court. Upon this evidence we refrain from comment.

The judgment is

Reversed.

J. W. MILLS v. MUTUAL BUILDING & LOAN ASSOCIATION, A CORPORATION, AND E. Y. KEESLER.

(Filed 3 January, 1940.)

1. Mortgages § 32a—

A declaration in a deed of trust of the trustee's right to take possession upon default does not require that the trustee take possession as a condition precedent to foreclosure under the power of sale contained in the instrument.

2. Same—

The exercise of the power of sale in a mortgage or deed of trust will be scrutinized by courts of equity for the protection of the mortgagor, and the power must be exercised under well recognized restrictions.

3. Mortgages § 35a—

When a mortgagee purchases at his own sale, the sale is voidable at the election of the mortgagor, and the trust relationship continues regardless of good faith and absence of fraud, the rule being founded upon the opportunity of oppression arising out of the relationship.

4. Mortgages § 17—

A mortgagee is entitled to possession upon default, but he must account to the mortgagor for rents, profits and waste, the mortgagor being entitled to credit therefor on the mortgage debt.

5. Mortgages § 39c—

Where a mortgagee purchases the property at his own foreclosure sale and thereafter sells to an innocent purchaser, the mortgagor may elect to disavow the foreclosure sale and recover damages for the wrongful conversion of his equity of redemption.

6. Mortgages §§ 18, 35a—Right of cestui to bid in property is predicated upon duty of trustee to act impartially and protect rights of both parties.

A trustee in a deed of trust is agent for both the trustor and *cestui que trust*, and upon default he is not only under duty to make due advertisement, conduct the sale and execute the deed to the purchaser, but is also under duty to apprise both parties of his intention to sell, to exercise good faith, act impartially, and to exercise due diligence to procure an advantageous sale for the protection of both parties, and the right of the *cestui que trust* to bid in the property is predicated upon this duty and the fact that its exercise precludes the opportunity for oppression of the debtor by the creditor.

7. Mortgages §§ 35a, 39e—Evidence that trustee acted as agent of cestui in bidding in property held for jury in trustor's action for damages.

Plaintiff's evidence tended to show that the trustee named in the deed of trust was the secretary-treasurer and chief active executive officer of defendant *cestui que trust*, and as such executive officer was the person to whom the trustor would have to apply for any forbearance, that it was his duty to direct foreclosure to make or direct advertisement and sale and execute deed to the purchaser and to determine the bid of the *cestui que trust* if it desired to bid at the sale, and that in the present instance he wrote the memorandum of the amount the *cestui* should bid, which was signed by his subordinate, and that the property was purchased by the *cestui* for this sum at the foreclosure sale, and thereafter sold by it to an innocent purchaser. *Held:* Equity looks to the substance and not the form, and the evidence discloses that the instrument was in effect a mortgage within the scope of the rule prohibiting purchase of the property at the foreclosure sale by the mortgagee, and judgment as of nonsuit was improvidently entered in plaintiff trustor's action for damages for wrongful conversion of his equity of redemption.

STACY, C. J., concurring.

CLARKSON, J., concurring.

APPEAL by plaintiff from *Johnston, Special Judge,* at May Extra Term, 1939, of MECKLENBURG. Reversed.

Civil action for an accounting and to recover damages for breach of trust for wrongful conveyance of real property purchased by defendant corporation at foreclosure sale and resold to an innocent purchaser.

In June, 1924, plaintiff purchased from B. C. Talley a house and lot in Charlotte, subject to a first mortgage lien thereon in favor of the defendant corporation to secure an indebtedness of $3,500.00 upon which there was then due $2,734.71. There were also outstanding two other mortgage liens in the sum of $1,936.62 and $1,328.67, respectively, which were assumed by the plaintiff. By payments and refinancing, from time to time, the plaintiff reduced the total indebtedness to $2,100. On 1 November, 1932, he executed a paper writing in the form of a deed of trust to the defendant E. Y. Keesler, as trustee, to secure a note in that amount, payable to the corporate defendant. There was default in the payment of the regular installments maturing on the last cited note and by reason thereof the trustee, after advertisement, foreclosed the instrument by sale 4 May, 1936, and on 16 May, 1936, conveyed said premises, by deed of foreclosure, to the corporate defendant, the purchaser at the sale. On 8 October, 1938, the corporate defendant conveyed the premises to C. P. Wood and wife by fee simple deed.

The purchase price at the sale was $1,870. The consideration for the sale to Wood and wife is not disclosed but it does appear that at the time the corporate defendant took a purchase money mortgage, or deed of trust, on the premises in the sum of $3,300.

The defendant Keesler, the trustee named in the instrument dated 1 November, 1932, securing the indebtedness of the plaintiff to the corporate defendant, was secretary and treasurer of the corporate defendant in charge of personnel of its office. As such it was his business to handle savings and make loans and he was the active officer in charge of its business. He conducted the sale, as trustee, and entered the bid at the sale for the corporate defendant. At the time he had in his possession the following written memorandum made out in his own handwriting but signed by the assistant secretary, to wit:

"MEMO
MUTUAL B. & L. ASSOCIATION
119 East Third Street
Charlotte, N. C.
5/4/36
E. Y. Keesler, Trustee

This is to be considered our bids as indicated for properties to be foreclosed by you this day:

Delane, Preston & Ross	900 to 1155
" " "	900 to 1155
Mrs. Alice Hutchinson	490 to 523
J. W. Mills	1870
W. B. Webster	2000 to 2650

Mutual B. & L. Ass'n.
by G. Meb Long, Asst. Secy."

The corporate defendant having conveyed the property formerly belonging to the plaintiff to an innocent purchaser, the plaintiff instituted this action to recover rents and profits received, or which should have been received, by the defendants from the date of the foreclosure sale to the date of the conveyance to Wood, during which time the defendants were in possession thereof, and for damages for the wrongful conversion of his equity in said land.

At the conclusion of the plaintiff's evidence in chief, on motion of the defendants, the court below entered judgment dismissing the action as of nonsuit. Plaintiff excepted and appealed.

Thaddeus A. Adams and J. Louis Carter for plaintiff, appellant.
H. L. Taylor and Chas. Brenizer for defendants, appellees.

BARNHILL, J. The instrument the plaintiff executed to secure the indebtedness to the corporate defendant contained the following provisions: "It being distinctly understood and agreed by the parties hereto

that in the event of default in compliance with the terms hereof for a period of thirty days that the party of the second part shall be entitled to enter into possession of said lands for the purpose of collecting the rents and profits arising therefrom and applying the same upon the debts hereby secured, and he is hereby authorized and empowered so to do without formality or process of law. But if the said party of the first part shall make default in the payment . . . or shall make default in any of the aforesaid stipulations . . . then, and in such event, the said E. Y. Keesler shall have the right, and it shall be his duty when requested by the party of the third part, to immediately enter upon and take possession of said premises hereby conveyed and sell the same at public auction, etc."

The plaintiff contends that the provision permitting the grantee to take possession upon default makes the taking of possession a condition precedent to the right to foreclose. This contention cannot be sustained. Upon default of the mortgagor the mortgagee is entitled to possession. *Weathersbee v. Goodwin,* 175 N. C., 234, 95 S. E., 491; *Montague v. Thorpe,* 196 N. C., 163, 144 S. E., 691. The declaration of this right in the instrument does not preclude foreclosure prior to entry and assumption of possession. We do not consider the Massachusetts cases cited by plaintiff binding on us under the laws of this State.

Originally there could be no foreclosure of a mortgage except through a suit in equity. "The idea of allowing the mortgagee to foreclose the equity of redemption by a sale made by himself, instead of a decree for foreclosure and a sale made under the order of the court, was yielded to after great hesitation, on the ground that in a plain case when the mortgage debt was agreed on and nothing else was to be done except to sell the land, it would be a useless expense to force the parties to come into equity when there were no equities to be adjusted, and the mortgagor might be reasonably assumed to have agreed to let a sale be made after he should be in default." *Kornegay v. Spicer,* 76 N. C., 95; *Eubanks v. Becton,* 158 N. C., 230, 73 S. E., 1009.

The right of the mortgagee to foreclose a power of sale contained in the instrument is now generally accepted. However, as there are many opportunities for oppression in the enforcement of such power, courts of equity are still disposed to scrutinize the exercise thereof for the protection of the mortgagor. *Eubanks v. Becton, supra.* This right, now, as in the beginning, must be exercised under well recognized restrictions. A mortgagee may not purchase at his own sale; if he does so, he does not acquire an absolute estate. The sale does not alter the relation of mortgagor and mortgagee existing between the parties. *Whitehead v. Hellen,* 76 N. C., 99; *Shew v. Call,* 119 N. C., 450; *McLeod v. Bullard,* 84 N. C., 531; *Howell v. Pool,* 92 N. C., 450; *Dunn v. Oettinger Bros.,*

148 N. C., 276; *Rich v. Morisey,* 149 N. C., 37. Such sale is voidable at the election of the mortgagor. *Joyner v. Farmer,* 78 N. C., 196; *Gibson v. Barbour,* 100 N. C., 192; *Rich v. Morisey, supra; Owens v. Mfg. Co.,* 168 N. C., 397, 84 S. E., 389; and may be disavowed by the mortgagor. *Austin v. Stewart,* 126 N. C., 525. While the mortgagee, upon default, is entitled to possession as against the mortgagor, *Weathersbee v. Goodwin, supra; Montague v. Thorpe, supra;* he is responsible to the mortgagor for rents and for all acts and omissions as a tenant, the mortgagor being entitled to credit on the mortgage debt for rents, profits and damages; *Morrison v. McLeod,* 37 N. C., 108; *Green v. Rodman,* 150 N. C., 176, 63 S. E., 732; and when the mortgagee has purchased at his own sale and then reconveyed the property to an innocent purchaser the mortgagor may elect to disavow the foreclosure sale and recover damages for the wrongful conversion of his equity of redemption. *Warren v. Susman,* 168 N. C., 457, 84 S. E., 760; *Davis v. Doggett,* 212 N. C., 589, 194 S. E., 288.

In the enforcement of these restrictions by courts of equity it has now become well established that although mortgages with power of sale are not looked upon with as much disfavor as they once were, still, courts of equitable jurisdiction will guard the rights of the mortgagor with jealous care and the rule generally prevails that a mortgagee with power to sell is a trustee, and, as such, is not allowed to purchase at his own sale so as to render the sale binding or cut off the equity of redemption. A mortgagee cannot be both vendor and purchaser, and if he purchases at his own sale, he is still a trustee for the mortgagor. It is not of moment that in purchasing he was wholly innocent and free of fraud. 19 R. C. L., Mtges., sec. 425. It is the opportunity for oppression that such conduct presents which invokes the equitable prohibition. *Davis v. Doggett, supra.*

That it is inequitable to permit a mortgagee to purchase the mortgagor's equity of redemption apparently was first declared (inferentially) by this Court in *Lee v. Pearce,* 68 N. C., 76, and in express terms in *Whitehead v. Hellen, supra.* The principle was fully discussed and reaffirmed in *McLeod v. Bullard, supra.*

The restrictions upon the creditor in respect to the security when the conveyance was made directly to him in the form of a mortgage brought about the creation of deeds of trust as a more acceptable form of conveying real property for security. This form of security has now come into general and, in some instances, universal use. Pomeroy Eq. Jur., sec. 995; *Reynolds v. Waterville,* 92 Me., 292, 42 Atl., 553. When a sale is had under power in this form of security the creditor may bid at the sale, *McLawhorn v. Harris,* 156 N. C., 107, 72 S. E., 211; *Hayes v. Pace,* 162 N. C., 288, 78 S. E., 290, 37 L. R. A. (N. S.), 831, for, by

the intervention of a disinterested third party, the opportunity for oppression is removed.

The object of deeds of trust is, by means of the introduction of trustees as impartial agents of the creditor and debtor alike, to provide a convenient, cheap and speedy mode of satisfying debts on default of payment; to assure fair dealing and eliminate the opportunity for oppression; to remove the necessity of the intervention of the courts; and to facilitate the transfer of the note or notes secured without the necessity for a similar transfer of the security.

The relaxation of the strict rules equity imposes upon the mortgagor in relation to deeds of trust is predicated upon the theory that the trustee is a distinterested third party acting as agent both of the debtor and of the creditor, thus removing any opportunity for oppression by the creditor and assuring fair treatment to the debtor. He is trustee for both debtor and creditor with respect to the property conveyed. A creditor can exercise no power over his debtor with respect to such property because of its conveyance to the trustee with power to sell upon default of the debtor. *Simpson v. Fry,* 194 N. C., 623, 140 S. E., 295; *Woodcock v. Merrimon,* 122 N. C., 731; *Hinton v. West,* 207 N. C., 708, 178 S. E., 365.

The trustee for sale is bound by his office to bring the estate to a sale under every possible advantage to the debtor as well as to the creditor. *Johnston v. Eason,* 38 N. C., 330, and he is bound to use not only good faith but also every requisite degree of diligence in conducting the sale and to attend equally to the interest of the debtor and the creditor alike, apprising both of the intention of selling, that each may take the means to procure an advantageous sale. *Anon. case,* 6 Mad., 10; *Johnston v. Eason, supra.* He is charged with the duty of fidelity as well as impartiality, of good faith and every requisite degree of diligence, of making due advertisement and giving due notice. *Hinton v. Pritchard,* 120 N. C., 1; *Davenport v. Vaughn,* 193 N. C., 646, 137 S. E., 714; *Chas. Green Real Est. Co. v. St. Louis Mut. House Bldg. Co.,* 196 Mo., 358, 93 S. W., 1111. Upon default his duties are rendered responsible, critical and active and he is required to act discreetly, as well as judiciously, in making the best use of the security for the protection of the beneficiaries. *Maryland v. Farmers Loan & Trust Co.,* 24 Hun. (N. Y.), 297.

In the present case the grantee in the deed of trust is the secretary-treasurer, manager and chief active executive officer in charge of the personnel of the corporate defendant, the creditor whose debt is secured. As such he negotiated the loan; it was his duty to make collections; upon default it was for him to direct a sale of the security; it was to him the debtor was required to go to seek indulgence in respect to the debt, or a

delay in the date of sale; and it was for him, in case of foreclosure, to either make or direct the advertisement and sale. Upon sale under foreclosure it was his duty to execute the deed of foreclosure. Should the corporation desire to purchase at the foreclosure sale it was for him to ascertain and determine the balance due on the debt and the amount to be bid at the sale (and this he undertook to do).

These duties devolved upon him whether the instrument was executed to him, as trustee, or to the corporation in the form of a mortgage.

The evidence in this record indicates that the trustee, in fact, acted both for himself, as trustee, and for the creditor, as its chief executive officer. He, as the chief executive officer, demanded of himself, as trustee, that the property be foreclosed. As trustee, he advertised and sold. As manager of the creditor, he determined the amount to be bid and directed himself, as trustee, to place a bid in that amount. Then, as trustee, he placed the bid for the creditor and made the sale thereon. Prior to the sale he prepared a memorandum in his own handwriting, which was signed by his subordinate, at his direction, authorizing bids at five separate foreclosure sales to be made on the same date. As to four of these he gave himself discretion to bid from a minimum to a maximum amount. While the written memorandum designates only one amount to be bid at the foreclosure of the instrument under consideration, it cannot be gainsaid that if he had the authority to vest in himself discretionary power prior to the sale, he possessed that same discretion at the sale so that he could have bid more if he deemed it wise to do so.

The personality of the trustee, as such, and as the chief executive officer of the creditor cannot be separated. His duties are dual and inconsistent. He does not and cannot occupy that position of disinterested impartiality which is the foundation stone on which the distinction in the law relating to deeds of trust and mortgages rests. The opportunity for oppression is present with as much potency as when the creditor is the grantee and the instrument is in the form of a mortgage.

Equity regards substance not form and is not bound by names parties may give transactions. *Shoemaker v. Eastern Bank & Trust Co.*, 52 Fed. (2nd), 925; *Moring v. Privott*, 146 N. C., 558; *Whitehead v. Hellen, supra.* A court of equity seeking to do justice among all parties looks at the spirit and not the form of the transactions. *Trust Co. v. Spencer*, 193 N. C., 745, 138 S. E., 124; *Hinton v. West, supra.* "It regards corporate organization objectively and realistically, unencumbered by fictions of corporate identity, and thus, brushing aside form, deals with substance. 1 Fletcher Cyc. Corp., Ferm. Ed., sec. 45." *Unemployment Compensation Commission v. Coal Co., ante*, 6. Having regard for these principles, under the facts of this case, we are led irre-

sistibly to the conclusion that an instrument—in form a deed of trust—executed to the chief active executive officer of a corporation, to secure a debt to the corporation is, in effect, a mortgage, and the law relating to the foreclosure of mortgage deeds rather than the law relating to trust deeds is applicable.

In this conclusion there is no suggestion of wrongdoing on the part of anyone. We merely determine the law to be applied to the facts of this case.

The exception of the plaintiff to the judgment dismissing the action as of nonsuit must be sustained.

Reversed.

STACY, C. J., concurs in the reversal of the nonsuit, but is not prepared to say that the executive officer of a corporation, though actively in charge of its business, is perforce the corporation, or that a corporation may not maintain its identity separate and apart from its active executive officer for the purposes here considered. It is possible that the security of a number of titles is dependent upon this distinction, with the public registry silent on the point because not heretofore questioned. Each case should stand on its own base.

CLARKSON, J., concurring: On the facts in the case I concur in the result that the sale under the circumstances was voidable. I think there should be a trial and a jury should determine as to whether or not the plaintiff was estopped by his conduct to make the contention he now does. The defendant set up the plea of estoppel. Par. 17 of the answer is as follows:

Though plaintiff knew of said sale for such long period of time he allowed the defendant corporation to bear the burden during such period of paying such taxes and repairs without an effort to redeem or buy back the property except the overture to buy it back hereinbefore set forth. The plaintiff, if he had any right to redeem said property or to make any claim for damages on account of the defendant corporation's sale thereof, which defendants deny, has by his actions as aforesaid waived and forfeited such rights and by his conduct as alleged herein is estopped to contest the validity of said public sale made by said trustee to the defendant corporation or the deed executed by the trustee to said defendant corporation in pursuance of such sale or to claim damages on account of the sale of said property by defendant corporation; and defendants plead such waiver and estoppel as a complete bar to plaintiff's action.

The facts are borne out by the record and stated by the defendant as follows:

Corporate defendant is a building and loan association chartered in 1881, organized under the laws of North Carolina with the powers provided by law, N. C. Code, 5170-5193. The individual defendant is the duly elected secretary and treasurer of corporate defendant and is a member of its board of directors, loan committee and executive committee. He was trustee in the deed of trust upon which this action arises. The plaintiff is an engineer of 20 years experience with the State Highway and Public Works Commission, receiving a salary of $325.00 per month.

The deed of trust in question is dated 1 November, 1932, and secures the payment of $2,100.00 in the 137th class of stock of corporate defendant. Plaintiff's pass-book designates weekly payments of principal $5.25, interest $2.43, total $7.68. The deed of trust was in the usual form of deeds of trust to secure such loans with power of sale in case of default in payment of weekly interest on loan, weekly installments on stock pledged, taxes or assessments as they become due besides mentioning other defaults. In such case "the said E. Y. Keesler shall have the right, and it shall be his duty when requested by the party of the third part, to immediately enter upon and take possession of the premises hereby conveyed and sell the same at public auction" after due notice.

Plaintiff, according to his own evidence, was seriously in default: In December, 1933, 25 weeks in installments and interest; 31 December, 1934, 70 weeks, not over seven payments having been made in a year; 31 December, 1935, 73 weeks, about $500.00; no payments at all were made after 9 November, 1935, the sale being made 4 May, 1936, when he was $702.54, or approximately 90 payments, behind; besides, he was in default 4 years in taxes and one in street assessments, a total arrearage at the time of sale of $962.82. Part of the time plaintiff collected the rents, but did not pay them to the association. Because of plaintiff's default, his property was advertised and sold by the trustee under the terms of the deed of trust on 4 May, 1936.

At the foreclosure sale on 4 May, 1936, corporate defendant, through its assistant secretary, made a written bid of $1,870.00, which was the amount of the indebtedness secured by deed of trust and costs of sale, filed with individual defendant as trustee, and this was the high bid at sale. The bid was reported to the clerk 4 May, 1936, and at that time the trustee made the marginal entry requesting bond for increase of bid. The trustee's deed to corporate defendant is dated 16 May, 1936, and acknowledged by the trustee before a notary public employed by corporate defendant as a clerk who was a stockholder in and borrower from corporate defendant. Three months after the sale and 9 months after any payment had been made by plaintiff, he first appeared at the office of the association to "see what arrangements could be made," and to

inquire whether if corporate defendant sold the property at a profit it would give him the benefit of the profit and if it would convey the property back to him and how much cash would be required in such case. E. Y. Keesler, the secretary and treasurer, said he would be glad to "go into the matter." Within a few days Mr. Keesler wrote him as follows:

"I have taken up with our loan committee the question of 'selling back' to you your former house on Thomas Avenue this city. . . . Although under no obligation to you, yet our committee is willing to *'deed the property back'* to you at our investment and carry a loan on it in the sum of $2,000.00. . . . We will hold the proposition open until August 31st."

Plaintiff received the letter in due course of mail but "after August 20, 1936, did nothing . . . until February, 1939," when he employed a lawyer.

The defendant thereafter held the property without sale until October, 1937, one year and 2 months, when it contracted to sell, completing sale October, 1938, 2 years and 2 months after writing plaintiff it would "sell back" the property without response from plaintiff. The plaintiff for the first time in February, 1939, through his counsel, notified the defendant that he made the objections to the sale under the deed of trust mentioned in the plaintiff's complaint and his brief. It was then 3¼ years from the date of plaintiff's last payment to defendant association and 7 years since he had paid taxes on the property involved.

In *Joyner v. Farmer,* 78 N. C., 196 (199), it is held: "The sale by the mortgagee is not void, but only voidable, and can be avoided only by the mortgagor or his heirs or assigns. Washburn, *ante.* The estate of the mortgagee acquired by the sale, being voidable only, may be confirmed by any of the means by which an owner of a right of action in equity may part with it. (1) By a release under seal, as to which nothing need be said. (2) Such conduct as would make his assertion of his right fraudulent against the mortgagee, or against third persons, and which would therefore operate as an estoppel against its assertion. (3) Long acquiescence after full knowledge, and probably this method may be classed with the second, unless it has continued for so long a time that a statute of limitations operates, or there is a presumption of a release. Washburn, *ante;* 8 Rich. Eq., 112; 4 Minn., 25; 16 Md., 508; Lewin on Trusts, 651. What length of time would suffice for such a purpose is left uncertain upon the authorities. White's Leading Cases in Eq., 158-168; *Mitchell v. Berry,* 1 Metc. (Ky.), 602; *Jenison v. Hogford,* 7 Pick., 1. Perhaps it may be that the statute of limitations of three years on a parol promise may furnish the proper rule." *Lockridge v. Smith,* 206 N. C., 174; *Shuford v. Bank,* 207 N. C., 428; *Council v. Land Bank,* 213 N. C., 329; *Smith v. Land Bank,* 213 N. C., 343.

The record discloses that the defendant building and loan association has been in existence for nearly 60 years. It is a matter of common knowledge that by its careful, fine and efficient management it has weathered every storm in all these years, including the deflated years, and done more than any other single agency to make Charlotte a city of homeowners. It has loaned millions and millions of dollars and never lost a cent, as has the Mechanics Perpetual Building and Loan Association of that city. Since the organization of these building and loan associations, there are selected by the stockholders each year twelve directors who are business and professional men of the highest type *who serve without pay.* To be a going concern it is absolutely necessary to have its borrowers conform to its by-laws as to prompt payment. In the present case, from the record, defendant corporation, through its officers, was perhaps too lenient to plaintiff. Plaintiff's last payment to the defendant building and loan association was 3¼ years and was 7 years in arrears in taxes. There is plenary evidence of estoppel which should be submitted to a jury.

MRS. IRENE ROBINSON v. L. F. McALHANEY.

(Filed 3 January, 1940.)

1. Courts § 2a—

The jurisdiction of the Superior Court on an appeal from a general county court is an appellate jurisdiction limited to matters of law only which are properly presented by errors assigned, and the Superior Court may either affirm or modify the judgment of the general county court or remand the cause for a new trial.

2. Appeal and Error § 2—

An appeal will lie to the Supreme Court from a judgment of the Superior Court entered on an appeal from a general county court, Public Laws of 1923, chapter 216, as amended by Public Laws of 1933, chapter 109 (Michie's Code, 1608 [cc]).

3. Appeal and Error § 6c: Judgments § 22i—

On appeal to the Superior Court from the general county court the Superior Court affirmed the verdict on one of the issues. *Held:* If plaintiff deemed that the judgment of the Superior Court in this respect was error, her sole remedy was by exception and appeal to the Supreme Court, and if she deems there is error in the decision of the Supreme Court, her sole remedy is by application for a rehearing.

4. Appeal and Error § 49a—The decision of the Supreme Court on appeal becomes the law of the case both in subsequent proceedings in the trial court and upon subsequent appeal.

The Superior Court on appeal from a general county court entered judgment granting a new trial on two of the issues relating to damages and

affirmed the verdict on all other issues, which included an issue relating to damages answered in favor of defendant. The judgment of the Superior Court was affirmed on appeal to the Supreme Court. *Held:* The judgment of the Supreme Court becomes the law of the case both in subsequent proceedings in the trial court and upon subsequent appeal, and it was error for the county court upon the subsequent trial to permit the jury to consider elements of damages embraced in the issue theretofore adjudicated in defendant's favor.

5. Master and Servant § 7c—In employee's suit for breach of contract, damages should be limited to those accrued on date of institution of action.

Plaintiff alleged that defendant authorized her to procure a lease on a certain tourist home and have sole charge of the operation of it for a period of five years, plaintiff to be paid a percentage of the gross receipts for her services. Plaintiff instituted this action for breach of contract before the termination of the five-year period. *Held:* Plaintiff's recovery should be limited to the damages accrued at the time of the institution of the action, and the action of the trial court in permitting the jury to compute damages on the basis of the compensation plaintiff would have received for the entire five-year period, while limiting the deduction of the amount plaintiff earned, or could have earned in other employment in the exercise of due diligence, from the date of the breach to the date of the institution of the action, is error.

APPEAL by plaintiff from *Pless, J.*, at June Term, 1939, of BUNCOMBE.

Civil action instituted 8 July, 1937, in general county court of Buncombe County, for recovery of damages for breach of contract.

The case came to this Court on former appeal from a judgment at the April Term, 1938, of the Superior Court of Buncombe County, on appeal thereto by defendant from judgment on verdict of the jury in general county court of said county. 214 N. C., 263, 199 S. E., 26.

The terms of the contract sued upon and established by the verdict, briefly stated, are these: That in February, 1936, it was agreed between plaintiff and defendant that if she would procure a lease on tourist home owned by H. L. Lambert and consisting of store, restaurant, rooms and cabins, located at the entrance of Great Smoky Mountain Park above the Cherokee Indian School in Swain County, and give to the defendant the benefit of her experience and good will in the community, and her knowledge of trading with the Indians, he would finance the entire proposition, furnish the necessary funds for the payment of rents, purchase of Indian craft, and all expenses incidental to such business, and provide for plaintiff and her two daughters board and lodging on the premises, and allow her three and one-half per cent of the gross receipts of the business—she to manage the business, be in full, complete and sole charge of the premises; that she obtained a five-year lease for defendant to become effective on 1 April, 1936, and that she remained upon the

premises and complied with the terms of the agreement until 1 June, 1936, during which period the defendant breached the contract in numerous respects.

Adverting to the former appeal, it will be noted that after considering and ruling upon each of the various exceptions then assigned as error, the judge of the Superior Court sustained the verdict (a) on the first and second issues, which established the contract and the breach of it, and (b) on the fourth issue: "What amount, if any, is plaintiff entitled to recover of defendant on account of board for herself and two daughters, as alleged in the complaint? Answer: 'None.'" But the court set aside the verdict on the third, fifth and sixth issues.

In judgment then signed it is stated that the verdict on the fourth issue "shall not be set aside, but shall remain in full force and effect as the verdict of the jury, for that there was no reversible error committed in the trial relating to said issue, and for the further reason that said issue was answered against the plaintiff, and the plaintiff has not appealed to this Court, and the defendant does not ask that the answer to said issue be set aside."

It further appears that the court ordered "that judgment of the general county court be set aside and the case be remanded thereto for new trial upon only two issues, the fifth and sixth, as follows:

"5. What amount has plaintiff obtained by way of compensation from other employment subsequent to the breach of the contract prior to the 8th day of July, 1937," and "6. What damage, if any, is plaintiff entitled to recover of defendant?"

This judgment of the Superior Court was affirmed on the appeal to this Court.

On re-trial in the general county court the case was submitted to the jury on the said issues as directed. To the issue, "What damage, if any, is plaintiff entitled to recover?" the jury answered: "$4,000," and to the other issue "$400." Thereupon the court entered judgment in favor of the plaintiff for $3,600.

In the course of the second trial, on being cross-examined with reference to her testimony as a witness on former trial, plaintiff testified: "I think I made some statement to that effect then that three and one-half per cent I was to receive from the gross income was to be paid monthly, but it was not definitely agreed as to how it was to be paid. I was to have money any time I needed it, daily, weekly, monthly, any time I needed money I was to take it." Then upon being asked if she did not swear on the former trial that the three and one-half per cent was to be paid monthly, she replied: "That is something near right, with the exception I was not asked anything about putting anything back into the business at that time. That was thoroughly discussed.

We thoroughly discussed it, that we would allow as much to go back into the business as we could possibly do without. In addition to that I testified each month as the business went along he was to pay me three and a half per cent of the gross business shown each month, and that he was to board and furnish room for me and my two children. . . . That is what I said the contract was. I have not changed the contract with Mr. McAlhaney since I was on the stand before. It is just exactly what it was before."

The defendant, having preserved two hundred and fourteen exceptions, appealed to the Superior Court of Buncombe County. In judgment of Superior Court on such appeal the presiding judge, after reviewing the history of the case following the first trial in general county court, and prior to the second trial, states that: "Upon the second trial in the county court, the jury was permitted to take into consideration the value of the board and lodging for plaintiff and her two daughters in answering the issue as to damage, and the position of plaintiff was that she was entitled to recover damages for the breach of the contract for the entire five-year period of the lease in question, and that she was thereby not limited in her recovery to the percentage due her under the contract to the date of the institution of the action; yet the court, while it adopted this theory of the plaintiff, at the same time submitted an issue as to the amount the plaintiff had obtained by way of compensation from other employment and limited it to the period between the date of the breach of the contract and the date of the issuing of summons.

"Upon the argument of the appeal before the Superior Court counsel for the plaintiff stated that the contract between the plaintiff and defendant is not one of partnership, but is one of employment.

"Upon due consideration, the court is of the opinion, in the first place, that the instructions upon the issues submitted were repugnant to each other; and, in the second place, that the court was in error in permitting the plaintiff to recover damages for the period subsequent to the institution of the action, to wit: July 8, 1937, it being the opinion of the court that the plaintiff was limited as a matter of law to such damages as she might establish prior to said date.

"The court, in entering this judgment, does not make any adjudication with regard to the rights of the parties subsequent to the date of the issuing of the summons."

Thereupon the judge ruled upon each of the exceptions assigned, and, after sustaining seventy-one of them, entered judgment (a) that the verdict on the first issue, to wit: "What damage, if any, is plaintiff entitled to recover of defendant? Answer: $4,000," shall be set aside for errors committed by the trial court in the trial of the cause as covered by the exceptions set out in the judgment; (b) that the verdict on the

second issue, to wit: "What amount had plaintiff obtained by way of other employment subsequent to the breach of the contract, and prior to the 8th day of July, 1937? Answer: $400 shall not be set aside, but shall remain in full force and effect as the verdict of the jury, for that there was no reversible error committed in the trial relating to the submission of said issue, and for the further reason that said issue was answered against plaintiff, and plaintiff has not appealed to this court, and defendant has not asked that the answer to this issue be set aside."

Thereupon the court ordered the case to be remanded to the general county court for a new trial "in conformity with this judgment on one issue, namely: 'What damage, if any, is the plaintiff entitled to recover of defendant in conformity with the judgment of this court?'"

Plaintiff appeals therefrom to the Supreme Court, and assigns error.

Irwin Monk and Weaver & Miller for plaintiff, appellant.

Dan K. Moore, B. C. Jones, and Jones, Ward & Jones for defendant, appellee.

WINBORNE, J. In the main these two questions present the assignments of error debated on this appeal:

1. Where on defendant's appeal thereto from judgment of general county court the Superior Court sustains the verdict on one, and sets aside the verdict, and orders a new trial on the other of two issues with respect to separable elements of damage for breach of contract submitted to and answered by the jury in favor of plaintiff in general county court, and the judgment of Superior Court is affirmed on appeal to Supreme Court, is the judgment *res judicata* of the matters to which the issue, on which the verdict is sustained, relates?

2. Where plaintiff, who has contract of employment for a period of five years at compensation payable in installments, institutes an action for the recovery of damages for breach of such contract before the expiration of the period of time covered thereby, is the recovery limited to damages to date of institution of action?

We are of opinion and hold that these questions are properly answered in the affirmative.

1. The first question, predicated upon a group of assignments of error, is succinctly raised by the ruling of the judge of Superior Court in sustaining exception by defendant to the refusal of general county court to instruct the jury, as requested, "that in considering what damages, if any, the plaintiff is entitled to, it will not take into consideration any damages for board and lodging for the plaintiff and her two daughters for the reason that it has heretofore been determined in this action by a jury verdict that the plaintiff was not entitled to recover therefor."

This request for instruction is based upon the judgment of the Superior Court sustaining the verdict on the fourth issue in former appeal from the general county court.

The Superior Court, as it relates to this action, is a court of appellate jurisdiction of all appeals from the general county court for errors assigned in matters of law only, and may either affirm or modify the judgment of the general county court or remand the cause for a new trial. From the judgment of the Superior Court an appeal may be taken to the Supreme Court, as is provided by law. Public Laws 1923, ch. 216, sec. 18, incorporated in Michie's Code of 1935, as sec. 1608 (cc), as amended by Public Laws 1933, ch. 109. See *Jenkins v. Castelloe,* 208 N. C., 406, 181 S. E., 266; *Smith v. Winston-Salem,* 189 N. C., 178, 126 S. E., 514; *Davis v. Wallace,* 190 N. C., 543, 130 S. E., 176.

"A decision by the Supreme Court on a prior appeal constitutes the law of the case, both in subsequent proceedings in the trial court and on a subsequent appeal;"—headnote epitomizing decision in *Harrington v. Rawls,* 136 N. C., 65, 48 S. E., 57, cited in numerous decisions of this Court, among which are these: *Nobles v. Davenport,* 185 N. C., 162, 116 S. E., 407; *Ray v. Veneer Co.,* 188 N. C., 414, 124 S. E., 756; *Strunks v. R. R.,* 188 N. C., 567, 125 S. E., 182; *Davis v. Lumber Co.,* 190 N. C., 873, 130 S. E., 156; *Mfg. Co. v. Hodgins,* 192 N. C., 577, 135 S. E., 466; *Moses v. Morganton,* 195 N. C., 92, 141 S. E., 484; *Mayo v. Comrs.,* 196 N. C., 15, 144 S. E., 925; *Ingle v. Green,* 199 N. C., 149, 154 S. E., 83; *S. c.,* 202 N. C., 116, 162 S. E., 476; *Masten v. Texas Co.,* 204 N. C., 569, 169 S. E., 142; *Power Co. v. Yount,* 208 N. C., 182, 179 S. E., 804; *Betts v. Jones,* 208 N. C., 410, 181 S. E., 334; *Ferrell v. Ins. Co.,* 208 N. C., 420, 181 S. E., 327; *Groome v. Statesville,* 208 N. C., 815, 182 S. E., 657; *Dixson v. Realty Co.,* 209 N. C., 354, 183 S. E., 382; *McGraw v. R. R.,* 209 N. C., 432, 184 S. E., 31; *Stanback v. Haywood,* 213 N. C., 535, 196 S. E., 844.

If on the first trial in the present action plaintiff considered that her rights would be prejudiced by the submission of a separate issue with respect to her claim for damages for board for herself and two children, she should have objected and preserved exception to the submission of it and appealed. But having failed to so object and appeal, if there were error in the judgment of the Superior Court in sustaining the verdict on the fourth issue, the remedy then opened to plaintiff was by exception and appeal to the Supreme Court. Then, if there were error in the decision of the Supreme Court, the remedy was solely by application for a rehearing to correct such error. Failing in or to do this, the judgment is *res judicata* and binding in subsequent proceedings in the trial court and on subsequent appeals.

Reference, however, to the record and to brief of plaintiff on the former appeal reveals that while exception is taken to the judgment, it is referred to as formal, and the ruling of the judge below in sustaining the verdict on the fourth issue is not pressed for error.

2. The second question, likewise founded upon series of assignments of error, is raised in summary by the rulings of the judge of Superior Court in sustaining defendant's exceptions to the refusal of the general county court to instruct the jury as requested in these two special instructions: (a) "That when the plaintiff and defendant entered into the contract as set out in the complaint that they agreed upon what amount the plaintiff should receive for her services or her work in connection with said business, so the court charges the jury that in considering the question of damages it cannot allow anything in excess of 3½% on the gross receipts which were received in said business, or which would have been received had the plaintiff and defendant continued to operate under the contract as originally entered into, up to and including July 8, 1937, the date on which this action was instituted;" and further, (b) "that the value of the contract to the plaintiff was the sum that she could reasonably expect to obtain from it after the contract was entered into, and the jury cannot, in passing upon any damage, take into consideration any values which it may be contended that the contract had outside of those specified in the contract itself, to wit: 3½% on the gross receipts prior to July 8, 1937."

With respect to the question here presented, plaintiff contends that the contract is for the entire five-year period of the lease in question, and that she is not limited in her recovery to the percentage due her under the contract to the date of the institution of the action. On the other hand, the defendant contends that the contract is one of employment and, while it may be entire, the services are to be paid for by installments at stated intervals, and the plaintiff, having elected to sue before the expiration of the life of the contract, is limited in her recovery of damages to the time of the bringing of the suit.

In accepting the latter view, the court seems to have followed well established law in this State. In *Smith v. Lumber Co.*, 142 N. C., 26, 54 S. E., 788, the Court said: "When the contract is entire and the services are to be paid for by installments at stated intervals, the servant or employee who is wrongfully discharged has the election of four remedies: (1) He may treat the contract as rescinded by the breach, and sue immediately on a *quantum meruit* for the services performed; but in this case he can recover only for the time he actually served. (2) He may sue at once for the breach, in which case he can recover only his damages to the time of bringing suit. (3) He may treat the contract as existing and sue at each period of payment for the salary then due.

(We do not consider the right to proper deduction in this case, as it is not now presented.) (4) He may wait until the end of the contract period, and then sue for the breach, and the measure of damages will be *prima facie* the salary for the portion of the term unexpired when he was discharged, to be diminished by such sum as he has actually earned or might have earned by a reasonable effort to obtain other employment."

In the present case plaintiff has elected to pursue the second remedy and is limited in recovery of damages to date of institution of the action.

We have carefully reviewed and considered all other exceptions assigned as error in the record on this appeal, and find no cause to disturb the judgment of the Superior Court from which the appeal is taken.

Affirmed.

STATE v. J. B. MURRAY AND ARCHIE C. STEPHENS.

(Filed 3 January, 1940.)

1. Criminal Law § 33—

Prior to making the confessions admitted in evidence, defendants were warned of their rights and told by the witness what the matter was about and that it was very serious. *Held:* An exception on the ground that the warning was not sufficient is untenable.

2. Same—

Ordinarily, confessions are to be taken as *prima facie* voluntary and admissible unless the contrary is made to appear, the burden being upon the party against whom the confession is offered to so show.

3. Same—

The fact that a confession is made after arrest to an officer of the law does not in itself render the confession incompetent.

4. Criminal Law §§ 34a, 35—Declaration of conspirator made after termination of conspiracy, in presence of co-conspirator and impliedly assented to by him, is competent against both.

The state's evidence tended to show that defendants conspired to rob deceased, that in the perpetration of the robbery one of them struck the fatal blow, the other being present aiding and abetting. Both defendants made confessions which were practically the same. *Held:* An instruction that declarations made by one defendant in the absence of the other were competent only against the defendant making them, but that the declarations made by defendants in the presence of each other are competent against both, is without error, since, even though the declarations were made after the termination of the conspiracy, the fact that each defendant made substantially identical declarations is an implied assent to the declarations of the other, and since it appeared that each defendant had full opportunity to deny statements made by the other in his presence under circumstances calling for a denial if any of the statements were untrue.

5. Same—

The court permitted the solicitor to read the entire signed statements made by each of the defendants. Defendants objected thereto on the ground that each statement involved the defendant other than the one making the statement. *Held:* It appearing that the entire of each of the statements related to the defendant making it, and that the court instructed the jury that each of the statements was competent only against the defendant making it, the objection is untenable.

6. Homicide § 25—Evidence held sufficient for jury on charge of first degree murder.

Evidence tending to show that defendants conspired and agreed to rob a farmer of the proceeds of tobacco sold by him, that in the perpetration of the robbery one of them struck the fatal blow, the other being present aiding and abetting, *is held* sufficient to be submitted to the jury on the question of the guilt of each defendant of murder in the first degree.

7. Criminal Law § 51—

The action of the trial court in permitting the solicitor to read to the jury written statements made by defendants that had been properly admitted in evidence cannot be held for error when it appears that the court cautioned the jury that each statement was competent only as to the defendant making it.

8. Criminal Law § 53c—

The instruction of the court when read contextually as a whole *held* not to place the burden on each defendant of proving that both defendants were insane at the time the crime was committed, but to properly place the burden on each defendant, respectively, to prove his plea of insanity.

9. Criminal Law § 5c—

A defendant has the burden of proving to the satisfaction of the jury his defense of insanity.

10. Criminal Law § 53a—Where jury requests additional instructions on particular point, the court need not repeat therein instructions on defendants' defense.

In this prosecution for murder committed in the perpetration of a robbery the jury, after it had retired for its deliberations, returned into court, and asked additional instructions as to whether defendants would be guilty of murder in the first degree if the fatal blow had been struck after the robbery had been completed. The court correctly charged them on this point. Defendants objected on the ground that in the additional instructions the court failed to charge on their defense of insanity. *Held:* It was not incumbent on the court to repeat the instructions on defendants' plea of insanity in giving the additional instructions on the particular aspect of the case, and there being no error when the additional instructions are construed with the charge as a whole, the objection is untenable.

11. Criminal Law § 79—

While exceptions not brought forth in defendants' brief are deemed abandoned, nevertheless they may be considered when defendants have been convicted of a capital felony.

STATE *v.* MURRAY.

APPEAL by the defendants from *Sinclair, Emergency Judge,* at Special June Term, 1939, of DURHAM.

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

R. M. Gantt and Bennett & McDonald for defendants, appellants.

SCHENCK, J. The defendants were each convicted of murder in the first degree and from sentence of death appealed to the Supreme Court, assigning errors.

The State's evidence tended to show that on the night of 22 September, 1938, one Alford Marshall Snipes received fatal wounds from which he died three days later; that Snipes was a tobacco farmer and had sold his tobacco at a warehouse in Durham and had a cashier's check for $100.00 in his possession which he had received from the sale of his tobacco; that the defendants worked in and about the warehouse and knew that Snipes had the check; that the defendants planned between themselves to rob Snipes of the check; that after the defendants and Snipes had drunk a pint of whiskey one of the defendants put Snipes on a pallet in a room at the warehouse used for sleeping quarters for farmers selling their tobacco there; that after Snipes had fallen asleep the defendants returned to where he was, and one of them struck him over the head with a bottle and then with a piece of iron, while the other defendant kept watch; that then both of the defendants ransacked the clothing of Snipes and took from him the cashier's check, which they took to the bank and cashed, one defendant getting the money from the cashier while the other waited on the outside of the bank; that the defendants divided the money between them.

The defendants did not testify in their own behalf, but offered evidence tending to show that they, and each of them, were insane at the time the alleged crime was committed, and did not possess mental capacity to understand the consequences of their acts.

We will adopt for the discussion of the exceptive assignments of error the order in which they are brought forward in the appellants' brief.

Exceptions 3, 4, and 5 relate to the warning given to the defendants before they made the confessions offered in evidence by the State. The defendants contend that the warning was not sufficient. With this contention we cannot concur, since it appears from the testimony of the officer by whom the confessions were sought to be proven that he did not offer the defendants any reward or inducements to make the confessions, did not threaten them, and warned them of their rights and said to them, "This is a very serious matter, and I presume you know what it is about. It is about this man that has been hit at the warehouse." Ordinarily,

confessions are to be taken as *prima facie* voluntary and admissible in evidence unless the contrary is shown and the burden is upon the party against whom they are offered to so show. *S. v. Sanders,* 84 N. C., 729; *S. v. Rodman,* 188 N. C., 720. The defendants produced no evidence of involuntariness and no such evidence appeared in that of the State.

Exceptions 11, 12, 13 and 14 relate to his Honor's permitting the witness Featherstone to relate what the defendants said to him, an officer. "Where there is no duress, threat or inducement, and the court found there was none here, the fact that the defendants were under arrest at the time the confessions were made, does not *ipso facto* render them incompetent. *S. v. Newsome,* 195 N. C., 552, 143 S. E., 187; *S. v. Drakeford,* 162 N. C., 667, 78 S. E., 308. 'We are not aware of any decision which holds a confession, otherwise voluntary, inadmissible because of the number of officers present at the time it was made. Nor has the diligence of counsel discovered any.' *S. v. Gray,* 192 N. C., 594, 135 S. E., 535." *S. v. Stefanoff,* 206 N. C., 443.

Exception 17 relates to his Honor's instruction as to the confessions made by the respective defendants as testified to by the witness Featherstone. His Honor instructed the jury that any statement made by the defendant Murray when the defendant Stephens was not present was competent only against Murray, and any statement made by the defendant Stephens when Murray was not present was competent only against Stephens; and that statements made by Murray in Stephens' presence, and statements made by Stephens in Murray's presence, were competent against both defendants. This was a correct instruction under the circumstances of this case, since both defendants had made substantially the same confessions. Declarations of one conspirator or codefendant, although made after the termination of the conspiracy, are competent against another conspirator or codefendant if uttered in his presence and he assented thereto; and the necessary assent may be evidenced by the accused making statements practically the same as those made by his co-conspirator or codefendant. 16 C. J., pp. 658-9, par. 1312. At the time the respective confessions were made in the presence of the other fendant, such other defendant had full opportunity to make denial thereof, and, if untrue, a reply from him might have been properly expected. *S. v. Jackson,* 150 N. C., 831.

Exception 25 relates to his Honor's permitting, over objection, the solicitor to read the signed statements of the defendants for the reason that part of such statements involved the defendant other than the makers thereof. While it is true such statements involved the defendant other than the makers thereof, the entire statements related to the defendants making them, and were therefore as a whole competent against the makers thereof. The court was careful to instruct the jury

that the statements were only competent against the respective makers thereof. This exception cannot be sustained.

Exceptions 31 and 55 are to the court's refusal to sustain the demurrers to the evidence and motions for dismissal lodged under C. S., 4643. These exceptions were properly overruled, since the evidence was amply sufficient to sustain a verdict.

Exception 56 is to the court's permitting the solicitor in his argument to read the written statements signed by the defendants to the jury. These statements had been admitted in evidence and as such it was permissible to read them to the jury. The court, however, was careful to instruct the jury that they were competent only against the makers thereof. This exception is untenable.

Exception 58 is to the following excerpt from the charge: "The jury may find that both the prisoners were sane at the time and knew what they were doing, and understood the nature and quality and consequence of their acts; or they may find that both were insane and did not so know and understand; or that one was insane and the other not insane, the law putting the burden upon the prisoners and each of them to satisfy the jury from all the evidence that they were insane at the time and did not know they were doing wrong, if you find from the evidence beyond a reasonable doubt that they, or either of them, committed the alleged robbery and homicide."

It is the contention of the defendants that the foregoing charge placed the burden upon each defendant of satisfying the jury that both defendants were insane at the time the crime was committed. We cannot concur with this contention. An inspection of the portion of the charge assailed by the exception divulges that it was the intention of the judge to place the burden on each defendant to prove to the satisfaction of the jury that he was insane, and not that both the defendants were insane, and we think this intention was made clear to the jury. The judge plainly charged the jury that they might find that one of the defendants was insane and the other was not. We are of the opinion, and so hold, that the portion of the charge assailed when read contextually in the light of the entire charge was free from prejudicial error.

The charge as to the burden of proof placed upon the defendants when they interposed a plea of insanity was in accord with the decisions of this Court. *S. v. Jones,* 191 N. C., 753; *S. v. Jones,* 203 N. C., 374; *S. v. Stafford,* 203 N. C., 601.

Exception 60 relates to instructions given by the court in response to a request for further instructions made by the jury after they had deliberated for several hours. The record is as follows: "Shortly after 12 o'clock the jury returned to the courtroom and the following proceedings were had: The Court: Gentlemen, you have not agreed upon your

verdict? Juror: We have not. The Court: Is there anything I could do to help you? Juror: What we want to know is if the man was hit in the act of robbery or after he had already robbed him, what we want to know is if it makes any difference whether the blow that killed him was in the act of robbery or after the robbery was committed?

"The court charged as follows: If the blow was struck at any time from the beginning of the proceeding of robbing him until after he had been robbed, during the entire proceeding and that blow resulted in his death, then the defendants would be guilty of murder in the first degree. As I have told you, you are the judges of the evidence and you must rely upon your recollection of the evidence and not mine. My recollection of the evidence was to the effect that the defendants went to the room where this man was sleeping; that there was something said about robbing him of his tobacco check; one of the men struck him in the head with a deadly weapon, some instrument, which resulted in his death, and after striking him in the head the man rose up and said, 'Hey, is that you?' and that afterwards there was some evidence, as my recollection has it, he struck him with some other weapon and that after he was struck one or more of the defendants ran their hands in his pockets, one of the defendants running his hand in one pocket and not finding the check and the other defendant running his hand in the other pocket, the left pocket, and finding the check. If you find beyond a reasonable doubt that those are the facts and that the blow or those blows resulted in the death of the deceased during the perpetration or attempted perpetration of a robbery, it makes no difference at exactly what moment the robbery occurred, the defendants or anyone acting with them would be guilty of murder in the first degree."

The defendants complain that this, which they term a "second charge," fails to set out the main defense of the defendants and is in effect "a peremptory instruction to find the defendants guilty of murder in the first degree." We cannot adopt the position taken by the defendants. What the judge told the jury was in response to a particular question propounded by the jury to the court—a request for instruction upon a particular phase of the case. When the question had been answered, or the request complied with, there was no further obligation upon the court, no necessity to again present the contentions of the defendants as to insanity, etc., which contentions had already been fully and impartially presented to the jury in the charge in chief. What was said by the judge in response to the request for further instructions upon a particular phase of the case must be considered in connection with the charge as a whole, and when so considered there appears to be no error.

Exceptions 61, 62 and 63 relate to the court's refusal to arrest judgment, refusal to set aside the verdict, and to pronouncing the judgments

of death. These exceptions are untenable, and further discussion thereof is rendered unnecessary by what had been said relative to the other exceptions in the record.

We have given consideration to each exception set out in the appellants' brief, and notwithstanding that those exceptions appearing in the record and not so set out are taken to be abandoned, Rule 28, we have, in view of the seriousness of the issue involved, considered them also, and we find no prejudicial error.

The homicide, except by the plea of not guilty, was practically undenied. The defense interposed on behalf of the prisoners was that of mental irresponsibility or insanity. The evidence tending to support this plea was submitted to the jury and rejected or found to be unsatisfactory. The confessions made by the defendants were found by the learned and impartial judge to have been voluntarily made. The evidence amply supports the verdict, carrying, as it does under the Constitution and statute law of our State, the death penalty.

The judgments of the Superior Court must be affirmed, since on the record we find

No error.

HIRAM P. WHITACRE, ADMINISTRATOR OF THE ESTATE OF BENNIE HAIGLER, v. CITY OF CHARLOTTE, A MUNICIPAL CORPORATION.

(Filed 3 January, 1940.)

1. Dedication § 1: Easements § 3—

An allegation of permissive user by the public of a path across private land within the corporate limits of a municipality and the construction by the municipality of a bridge across a creek on the land for the convenience of those using the path, is insufficient to show that the public had acquired title of the way as against the owner of the land either by adverse user or implied dedication.

2. Municipal Corporations § 14—

The duty of a municipality to maintain its streets in proper repair and reasonably safe condition applies as well to bridges under its control used by the public for the purpose of travel.

3. Pleadings § 20—

A demurrer not only admits the specific facts alleged in the complaint but also relevant inferences of fact necessarily deducible therefrom.

4. Municipal Corporations § 14—Fact that bridge is constructed on private lands does not relieve municipality of liability when it exercises control thereover and by acts invites public to use same as a public way.

In this action against a municipality, the complaint alleged in substance that the public, by permission of the owner, used a path across private

lands within the corporate limits as a short cut between two city streets, that the public used stepping stones in crossing a creek on the lands until the municipality, at the request of citizens and residents of the locality, constructed a bridge across the creek for the public convenience, that the municipality on one or two occasions closed the bridge for repairs and that plaintiff's intestate was killed as a result of the municipality's failure to keep the bridge in proper repair and in a reasonably safe condition. *Held:* The facts alleged disclose that the municipality constructed a bridge for public use and exercised control thereover and, inferentially at least, treated and held out the bridge as a public way, and defendant's demurrer to the complaint should have been overruled, it not being prerequisite to liability on the part of the city in such case that it own the way as a public street.

5. Municipal Corporations § 12—

The negligent failure of a city to maintain in a reasonably safe condition for public travel a bridge built by it over private lands within the city limits for the use of the public comes within the exception to the general rule, and the municipality may not escape liability on the ground that its negligence was in the exercise of a governmental function.

6. Municipal Corporations § 13b—

A municipality may not escape liability for its negligence in failing to maintain in a reasonably safe condition a bridge constructed by it over private lands for the use of the public on the ground that its construction of the bridge was *ultra vires*, since the construction of the bridge is within its general corporate powers and it may be held liable for acts done therein though done at an unauthorized place or in an unauthorized manner.

7. Pleadings § 20—

Upon demurrer, the allegations of the complaint will be liberally construed in favor of the plaintiff, C. S., 535.

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

APPEAL by plaintiff from *Johnston, Special Judge,* at October Term, *1939*, of MECKLENBURG. Reversed.

Plaintiff instituted this action to recover damages for death of his intestate alleged to have been caused by the negligent failure of defendant to maintain a foot bridge across a stream within the city limits. Defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained.

The material facts alleged in the complaint may be briefly stated as follows: Sugaw Creek flows north and south through a portion of the city of Charlotte, and through the grounds of the Thompson Orphanage. There are streets east and west of the orphanage property paralleling the stream. By permission of those in charge of the orphanage, residents of the community and the public were accustomed to use a walkway a short distance across the orphanage ground on either side of and

approaching the creek and to cross the creek, formerly on stepping stones, now by the bridge erected by the city. On either side of the creek are located city schools, and the pathway and bridge are used by those going to and from said schools as well as by the public. In 1929, at the request of citizens and residents of the locality, and for the public convenience, the city by resolution authorized the construction of a bridge across the stream, at a cost of $268. While the resolution of the city commissioners authorized "the erection of a bridge over Sugaw Creek on First Street between Cecil and Morrow," at the request of the local residents the bridge was constructed several hundred feet south of the point where First Street extended would have crossed the creek. On one or two occasions the city closed the bridge temporarily for the purpose of repairing it. The complaint alleged that, due to the negligent failure of the city to properly construct, inspect and maintain the bridge, it fell while plaintiff's intestate was thereon, causing his death.

From judgment sustaining the demurrer, plaintiff appealed.

Uhlman S. Alexander for plaintiff, appellant.
J. M. Scarborough for defendant, appellee.

DEVIN, J. The sufficiency of the complaint to state a cause of action against the city of Charlotte is challenged by the demurrer upon the ground that it appears that the foot bridge complained of was not constructed on a street, or on property belonging to the city, and did not immediately connect city streets or public ways, and that consequently in law no duty was imposed upon the city to inspect, maintain and repair the bridge.

There is no allegation in the complaint that the walkways leading to the bridge were over the property of the city. The public who passed over the walkways leading to the bridge did so by permission of the owner of the land. The allegation of permissive use of the walkway across the lands of the Thompson Orphanage by the public since the construction of the bridge, or before when the stream was crossed by means of stepping stones, is insufficient to show that the public had acquired title to the way as against the owner of the land, either by adverse user or implied dedication. *Hemphill v. Forest City,* 212 N. C., 185, 193 S. E., 153.

However, it does appear from the complaint that for the convenience of the public the city undertook to construct a bridge within the city limits, at the public expense, and to keep it in repair and to exercise control over it, and thereby invited the public to travel upon it and to use it as a public way.

It is a well recognized rule that a duty rests upon a municipal corporation to maintain its streets in proper repair and reasonably safe condition (*Willis v. New Bern,* 191 N. C., 507, 132 S. E., 286), and this duty applies as well to bridges under its control used by the public for the purpose of travel. McQuillin Municipal Corporations (2nd Ed.), sec. 2938; *Michaux v. Rocky Mount,* 193 N. C., 550, 137 S. E., 663.

While it is not specifically alleged that the place of injury was in a public way or that the bridge and walkways across the lands of the Thompson Orphanage constituted a public way (*Bickel Paving Co. v. Yeager,* 176 Ky., 712), or that the plaintiff's intestate was injured by reason of any defect in a city street or public way (*Duren v. Charlotte,* 210 N. C., 824, 185 S. E., 434), it does appear from the facts alleged, inferentially, that the city had treated and held out the bridge as a public way. It constructed the bridge for use by the public as a means of crossing the stream. It exercised control over the bridge, and impliedly invited the public to use it. The demurrer for the purpose of testing the sufficiency of the complaint admits not only the specific facts alleged therein but also relevant inferences of fact necessarily deducible therefrom. *Ins. Co. v. McCraw,* 215 N. C., 105.

The general rule is stated in McQuillin Municipal Corporations (2nd Ed.), sec. 2922, as follows: "Where an injury occurs on a road or sidewalk, and it is sought to hold the municipality liable in damages, the first question which presents itself is whether the place of the accident was a public highway under the control of the municipality. If not a public highway, the municipality is not liable. However, if the municipality has exercised control over the way and improved or recognized it as a public street, that is ordinarily sufficient, and in such case the municipality will be estopped to deny that the way was a public street. . . . The mode in which the street was established is immaterial. . . . The question whether the title to the street is in the municipality is immaterial. The material thing which must exist is the act of the municipality inducing the people to believe that the way is a public one. . . . User by the public of streets and ways and recognition of such user by the municipality may constitute such streets and ways public as to municipal liability. Thus a municipality, it was held, was liable for injuries resulting from defective sidewalks constructed on private property where they were treated by the city as public walks and permitted to be used as such." *Richmond v. Marseilles,* 190 Ill. App., 227.

In *Taake v. City of Seattle,* 47 Pac., 220, it was held no defense to an action for damages due to a defect in a street that the city did not have title to the land. The Court said: "If, as a matter of fact, this street was laid out by the city of Seattle, was used by it as a street, and the public were invited to use it as such, it becomes its duty to maintain

it in proper repair. . . . The question in this case is, was there testimony tending to show the user by the public, at the instance or invitation of the city, of the street at the place where the injury was sustained."

The rule laid down by McQuillin is further supported by what was said in *Mayor v. Sheffield,* 71 U. S., 189, quoted in *Gilbreath v. Greensboro,* 153 N. C., 396, as follows: "If the authorities of a city or town have treated a place as a public street, taking charge of it and regulating it as they do other streets, and an individual is injured in consequence of the negligent and careless manner in which this is done, the corporation cannot, when it is sued for such injury, throw the party upon an inquiry into the regularity of the proceedings by which the land became a street or into the authority by which the street was originally established."

In *Browning v. City of Aurora,* 190 Mo. App., 477, it was said: "The defendant city had for years maintained this culvert with knowledge of its use by the public as a foot bridge and it ought to be required to respond for the consequences of its negligence in maintaining it."

In *Gilpatrick v. Biddeford,* 51 Me., 182, it was held that repairs by the city upon a private way in public use was evidence that it had been established as a public way. And in *Benton v. St. Louis,* 217 Mo., 687, it was held that "long public user as of public right" had the same effect.

In *Louisville & N. R. v. Muncey,* 17 S. W. (2nd), 422, it was said: "The record in this case appears to show that the city had no title to the land on either side of the river at the landing point of the bridge, or where the approaches to the bridge were located. In fact, the bridge was not located on property belonging to the city of Hazard, and the city had no authority, in writing at least, to erect the bridge across the right of way of the railroad company. The acts of the railroad company in consenting to the construction of the bridge by the city amounted to a dedication, and, the city having accepted the dedication, the bridge is a public way of the city." It was held that the city was under duty to keep the bridge in reasonably safe condition for public travel.

While the exact question presented by this appeal has not heretofore been considered by this Court, we think the reasoning underlying the decisions from other jurisdictions and the authorities cited furnish a sound basis for our conclusion that where a municipality for the public convenience has constructed a bridge on a way permitted to be used by the public across private property between two streets, and has exercised control over it, and by its acts invited the public to travel over it, a duty would devolve upon the city to keep it in reasonably safe condition for that purpose. 20 L. R. A. (N. S.), 553; *Ackerman v. Williamsport,* 227 Pa., 591; *Seymour v. Salamanca,* 137 N. Y., 364; *Oliver v.*

Worcester, 102 Mass., 489 (502); *Gilbert v. Manchester,* 55 N. H., 298. This view finds additional support in what was said in *Spell v. Roseboro,* 214 N. C., 364, 199 S. E., 265.

Nor can it be successfully maintained that, since the negligence complained of was in the exercise of governmental functions for a public purpose, no liability for tort could arise. *Broome v. Charlotte,* 208 N. C., 729, 182 S. E., 325. The negligence here alleged relates to the failure of the city to maintain in a reasonably safe condition for public travel a bridge which had been built by the city within the city limits for the use of the public. This brings the case within the well recognized exception to the rule of non-liability for torts committed in the exercise of governmental functions. *Hamilton v. Rocky Mount,* 199 N. C., 504, 154 S. E., 844; *Bunch v. Edenton,* 90 N. C., 431; C. S., 2675.

The defense interposed by the demurrer, that the action of the city in constructing the bridge was *ultra vires,* cannot avail the defendant. The general rule seems to be that where a municipality acts upon matters within its general corporate powers, it may be held liable for acts done at an unauthorized place or in an unauthorized manner, or otherwise in excess of its powers. The city had general authority under its charter to build bridges over streams within the city limits, and if the location of the one in question was not on a city street, this would not be a sufficient departure from its corporate powers to relieve the city of liability for negligence in connection therewith under the plea of *ultra vires.* 43 C. J., 934; *Stoddard v. Saratoga Springs,* 127 N. Y., 261, 27 N. E., 1030; *Bator v. Ford Motor Co.,* 269 Mich., 648 (668); 2 Dillon Mun. Corp. (4th Ed.), sec. 971; 6 McQuillin Mun. Corp., secs. 2808, 2809. In *Love v. Raleigh,* 116 N. C., 296, 21 S. E., 503, it was held that to support the plea of *ultra vires* it must appear that the act in question lies wholly outside of the general or specific powers of the corporation conferred by its charter or by statute.

We are of opinion that the allegations of the complaint, liberally construed as required by the statute (C. S., 535), are sufficient to make out a case, and that the demurrer was improperly sustained.

The judgment sustaining the demurrer is

Reversed.

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

NAOMI HURDLE WRIGHT v. FLEETWOOD GUY WRIGHT.

(Filed 3 January, 1940.)

1. Divorce § 15—Court may reopen and amend prior orders awarding subsistence to wife and children.

This action was instituted for alimony without divorce and for reasonable subsistence for the children of the marriage and counsel fees. An order was entered by consent requiring defendant to maintain the home occupied by plaintiff, defendant and the children and to make available to her a grocery account in a specified sum. Thereafter, on motion, the custody of the children was awarded plaintiff by an order stipulating that the prior order relating to subsistence be continued in effect until further hearings, which might be had on motion of either party. *Held:* Objection to a third order entered in the cause amending and changing the award of subsistence on the ground that the court was without authority to reopen, review and overrule the prior orders, is untenable, the prior orders being interlocutory and *pendente lite*, and authority for modification being provided both by the orders themselves and by statutory provision, C. S., 1667.

2. Divorce § 13—

In the wife's action for alimony without divorce, the amount to be allowed her as alimony and for the support of the children of the marriage is within the sound discretion of the trial court, and its order will not be disturbed except where such discretion has been grossly abused.

3. Same—

An allowance to the plaintiff of $40.00 per month, out of her husband's earnings of $20.00 per week, for support of the two minor children of the marriage of school age, and the allotment to her of the use of the home place owned by them by the entirety, with further provision that the wife should pay the monthly mortgage installments of $17.45 on the house, *is held* reasonable, and negatives any abuse of discretion.

4. Husband and Wife § 12—

The husband is entitled to possession during his lifetime of property held by entireties and such property constitutes a part of the *corpus* of his estate.

5. Divorce § 11—

The court is authorized to make an allowance of alimony *pendente lite* in actions for divorce either *a mensa et thoro* or *a vinculo*, C. S., 1666, and the amount to be allowed under this section is that which appears to the court just and proper, having regard to the circumstance and the parties.

6. Divorce § 13—

In making an allowance either for alimony without divorce or for alimony *pendente lite* the court is not limited to one-third of the net annual income of the husband's estate, C. S., 1666, 1667, it being only in the allowance of alimony following a decree of divorce *a mensa et thoro* that such limitation is provided by statute, C. S., 1665.

7. Same—Provision that wife and children should occupy home place owned by husband and wife by entireties held not prejudicial to husband.

In this action for alimony without divorce, the custody of two minor children was awarded the wife and defendant was ordered to furnish for the exclusive use of herself and her children the home place owned by them by the entireties and she was awarded $40.00 per month for the support of the children, out of which sum she was ordered to pay the monthly mortgage installments on the home place. Defendant objected to the order on the ground that the award of the home place amounted to an allotment of the *corpus* of his estate and that the allowance of alimony should be confined to a percentage of the husband's income. *Held:* Under provision of C. S., 1667, the court is authorized to assign the *corpus* of the husband's property to secure the allowance, and therefore it is immaterial to defendant whether the home place is taken and rents and profits therefrom used to provide a suitable residence for the wife and children or whether they are granted the right of occupancy of the home place, and it being found that such arrangement is most feasible and appropriate, the order will not be disturbed.

APPEAL by defendant from *Thompson, J.*, at Chambers, 11 November, 1939. From PASQUOTANK. Affirmed.

This is a civil action instituted by the plaintiff for subsistence for herself and children without divorce, heard on motion in the cause.

The complaint alleges a cause of action for divorce *a mensa et thoro* and she prays the custody of the children; alimony without divorce; a reasonable subsistence for the children; and counsel fees. In his answer the defendant admits that he has accused the plaintiff of infidelity and has spoken to her on many occasions regarding the same, and he further asserts that she is guilty of improper relations and associations with another man, although he does not plead the same in bar.

The cause came on for hearing on motion after notice before Thompson, J., in Chambers, 26 August, 1939, at which time an order was entered by consent and without prejudice to the rights of either party, requiring the defendant to maintain the home occupied by plaintiff and her children and to make available to her a grocery account not to exceed $10.00 per week. Certain attorney fees were also allowed.

The cause again came on to be heard on motion, before Pless, J., at the October Term, 1939, at which time it was found as a fact that the plaintiff is a fit and suitable person to have the custody of the children and an order was entered awarding their custody to the plaintiff with certain stipulation in respect to the rights of the defendant to visit and associate with them. It was further stipulated therein "that the orders of his Honor, C. E. Thompson, resident judge of the First Judicial District, be, and the same are hereby, continued in force and effect as to the amount of support for the said children until further hearings as to that aspect of the matter, said hearings to be heard upon motion of either

the plaintiff or the defendant; this part of the decree being without prejudice to the right of either party to seek a revision of the amount awarded under the order of Judge Thompson, without regard to the changed financial condition of either party."

The cause again came on to be heard on motion, before Thompson, J., at Chambers, 11 November, 1939, both parties being present and represented by counsel. At this hearing the plaintiff waived any right to alimony for herself and requested the court to fix the amount which the defendant should be required to pay the plaintiff for the support of their said children. After hearing the evidence the court made a full finding of the facts from which it appears that the plaintiff is without property except that she and the defendant own a home place, subject to a mortgage, as tenants by the entirety; that the defendant is an able-bodied man in good health and earns $20.00 per week; that it will reasonably require the sum of $40.00 per month for the support of the two children; that it is necessary for the plaintiff and her children to have a place with furnishings reasonably needful in which the plaintiff may keep and provide them with the ordinary comforts to which their station in life entitles them; that the home place owned by the plaintiff and defendant as tenants by the entirety is suitable for that purpose; and that "it will be more convenient for the children to remain where they are now living . . . and less troublesome for the defendant to procure for himself other living quarters than for the plaintiff to be obligated so to do in behalf of the children, and that in the state of affairs now existing between the plaintiff and the defendant it would not be conducive to the proper home life of the children nor to their best interest for the parties hereto to continue to live in the same house as they have been (doing) in the past."

The judge thereon entered an order requiring the defendant to pay the plaintiff $40.00 per month for the support, maintenance and care of his children; that the defendant supply the entire premises—the home place—to them with the furniture and fixtures therein as a dwelling place for said two children; that the defendant immediately vacate said premises and that until a further order of the court the plaintiff pay on the F. H. A. loan the monthly installments of $17.45 out of the $40.00 per month allowed her for the support of the children.

The defendant having admitted that the evidence offered was sufficient to support the findings of fact made by the judge, excepted to the judgment entered and appealed.

R. Clarence Dozier for plaintiff, appellee.
J. Henry LeRoy for defendant, appellant.

BARNHILL, J. The defendant assails the order entered by Thompson, J., for that it reopens, reviews and overrules the prior orders entered therein. This position cannot be sustained. In each of the former orders it is expressly stipulated that it is entered without prejudice. Furthermore, the former orders were interlocutory and *pendente lite* and the statute, C. S., 1667, under which the action was instituted, expressly provides: "The order of alimony herein provided for may be modified or vacated at any time on the application of either party or of anyone interested."

The defendant further contends that the allowance made is not a "reasonable subsistence" but is altogether disappropriate to the husband's earnings or income and is unreasonable. In proceedings of this nature the amount to be allowed the plaintiff as alimony and for the support of the children of the marriage is within the sound discretion of the trial judge and will not be disturbed except where such discretion has been grossly abused. *Davidson v. Davidson,* 189 N. C., 625, 127 S. E., 682; *Schonwald v. Schonwald,* 62 N. C., 215; *Barker v. Barker,* 136 N. C., 316, 48 S. E., 733; *Anderson v. Anderson,* 183 N. C., 139, 110 S. E., 863.

The children of the marriage are 12 years of age and 9 years of age, respectively. They must be clothed, fed and provided with the necessary books and supplies incident to attending school. After the plaintiff has made the installment payments on the mortgage on the home place she has remaining out of the allotment in cash made to her only $22.50 per month with which to provide these essentials. In addition, she is, under the order, furnished a home in which to live. It has been found by the court, upon sufficient evidence, that this allowance is reasonably required and is necessary to provide the children with the ordinary comforts to which their station in life entitles them. Nothing appears upon the record which would justify the conclusion that in fixing the amount to be paid there was any abuse of discretion by the court below.

But the exception the defendant most earnestly stresses in his brief and on argument here is based on the contention that the court below was without power to award to the plaintiff any part of the *corpus* of the defendant's estate. He contends that alimony and subsistence can be awarded only out of income and that there is no authority under our statute for the allotment of any part of the *corpus* of the estate to the plaintiff. In respect to this exception the defendant correctly asserts that the possession of the estate by entirety vests in the husband during his lifetime and that the home place constitutes a part of the *corpus* of his estate. *Holton v. Holton,* 186 N. C., 355, 119 S. E., 751; *Dorsey v. Kirkland,* 177 N. C., 520, 99 S. E., 407.

C. S., 1665, provides for the allowance of alimony following a decree of divorce *a mensa et thoro,* which allowance "shall not in any case

exceed the one-third part of the net annual income from the estate, occupation or labor of the party against whom the judgment shall be rendered." C. S., 1666, provides for the allowance of alimony *pendente lite* in actions for divorce either *a mensa et thoro* or *a vinculo*. Under this section "the judge may order the husband to pay her (wife) such alimony during the pendency of the suit as appears to him just and proper, having regard to the circumstances of the parties."

The limitation of the allowance to one-third of the net annual income from the estate as contained in C. S., 1665, is omitted from C. S., 1666, and C. S., 1667. Except when the allowance is made following a decree of divorce *a mensa et thoro* the court, in making the allowance, is not confined to a one-third part of the defendant's net annual income. *Anderson v. Anderson,* 183 N. C., 139, 110 S. E., 863. It has been held that the payments required for the support of the wife may be made a charge upon the land of the husband. *Bailey v. Bailey,* 127 N. C., 474; *Sanders v. Sanders,* 167 N. C., 317, 83 S. E., 489; *Green v. Green,* 143 N. C., 506; *Anderson v. Anderson, supra; White v. White,* 179 N. C., 592, 103 S. E., 216; or a specific charge upon his homestead and personal property exemptions; *Walker v. Walker,* 204 N. C., 210, 167 S. E., 818; or he may be required to execute a deed of trust conveying real property to a trustee to secure the performance of the decree; *Anderson v. Anderson, supra; Green v. Green, supra.*

The provisions as to the allowance of subsistence contained in C. S., 1667, are more liberal even than the provisions of 1666 and the trial judge is vested with broader powers in decreeing the subsistence to be awarded. It is expressly provided in this statute that it shall be lawful for such judge "to cause a husband to secure so much of his estate or to pay so much of his earnings, or both, as may be proper according to his condition and circumstances for the benefit of his said wife and the children of the marriage." "Estate," as used in this section, means the aggregate of property of all kinds which a person possesses. Webster's New International Dict.; *Anderson v. Anderson, supra.* The allowance may be a proportion of the husband's estate which is judicially allowed and allotted to the wife. *Anderson v. Anderson, supra.* When the decree requires the assignment of real estate as a part of the subsistence award "the court has power to issue a writ of possession when necessary in the judgment of the court to do so." C. S., 1668.

The court was authorized to sequester the home place and to require the application of the rents and profits therefrom to the procurement of a residence for the children as a necessary part of the subsistence allowed. The defendant is not prejudiced by the order granting the right of occupancy of the home place in lieu thereof. As to him, in

either event, the result would be the same. As to the wife and children, the arrangement is much more feasible and appropriate.

The judgment below is

Affirmed.

NANCY COX KISER, ADMINISTRATRIX, v. CAROLINA POWER AND LIGHT COMPANY.

(Filed 3 January, 1940.)

1. Electricity §§ 7, 11—Evidence held properly submitted to the jury in this action against power company to recover for death caused by electrocution.

The evidence tended to show that defendant power company disconnected the electric service to a house following a storm, informed the owner that the house wiring system needed repairs, suggested that he employ an electrician, and promised to reconnect the service on receipt of notice that the repairs had been made, that the owner called an electrical contractor, that the workman sent out by him, instead of properly pulling new wires through the conduit, circumvented the conduit with temporary wires and, further, improperly crossed the wires, resulting in energizing the metal armor of the BX cable attached to the bottom of the floor joist, and reconnected the service contrary to defendant's rules, that intestate, a four-year-old child, while under the house, came into contact with the energized metal armor of the BX cable and was electrocuted, and that defendant, although advised of the owner's desire for immediate restoration of service, failed to make inspection during the seven days elapsing from the discontinuance of the service to the date of notification of intestate's death. *Held:* The evidence is sufficient to support the submission of the issue of negligence and proximate cause in defendant's failure to make due inspection, and fails to disclose intervening negligence on the part of the workman sent by the electrical contractor such as to insulate the negligence of defendant as a matter of law, and defendant's motion to nonsuit was properly denied.

2. Electricity § 6—

In the distribution of electric current a power company *is held* to that high degree of care and foresight which is commensurate with the inherent danger of the instrumentality.

BARNHILL, J., dissenting.

WINBORNE, J., concurs in dissent.

APPEAL by defendant from *Bobbitt, J.*, at March Term, 1939, of RANDOLPH.

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

The defendant furnishes electricity to the home of A. J. Cox in Asheboro. On the afternoon of 10 July, 1937, an electrical storm caused

one of the wires in the conduit to burn in two and resulted in a stoppage of the flow of current into the customer's house. The conduit is attached to the outer wall of the house. Complaint was made to the defendant's Asheboro office, and a Mr. Wham responded to the call. Upon investigation he found the facts as above stated, disconnected the wires by pulling the end of the melted wire from the cable and tying it back so that no current could be transmitted to the house wiring system, informed Mr. Cox that he would have to employ an electrician to make the necessary repairs, and on being asked by the customer if he could have lights that night, stated that after the repairs had been made, upon notice to the company "they would be glad to come down and reconnect the service." No such notice was given and the defendant did not reconnect the service, which was permitted to be done only by one of its agents.

The customer engaged an electrical contractor of Asheboro to make the repairs. Baxter Elliott was sent to do the work. Instead of pulling new wires through the conduit, as would have been proper, Elliott circumvented the conduit with two temporary wires and connected these to the wires of the defendant, which he should not have done. Not only this. He crossed the wires which resulted in energizing the metal armor of the BX cable attached to the bottom of the floor joist.

On the afternoon of 17 July, 1937, Leon Kiser, a child four years of age and grandchild of A. J. Cox, while under the house, came in contact with this energized metal armor of the BX cable and was electrocuted.

The case was submitted to the jury on plaintiff's allegation of negligence that the defendant knew or in the exercise of reasonable care should have known the current had been cut back into the house wiring system and failed to make due inspection thereof before the injury.

From a verdict for the plaintiff, assessing damages at $1,500, the defendant appeals, assigning errors.

Moser & Miller and S. W. Miller for plaintiff, appellee.
J. A. Spence and A. Y. Arledge for defendant, appellant.

STACY, C. J. Defendant disconnected A. J. Cox' electrical service following a storm on the afternoon of 10 July, 1937, informed him that his house wiring system needed repair, suggested that he employ an electrician to place it in proper condition, and promised to reconnect the service upon receipt of notice that the repairs had been made. The customer asked if he could have lights that night. No further communication was had between the power company and its customer until the afternoon of 17 July, 1937, when the company was informed that its customer's grandchild had been electrocuted while under the house.

The jury has found, upon full consideration of the evidence, that the proximate cause of plaintiff's intestate's death was the failure of the defendant to make due inspection of its service under the circumstances disclosed by the record. We cannot say there was error in submitting the case to the jury on this theory. *Small v. Utilities Co.*, 200 N. C., 719, 158 S. E., 385.

A high degree of foresight is required of the defendant because of the character and behavior of electricity which it generates and sells. *Shaw v. Public-Service Corp.*, 168 N. C., 611, 84 S. E., 1010. The defendant's knowledge of its service is supposedly superior to that of its customer's. It is not unreasonable, therefore, in view of the dangerous character of the product, to require the "utmost diligence and foresight in the construction, maintenance, and inspection of its plant, wires, and appliances, consistent with the practical operation of the business." *Turner v. Power Co.*, 167 N. C., 630, 83 S. E., 744. The care required must be commensurate with the dangers incident to the business. And so the law is written. *Haynes v. Gas Co.*, 114 N. C., 203, 19 S. E., 344.

The negligence of Baxter Elliott was not such as to insulate the negligence of the defendant as a matter of law. *Quinn v. R. R.*, 213 N. C., 48, 195 S. E., 85. The defendant's liability is predicated upon its failure to inspect its wires within a reasonable time. It knew that Cox was a regular user of its service. This had been interrupted, the defendant called, and with full knowledge of the facts, including the customer's desire to have the service restored immediately, the matter was allowed to go for seven days without further inquiry or attention on the part of the defendant. Under the circumstances, we think the question of due care was for the jury. What is due care is to be determined by the exigencies of the occasion. *Diamond v. Service Stores*, 211 N. C., 632, 191 S. E., 358.

It is true, the customer was to notify the defendant when the repairs to the house wiring system had been made, so that the service could be reconnected by the defendant, but this was not done. The defendant must have known, or in the exercise of a high degree of care should have known, according to the jury's finding, that the service had been restored in some way by the electrician called by the customer. With knowledge of this fact, actual or implied, the duty of inspection immediately devolved upon the defendant, as such restoration was contrary to its rules.

The conclusion results that the verdict and judgment should be upheld.

No error.

BARNHILL, J., dissenting: The defendant's employee disconnected the wires at the home at which the plaintiff's intestate was killed and "tied them back." They were located on the outside above the porch out of

reach. The circuit was broken so that there was no danger therefrom. To hold that the defendant in this case is liable in damages for its negligent failure to thereafter inspect the wires is to hold that it was its duty to foresee: (1) That the occupant of the house would employ an electrician who would send an incompetent or careless assistant to make the repairs to the house wiring, over which the defendant had no control; (2) that such employee, instead of running the wires through the conduit provided, would install temporary wiring extending under the house to the switch; (3) that he would switch the wires at the terminal, attaching the energized wire to the neutral terminal and the ground wire to the "hot" or charged terminal, thus energizing the switch box and the BX cable; (4) then, contrary to the prevailing custom and in violation of the rules of the defendant, he would connect the house wires to defendant's line, thus charging the house wires with electricity; and, (5) that the plaintiff's intestate, or some other person, would go under the house and come in contact with the energized cable. To my mind this requires a degree of prevision bordering on the omniscient and is far more than the law demands.

The point of delivery of current by the defendant was on the outside of the house above the roof. Its wiring ended there. This is the law under the rules and regulations governing electric service adopted by the Utilities Commissioner under authority duly vested in him by statute, C. S., 1112, subsections (b) (11).

The wiring within the house belonged to and was under the control of the property owner. The defendant had no right, and it was not its duty, to repair or inspect the same. There is no evidence that the defendant's wires were improperly connected by the electrician to the house wires or that an inspection thereof, had it been made, would have disclosed the conditions which caused the death. It is apparent that it would not have done so, for, in the final analysis, the dangerous situation was created by the improper connection of the wires at the switch box.

If it be conceded that the act of the defendant in leaving its energized wires disconnected at the house—in a harmless condition by reason of the fact that the circuit was broken—and in its failure to inspect, constitutes negligence, it was an act of omission, negative in nature. The negligence of the electrician employed by the occupant of the house was active and constitutes the direct, proximate cause of the unfortunate and untimely death of plaintiff's intestate. In my opinion, under no view of the evidence can it be said that the failure of the defendant to inspect its wires in any wise contributed thereto or proximately caused the same.

Under modern conditions when buildings are constructed provision is made for electric lighting. The wires and incidental fixtures are frequently placed on the inside of brick or stone walls. In the selection or

installation of the wires and fixtures the public service corporation has no part. It merely delivers current at the point of intake designated by the owner. While I fully concur in the view that a distributor of electric current should be held to a high degree of care, I feel that to adopt a rule which requires it to inspect and approve such wiring before cutting on its current places upon the public service corporation an unreasonable, and, in most instances, an impossible task.

WINBORNE, J., concurs in dissent.

EDWARD S. HEEFNER, JR., ADMINISTRATOR C. T. A. OF THE ESTATE OF JENNIE MITCHELL BRIGGS, DECEASED; ANNA THORNTON BASS; MARY THORNTON CANADA; HENRY THORNTON CANADA; ALICE THORNTON PAYNE; EVELYN THORNTON BAGBY; STERLING THORNTON MARTIN SPRATT; WACHOVIA BANK & TRUST COMPANY, TRUSTEE UNDER THE WILL OF JENNIE MITCHELL BRIGGS; LUCILE OGBURN; MAMIE LATHAM; EDITH BAGBY WATSON; SARA CANADA DONNELLY; LOUISE CANADA HOWELL; PLAINTIFFS, v. ELLEN BARBOUR THORNTON; JANIE THORNTON CREECH AND HUSBAND, GILBERT CREECH; EVELYN THORNTON BURGESS AND HUSBAND, MALCOLM BURGESS; CATHRYN THORNTON JOHNSON AND HUSBAND, DALLAS JOHNSON; HARRY C. THORNTON AND WIFE, MARY THORNTON; CLYDE A. THORNTON AND WIFE, HILDA THORNTON; LEMUEL E. THORNTON AND WIFE, JANET THORNTON; ELEANOR THORNTON; VIOLET THORNTON; KENNETH THORNTON; DAVID THORNTON; WACHOVIA BANK & TRUST COMPANY, TRUSTEE UNDER THE WILL OF W. W. BRIGGS; CHARLES WALTER BRIGGS; STEPHEN POTTER; STELLA POTTER; PETER POTTER AND LILA SMITH POTTER; RANSOM S. AVERITT AS GUARDIAN AD LITEM OF DAVID THORNTON, KENNETH THORNTON, VIOLET THORNTON AND ELEANOR THORNTON; AND BAILEY LIPFERT AS GUARDIAN AD LITEM OF ALL UNKNOWN HEIRS AT LAW OF W. W. BRIGGS, UNKNOWN DEVISEES OR LEGATEES OF HEIRS AT LAW OF W. W. BRIGGS AND ANY MINOR HEIRS AT LAW OF W. W. BRIGGS OR MINOR DEVISEES OR LEGATEES OF HEIRS AT LAW OF W. W. BRIGGS, OR ANY MINORS OR OTHER UNKNOWN PERSONS INTERESTED IN ANY WAY IN THE ESTATE OF W. W. BRIGGS, DECEASED.

(Filed 3 January, 1940.)

Wills § 33f—Devise and bequest of entire estate with full power of disposition is unrestricted, and bequest is absolute and devise is in fee.

The will in question bequeathed and devised "my entire estate of every nature and wherever situated" to testator's wife "with full and complete power to her to use, consume and dispose of same absolutely," and subsequently provided that after the death of testator's wife any part of the estate remaining unconsumed and undisposed of should go to her nephew.

Held: The bequest and devise to testator's wife was unrestricted and she takes the personalty absolutely and the realty in fee, C. S., 4162, and the subsequent provision for testator's nephew is repugnant thereto and is void, and will not defeat the devise and the bequest to testator's wife, nor limit either to a life estate.

APPEAL by Ellen Barbour Thornton, Evelyn Thornton Burgess and husband, Malcolm Burgess, Cathryn Thornton Johnson and husband, Dallas Johnson, Harry C. Thornton and wife, Mary Thornton; Clyde A. Thornton and wife, Hilda Thornton, Lemuel A. Thornton and wife, Janet Thornton, Eleanor Thornton, Violet Thornton, Kenneth Thornton and David Thornton, from *Johnston, Special Judge,* at May Term, 1939, of FORSYTH.

Civil action for construction of will of W. W. Briggs, deceased.

The controversy arises on these portions of the will of W. W. Briggs:

"First: After the payment of my debts I bequeath and devise my entire estate of every nature and wherever situated to my wife, Jennie M. Briggs, with full and complete power to her to use, consume and dispose of the same absolutely as she shall see fit.

"Second: After the death of my wife I bequeath and devise whatever of my estate shall remain unconsumed and undisposed of by my said wife to my wife's nephew, Briggs Thornton, provided he shall be 25 years of age at the time of the death of my said wife. But if the said Briggs Thornton shall be under 25 years of age at the time of the death of my wife, then I bequeath and devise whatever of my estate shall remain unconsumed and undisposed of by my wife to Wachovia Bank and Trust Company, in trust for the following uses:

"(1) To invest and re-invest and keep the same invested in safe income-bearing securities or productive real estate and collect the income therefrom;

"(2) To apply the net income from this trust estate for the support and education of the said Briggs Thornton until he shall be 21 years of age, then pay over the net income to him monthly or quarterly, or as often as to my trustee shall seem best, until he shall be 25 years of age, and when he shall be 25 years of age close the trust by paying over, delivering and conveying to him the *corpus* of the said trust estate;

"(3) If the income from this trust shall not be sufficient adequately to support and educate the said Briggs Thornton, then I authorize my trustee, in the exercise of its sound discretion, to apply any part of the principal for that purpose."

"Third: If my wife shall predecease me, then I bequeath and devise my entire estate to Wachovia Bank and Trust Company, in trust for my wife's nephew, Briggs Thornton, according to the terms and conditions above set forth."

It is stipulated and agreed that no children were born of the marriage of W. W. Briggs and Jennie M. Briggs; that Briggs Thornton was taken into their home upon the death of his mother, a sister of Jennie M. Briggs, in March, 1917, when he was five days old; that he lived with them until the death of W. W. Briggs and thereafter continued to live with Mrs. Briggs; and that he was treated by W. W. Briggs as his own child.

It further appears that Briggs Thornton died intestate and without children, on 5 March, 1936; and that Jennie M. Briggs died 5 June, 1936, leaving a will in which she made certain specific bequests of personal property and then further provided: "Item Five: I bequeath and devise the residue of my estate of every nature and kind, and wherever situate, to the Wachovia Bank & Trust Company, of Winston-Salem, North Carolina, in trust for the following uses:"

Upon hearing below the court was of opinion, as contended by plaintiff Edward S. Heefner, Jr., as the duly qualified and acting administrator *c. t. a.*, and his coplaintiffs as all of the beneficiaries under the will of Jennie M. Briggs, except Briggs Thornton, that the will of W. W. Briggs bequeathed to Jennie M. Briggs absolutely all of the personal property which W. W. Briggs owned and possessed at his death and devised to her in fee simple all the real estate, including that in question here, of which he died seized and possessed; and that same should be administered in accordance therewith; and so adjudged and directed the administrator *c. t. a.* of Jennie M. Briggs to administer such property as the property of his testatrix.

Appellants, widow and brothers and sisters of Briggs Thornton, deceased, except to the judgment and appeal to Supreme Court and assign error.

Manly, Hendren & Womble and W. P. Sandridge for plaintiffs, appellees.

J. A. Snow and Fred M. Parrish for defendants, appellants.

WINBORNE, J. This appeal raises for decision this question only:

Under the will of W. W. Briggs, after payment of his debts, did his wife, Jennie M. Briggs, take his "entire estate of every nature and wherever situated" absolutely and in fee simple, or did she take only a life estate therein?

We are of opinion and hold that it was the intention of W. W. Briggs to give to his wife, Jennie M. Briggs, his personal property absolutely and his real estate in fee simple, and not merely a life estate therein. This is in accordance with statute, C. S., 4162, relating to devises of real estate, and in conformity with the uniform rule pertaining to such pro-

visions for disposition by will of both personal and real property, often applied in decisions of this Court. *Patrick v. Morehead,* 85 N. C., 62; *Carroll v. Herring,* 180 N. C., 369, 104 S. E., 892; *Roane v. Robinson,* 189 N. C., 628, 127 S. E., 626; *Barbee v. Thompson,* 194 N. C., 411, 139 S. E., 838; *Lineberger v. Phillips,* 198 N. C., 661, 153 S. E., 118; *Hambright v. Carroll,* 204 N. C., 496, 168 S. E., 817; *Barco v. Owens,* 212 N. C., 30, 192 S. E., 862; *Williams v. McPherson, ante,* 565.

An unrestricted devise of real property carries the fee. *Roane v. Robinson, supra; Lineberger v. Phillips, supra; Hambright v. Carroll, supra.*

It is said in *Carroll v. Herring, supra,* that, "Where real estate is given absolutely to one person, with a gift over to another of such portion as may remain undisposed of by the first taker at his death, the gift over is void, as repugnant to the absolute property first given; and it is also established by law that where an estate is given to a person generally or indefinitely with a power of disposition, or to him, his heirs and assigns forever, it carries a fee, and any limitation over or qualifying expression of less import is void for repugnancy. The only exception to such rule is where the testator gives to the first taken an estate for life only, by certain and expressed terms, and annexed to it the power of disposition. In that particular and special case the devisee for life will not take an estate in fee, notwithstanding the naked gift of a power of disposition."

In *Barco v. Owens, supra,* the Court said: "The general rule is that where real estate is devised in fee, or personally bequeathed unconditionally, a subsequent clause in the will expressing a wish, desire or direction for its disposition after the death of the devisee or legatee will not defeat the devise or bequest, nor limit it to a life estate. . . . Conditions subsequent, in the absence of compelling language to the contrary, are usually construed against divestment. . . . The absolute devise is permitted to stand, while the subsequent clause is generally regarded as precatory only. . . . This is not at variance with the cardinal principle in the interpretation of wills, which is to discover and effectuate the intent of the testator, looking at the instrument from its four corners, but is in fact in aid of such discovery and effectuation."

Under the general rule as established by statute and in decisions of this Court, the words in the first paragraph in the will of W. W. Briggs "I bequeath and devise my entire estate of every nature and wherever situated to my wife, Jennie M. Briggs, with full and complete power to her to use, consume and dispose of same absolutely as she shall see fit," standing alone, constitute an unrestricted devise of his real property and an unconditional bequest of his personal property. This provision gives his "entire estate of every nature and wherever situated" to his

wife with "full and complete power" or disposition. The words are clear and unequivocal. No qualifying expression is annexed. The bequest carries absolutely, and the devise is in fee simple. The subsequent provision that "after the death of my wife, I bequeath and devise whatever shall remain unconsumed and undisposed of by my said wife," is repugnant to the absolute gift to the wife, and is void, and will not defeat the devise and the bequest to her, nor limit either to a life estate.

The judgment below is

Affirmed.

GEORGE W. EDWARDS v. BUENA VISTA ANNEX, INC., AND WACHOVIA BANK & TRUST COMPANY, TRUSTEE.

(Filed 3 January, 1940.)

Banks and Banking § 9b—Language of pledge held to cover every liability of the borrower to the bank arising out of ordinary conduct of business.

A corporation hypothecated collateral to the bank as security for money loaned on three notes executed by the corporation, and each note provided that the collateral pledged should be security "for the payment of this and any other liability or liabilities of the undersigned to said bank, or which may hereafter arise, whether due or not due, however arising or evidenced." The bank acquired in regular course of business a fourth note executed by the corporation to bearer, and the corporation had knowledge of this fact at the time of executing renewal notes in similar language for the three original notes. *Held:* The clear, unambiguous language of the pledge subscribed by the corporation included any liability of the corporation, "the undersigned" to the bank, "however evidenced," and the pledge applies to the fourth note as well as to the other three notes executed by the corporation. *Powell v. McDonald*, 208 N. C., 436; *Bank v. Furniture Co.*, 169 N. C., 180; *Newsome v. Bank*, 169 N. C., 534, cited and distinguished.

DEVIN, J., not sitting.

APPEAL by Wachovia Bank & Trust Company, claimant, from *Clement, J.*, at March Term, 1939, of FORSYTH.

Manly, Hendren & Womble and W. P. Sandridge for Wachovia Bank & Trust Company, claimant, appellant.

Ratcliff, Hudson & Ferrell for John Fries Elair, receiver of Buena Vista Annex, Inc., appellee.

SCHENCK, J. In the above entitled action the Buena Vista Annex, Inc., was placed in receivership, and John Fries Blair was appointed receiver, by the Forsyth County Court.

The Wachovia Bank & Trust Company filed claim with the receiver based on three notes of the Buena Vista Annex, Inc., aggregating $2,749.44, with interest, to which collateral was pledged by the following words in the body of each of the notes: ". . . having deposited herewith, as collateral security, for the payment of this and any other liability or liabilities of the undersigned to said bank, or which may hereafter arise, whether due or not due, however arising or evidenced, . . ." A part of the collateral thus hypothecated was sold by the receiver and from the proceeds the three notes were paid in full. There was a part of this collateral, namely, $1,000.00 and 4 shares of the Arista Mills stock remaining in the hands of the receiver after the payment of the said three notes.

The Wachovia Bank & Trust Company likewise filed claim with the receiver for a fourth note of the Buena Vista Annex, Inc., for the sum of $668.75, which note was payable to bearer and was acquired by the bank and trust company in the ordinary course of business. The bank and trust company, notwithstanding said note contains no collateral pledge clause, seeks to have said note paid from the remaining collateral pledged for the payment of the three other aforesaid notes, claiming that the pledging clause in the said three notes authorized such payment.

The receiver of the Buena Vista Annex, Inc., declined to pay the claim of the Wachovia Bank & Trust Company based upon this fourth note from the collateral pledged for the three other notes, whereupon appeal was taken by the claimant to the Forsyth County Court where the action of the receiver was upheld. Appeal was taken by the claimant to the Superior Court of Forsyth County, where the judgment of the Forsyth County Court was affirmed. The claimant, the Wachovia Bank & Trust Company, preserved exception to the judgment of the Superior Court, and appealed to the Supreme Court.

It is agreed that the only issue between the receiver, the appellee, and the claimant, the appellant, is: "Is the Wachovia Bank & Trust Company entitled to apply the $1,000.00 and the 4 shares of Arista Mills stock to the payment of the note described in Exhibit 2?" (being the fourth note for $668.75, which contained no collateral pledge clause).

We are of the opinion, and so hold, that the answer to the issue is in the affirmative.

The language of the contract contained in the collateral pledge clause of the three notes, namely: ". . . for the payment of this and any other liability or liabilities of the undersigned to said bank, or which may hereafter arise, whether due or not due, however arising or evidenced, . . ." is sufficient to include the fourth note payable to bearer, and due by the Buena Vista Annex, Inc., to the Wachovia Bank & Trust Company by virtue of having come into its possession in the

ordinary course of business. We can hardly think of any more certain language that could have been employed by the parties to embrace this particular obligation if they had it in mind and intended at the time to secure it by deposit of the collateral securities. It was clearly not intended to confine the securities merely to the liability on the notes containing the collateral pledge clause. If such had been the intent then the quoted words were mere surplusage. Such words having been placed in the contract they must be given effect, and when made effective they include any liability of the maker, "the undersigned" to the payee or holder in due course, "said bank" by way of other notes or "however arising or evidenced." *Norfleet v. Ins. Co.*, 160 N. C., 327. The language employed appears to have been intended to hold the collateral security for every liability of the borrower to the lender arising out of the lender's ordinary conduct of banking business, and the Buena Vista Annex, Inc., adopted this language when it executed the notes containing it. And furthermore it appears from the agreed statement of facts that the Buena Vista Annex, Inc., had knowledge of the fact that the Wachovia Bank & Trust Company held in due course the fourth note when it executed and delivered to said bank the three other notes in renewal of similar notes past due.

The appellee relies upon *Powell v. McDonald*, 208 N. C., 436, but an examination of this case discloses that the collateral pledge clause in the note involved provided that any surplus should be applied to any other note or obligation "upon which the undersigned shall be bound," and the Court held that since two persons executed the note, the surplus of the collateral after payment of the joint note could not be held to be applied to the extinguishment of a note or obligation of only one of the makers of the note, the Court being of the opinion that the word "undersigned" referred to the joint obligation of the two makers, or signers, and not to the individual obligations of each maker, or signer of the note.

The appellee likewise relies upon *Bank v. Furniture Co.*, 169 N. C., 180. This case involved the interpretation of an agreement entered into between the directors of a corporation and the bank, wherein the directors agreed to bind themselves to pay all indebtedness of said corporation to said bank "which now exist or may hereafter be created, whether by note, acceptance, overdraft, endorsement, or any other form, to the extent of $12,000." The bank sought to hold the directors personally liable under this agreement on a note of the corporation given to a third party and acquired by the bank in due course. The Court held that the agreement did not include the note sued on for the reason that it was given to a third party and the agreement shows it was made "in consideration of the credit extended to said company" by the bank, and that the agreement was "made in order to avoid the necessity and inconvenience of

endorsing specifically every evidence of indebtedness which said bank may hold against said company," the Court being of the opinion that it appeared from the agreement itself that it related only to obligations created between the corporation and the bank. No such situation appears from the contract involved in the instant case, the provision under consideration being practically all inclusive.

The appellee also relies upon *Newsome v. Bank,* 169 N. C., 534. The Court disposed of this case by holding that the question involved was settled by *Bank v. Furniture Co., supra,* stating that the exact question had been determined, that is, when consideration is given to the purpose and language of the instrument and the facts in evidence, the intent of the parties, as expressed in the contract, confine the obligation to indebtedness arising out of transactions directly between the bank and the obligors. The language of the contract involved, as well as the circumstances of the parties, in this case are distinguishable from those in the instant case.

The Superior Court held that the issue between the receiver, appellee, and the claimant, appellant, should be answered in the negative. With this holding we cannot concur.

The judgment of the Superior Court is

Reversed.

DEVIN, J., not sitting.

STATE v. JULIUS BUCHANAN.

(Filed 3 January, 1940.)

Criminal Law § 51—Permitting solicitor to read decision on former appeal which was not germane and tended to discredit defendant held reversible error.

Upon the trial the court permitted the solicitor to read, over defendant's objection, excerpts from the opinion of the Supreme Court on a former appeal granting a new trial for error committed by the court on the former trial in remarking during the course of the trial that defendant had "sworn both ways" and for error in the instruction that "a person of good character is more apt to tell the truth about the matter than a person of bad character." Defendant did not take the stand upon the second trial. *Held:* Since the law contained in the excerpts was not germane to the second trial, and might tend to confuse the jury, and since the excerpts were a vehicle to convey to the jury part of the evidence which the appellate court had under review with its commentaries thereon, and especially since the excerpts brought to the jury's attention

the very matter which was held prejudicial to defendant upon the former trial and was possibly even more prejudicial since the jury might think defendant has "sworn both ways" on the former trial on a substantial feature, the action of the court in permitting the solicitor to read the excerpts without correction by the court is prejudicial error.

APPEAL by defendant from *Alley, J.*, at July Term, 1939, of FORSYTH. New trial.

Charge: Murder.

Verdict: Guilty of murder in the first degree.

Sentence: Death by asphyxiation.

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

John D. Slawter and Richmond Rucker for defendant, appellant.

SEAWELL, J. The defendant was charged with the murder of his wife. The evidence was ample to sustain a verdict of murder in the first degree. Included in that evidence was a purported confession of the defendant, to the introduction of which objection was made. The exception cannot be sustained, since the evidence of the voluntariness of the confession is well within the standards heretofore approved by the Court.

One objection by the defendant, however, raises a question of such a serious nature as to merit further consideration.

The defendant was tried, convicted, and sentenced to death for this offense before, appealed, and a new trial was granted. The case is reported *ante,* at page 34.

Upon the second trial, now under review, the judge, over objection of the defendant, permitted the solicitor to read the following excerpts from the opinion in that case, with comment thereupon, as follows:

"THE SOLICITOR. This is by *Chief Justice Stacy.* 'Whereupon the court stated in the presence of the jury: "He swore both ways." To this the defendant noted an exception. The exception is well taken. The effect of the observation was to disparage or to discredit the defendant's testimony in the eyes of the jury. The remark, which, of course, was an inadvertence, is just one of those slips, or casualties, which, now and then, befalls the most circumspect in the trial of causes on the circuit.

" 'Again, the following excerpt taken from the charge forms the basis of one of defendant's exceptive assignments of error: "A person who has a good character is not as apt to commit the offense as a person of bad character, and a person of good character is more apt to tell the truth about the matter than a person of bad character." These exceptions are well taken.'

"I do that, gentlemen of the jury, because I want you to know that these exceptions will not arise in this case because, of course, I take it his Honor is not going to make a statement which the Supreme Court says is a statement of opinion. The law says the judge may not express an opinion, and I argue the Supreme Court said there his Honor, who tried the case, another judge, said: 'He swore both ways.' They said that is a statement of opinion. That won't arise in this trial. I want that understood in this case. That is not going to arise."

Reference to the opinion from which this quotation is made will show that the part read by the solicitor was immediately preceded by the following: "On the trial the defendant was asked by the solicitor if the money found by the officers when he was arrested came from the sale of liquor. He answered in the negative. The solicitor then inquired: 'You were not working. Where did you get it?' Counsel for defendant objected, with the remark, 'He did not say he was not engaged.'" We think the full effect of the objection applied in the present case can be better understood by taking these two excerpts together.

While the case before was sent back for retrial principally upon the ground that the remark of the judge at the time—"He swore both ways," —was calculated to discredit the defendant's testimony in the eyes of the jury, it has another significance at this time, since the defendant did not go upon the stand at his more recent trial. The jury might have inferred that he did not go upon the stand in his own defense because he had previously "sworn both ways." It is all the more unfortunate because while in the former trial the remark was predicated upon his inconsistent statement as to incidental facts, upon this trial the jury might naturally infer that he had made contradictory statements with regard to the killing itself.

We are sure that the solicitor was sincere in his purpose to disabuse the minds of the jury of the notion, if they entertained any such notion, that the action of the Supreme Court in the former case might be taken as any indication of an opinion as to the defendant's guilt or innocence, or as to the propriety of his conviction upon proper evidence of any degree of the offense charged. It is sufficient to say that neither the former opinion nor this opinion has any such effect.

It is the peculiarity of our practice that counsel for the defendant had the right to go to the jury both upon the law and the facts—C. S., 203—although C. S., 564, requires the judge to apply the appropriate law to the evidence; but neither the counsel nor the judge has the right to confuse the jury with statements of the law which have no application to the case they are then trying, more especially when it may be made a vehicle to convey to them any part of the evidence which the appellate Court had under review, or any commentaries thereupon. Much less

would this be proper when the comments were upon a former trial of the defendant for the same offense and the commentary had been of such a character as to produce the necessity of a new trial. Neither the law read to the jury nor the facts upon which such comment was made was in any sense germane to any question to be considered by them upon this trial, and that situation was, of course, obvious, since the evidence was all in, the defendant had not gone upon the stand, and argument was in progress. *S. v. Tucker,* 190 N. C., 708, 714, 130 S. E., 720. It was an independent venture of the solicitor, addressed to a matter *dehors* the trial—and highly speculative. *Conn v. R. R.,* 201 N. C., 157, 159 S. E., 331, 17 A. L. R., 641; *Howard v. Telegraph Co.,* 170 N. C., 495, 87 S. E., 313.

Reading from the report of a previous trial is especially attended with danger. *Forbes v. Harrison,* 181 N. C., 461, 107 S. E., 447. The trial judge did not undertake to correct any prejudicial effect which the reading of the opinion might have had, but, on the contrary, was apparently satisfied with the explanation of the solicitor. *S. v. Tucker, supra.*

The case has been twice tried and the defendant twice convicted. It is unfortunate that it must be tried a third time because of practically the same error, which has been allowed to speak through the recorded expressions of a former trial, with a like power to do harm. But with the court the standards of trial remain the same.

Comment upon other assignments of error not here considered becomes unnecessary.

For the error assigned, the defendant is entitled to a new trial, and it is so ordered.

New trial.

BENJ. Z. CAMERON v. C. J. McDONALD, SHERIFF, ET AL.

(Filed 3 January, 1940.)

1. Judgments § 22i: Courts § 3—

The sole remedy against error of law in a regular judgment rendered within the Superior Court's jurisdiction is by appeal, and in the absence of appeal the judgment is final and binding on the parties and may not be attacked in subsequent proceedings in the Superior Court, since no appeal will lie from one Superior Court judge to another.

2. Laborers' and Materialmen's Liens § 8: Homestead § 4—

The right of homestead is superior to the lien of a material furnisher. Constitution of North Carolina, Art. X, sec. 2.

3. Judgments § 32: Homestead § 8—Right to homestead may be waived.

The right to claim homestead may be lost by failure to assert it in apt time, by waiver, or by estoppel, and therefore when no appeal is taken

from a judgment in proceedings to enforce a materialman's lien which specifically orders the property to be sold free of homestead, the judgment is *res judicata* and estops the owner from maintaining subsequent proceedings to restrain the sale of the land free of homestead, notwithstanding that this provision of the prior judgment may be erroneous.

4. Constitutional Law § 3c—

Subject to certain exceptions, a defendant may waive a constitutional as well as a statutory provision made for his benefit, and such waiver may be made by express consent, by failure to assert it in apt time, or by conduct inconsistent with a purpose to insist upon it.

APPEAL by defendants from *Olive, Special Judge,* at September Term, 1939, of MOORE.

Civil action to restrain sale of plaintiff's land under execution free of homestead.

It is alleged in the complaint:

1. That the plaintiff is indebted to the defendant in the sum of $229.08, with interest from 18 February, 1938, for building materials and lumber purchased on credit and used by the plaintiff in the construction of a building on a lot of land, specifically described, situate in Moore County.

2. That on 4 March, 1938, the defendant filed material furnishers' "lien on said land and building, and brought action to enforce said lien, exclusive of homestead to the said plaintiff."

It appears from the "facts agreed":

3. That judgment by default was rendered in said action, "purporting to perfect said lien and declared it to be a specific lien on said lands, and directed that said lands be sold under execution free of defendant's homestead."

4. That no appeal was taken from said judgment, and no order has been entered setting aside, modifying or altering it in any way.

5. That execution was issued on said judgment, directing the sheriff to sell the same "free of defendant's claim of homestead" in accordance with the language of the judgment.

The court being of opinion "that the portion of said judgment . . . which adjudges that Babcock Lumber Company is entitled to have Benj. Z. Cameron's land sold free of homestead is void," entered judgment for plaintiff restraining the sale except upon allotment of the homestead.

From this order, the defendants appeal, assigning errors.

W. Clement Barrett and H. F. Seawell, Jr., for plaintiff, appellee.
Hoyle & Edwards for defendants, appellants.

STACY, C. J. In the present proceeding, the plaintiff seeks to annul that part of the judgment rendered in the case of "Babcock Lumber Company *v.* Benj. Z. Cameron" which orders a sale of certain lands to enforce specific lien thereon "free of defendant's claim of homestead." The character of the attack, whether direct or collateral, may be treated with indifference in the view we take of the case. *Finance Co. v. Trust Co.*, 213 N. C., 369, 196 S. E., 340; *Oliver v. Hood*, 209 N. C., 291, 183 S. E., 657; *Craddock v. Brinkley*, 177 N. C., 125, 98 S. E., 280; Note, Ann. Cas. 1914 B 82; 15 R. C. L., 839.

The plaintiff is entitled to prevail only in case the judgment assailed is void. *Ellis v. Ellis*, 193 N. C., 216, 136 S. E., 350. No appeal lies from one Superior Court to another. *S. v. Lea*, 203 N. C., 316, 166 S. E., 292, and cases there cited. The proper way to review an erroneous judgment of the Superior Court is by appeal to the Supreme Court. *Finger v. Smith*, 191 N. C., 818, 133 S. E., 186; *McLeod v. Graham*, 132 N. C., 473, 43 S. E., 935; *Henderson v. Moore*, 125 N. C., 383, 34 S. E., 446; *Dail v. Hawkins*, 211 N. C., 283, 189 S. E., 774.

It may be conceded that the order of sale "free of defendant's claim of homestead" is discordant with the law on the subject. *Cumming v. Bloodworth*, 87 N. C., 83. The court doubtless had in mind that the plaintiff was asserting a "mechanic's lien," which is superior to homestead, rather than a lien for materials furnished, which is inferior to the homestead exemption of the owner. *Broyhill v. Gaither*, 119 N. C., 443, 26 S. E., 31. It is the function of the Supreme Court to correct such errors when properly presented for review. But unless the jurisdiction of the appellate court is invoked in some appropriate way, *i.e.*, by appeal or *certiorari*, all regular judgments rendered within the trial court's jurisdiction, regardless of their correctness in law, become final and are binding on the parties. *Distributing Co. v. Carraway*, 196 N. C., 58, 144 S. E., 535.

It is provided by Art. X, sec. 2, of the Constitution that "Every homestead . . . not exceeding in value one thousand dollars . . . shall be exempt from sale under execution or other final process obtained on any debt," save and except sales for taxes and purchase-money obligations. Hence, had the judgment not mentioned the matter of homestead, or had it not been in issue, the case of *Cumming v. Bloodworth, supra*, would be a direct authority for the plaintiff's position. But with the question of homestead admittedly at issue and decided adversely to plaintiff's claim, though erroneously perhaps, it does not follow that the judgment, unappealed from and unchallenged, is void, either in whole or in part. "A regular judgment against him, disposing of his homestead, would not be void or even irregular, but at most only erroneous, and to

be corrected, if wrong, by appeal." *Simmons v. McCullin,* 163 N. C., 409, 79 S. E., 625.

The authority to hear and determine carries with it the power to adjudge erroneously as well as correctly. *Hart v. Smith,* 159 Ind., 661, 95 A. S. R., 280, 58 L. R. A., 949. This is a postulate of jurisdiction. *King v. R. R.,* 184 N. C., 442, 115 S. E., 172; *S. c., sub nomine, R. R. v. Story,* 193 N. C., 362, 137 S. E., 166. "A judgment not appealed from, however erroneous, is *res judicata.*" *North Carolina R. R. v. Story,* 268 U. S., 288. If this were not so, why have a court of review or one for the correction of errors?

Given jurisdiction and the power to decide, it is not perceived upon what principle a mistake in constitutional law should be visited with more, or less, serious consequences than a mistake in common or statutory law. *Treinies v. Sunshine Mining Co.,* filed 6 November, 1939, ... U. S., ..., 84 Law Ed., 1; *Simmons v. McCullin, supra; Koepke v. Hill,* 157 Ind., 172, 60 N. E., 1039; 87 A. S. R., 161; 15 R. C. L., 861.

Moreover, it is the general rule, subject to certain exceptions, that a defendant may waive a constitutional as well as a statutory provision made for his benefit. Sedgwick Stat. and Const. Law, p. 111. And this may be done by express consent, by failure to assert it in apt time, or by conduct inconsistent with a purpose to insist upon it. *S. v. Hartsfield,* 188 N. C., 357, 124 S. E., 629.

The right to claim a homestead may be lost by failure to assert it in apt time, by waiver, or by estoppel. *Pence v. Price,* 211 N. C., 707, 192 S. E., 99; *Duplin County v. Harrell,* 195 N. C., 445, 142 S. E., 481; *Simmons v. McCullin, supra; Caudle v. Morris,* 160 N. C., 168, 76 S. E., 17; *Wilson v. Taylor,* 98 N. C., 275, 3 S. E., 492; *Hinson v. Adrian,* 92 N. C., 121. The holding in *Lambert v. Kinnery,* 74 N. C., 348, is not at variance with this position. Nor is the decision in *Dellinger v. Tweed,* 66 N. C., 206, *contra.*

Having omitted to assert his right to a homestead in the particular land, when the matter was in issue, we think the plaintiff is now estopped to relitigate the question. *Ladd v. Byrd,* 113 N. C., 466, 18 S. E., 666. He may have preferred a homestead in other lands, or at least it did not then appear that the claim of homestead would be asserted against the enforcement of the lien on the specific property for materials furnished and used in the construction of the building erected thereon. *Ferguson v. Wright,* 113 N. C., 537, 18 S. E., 691. The matter is concluded by the former judgment.

A judgment regularly entered by a court having jurisdiction and authority to act in the premises, from which no appeal is taken, operates as an estoppel upon the parties thereto and those claiming under them, though the judgment may be erroneous in law. *Northcott v. Northcott,*

175 N. C., 148, 95 S. E., 104; *Moore v. Packer,* 174 N. C., 665, 94 S. E., 449; *Gold v. Maxwell,* 172 N. C., 149, 90 S. E., 115; *Propst v. Caldwell, ibid.,* 594, 90 S. E., 757; *White v. Tayloe,* 153 N. C., 29, 68 S. E., 907; *Weeks v. McPhail,* 128 N. C., 130, 38 S. E., 472; *Land Co. v. Guthrie,* 123 N. C., 185, 31 S. E., 601.

The logic of the decision in *Simmons v. McCullin, supra,* is in full support of the defendant's view.

Error.

C. S. EVANS v. CHARLOTTE PEPSI-COLA BOTTLING COMPANY.

(Filed 3 January, 1940.)

Food § 16—Evidence held insufficient for jury in this action by consumer to recover damages resulting from delcterious substance in bottled drink.

Evidence that plaintiff was injured by a foreign, deleterious substance in a drink bottled by defendant, that the bottle containing the foreign deleterious substance was not uniform in that the neck of the bottle was not directly over the center of its bottom, without evidence of defective machinery or failure to inspect and without evidence that like foreign, deleterious substances had been found in other drinks bottled by defendant under substantially similar conditions at about the same time, *is held* insufficient to be submitted to the jury on the issue of negligence, the doctrine of *res ipsa loquitur* not applying to such cases.

STACY, C. J., dissenting.

SEAWELL, J., concurs in dissent.

CLARKSON, J., not sitting.

APPEAL by defendant from *Phillips, J.,* at February Term, 1939, of UNION.

Vann & Milliken for plaintiff, appellee.
W. C. Davis and E. Osborne Ayscue for defendant, appellant.

SCHENCK, J. This is an action by a consumer to recover of a bottler damages resulting from drinking bottled beverage containing noxious substance.

When the plaintiff had introduced his evidence and rested his case the defendant moved for judgment as in case of nonsuit and renewed his motion after all the evidence on both sides was in. C. S., 567. This motion was refused and defendant, appellant, preserved exception.

There was evidence tending to show that in January or February, 1938, the plaintiff purchased a bottle of Pepsi-Cola from the Purol Filling Station in Wingate, North Carolina, which had been bottled and placed on the market by the defendant to be sold to and consumed by the public; that upon drinking from one-fourth to one-half of the contents of the bottle the plaintiff was made desperately sick; and that upon an analysis of the contents of the bottle it was found to contain one grain of arsenic trioxide per fluid ounce of Pepsi-Cola, which was in excess of a lethal portion. There was further evidence tending to show that the bottle which contained the Pepsi-Cola purchased by the plaintiff was not uniform in shape in that the neck of the bottle was not directly over the center of the bottom thereof, and that the bottle was "crooked."

There was no evidence that any other like products manufactured under substantially similar conditions and sold by the defendant at about the same time contained foreign or deleterious substances, and the plaintiff must rely solely upon evidence that related to the one "crooked" bottle containing arsenic trioxide. No other incident was mentioned in the evidence.

There was no evidence of defective machinery or failure to inspect; no evidence of negligence, unless the bare fact of the "crooked" bottle containing arsenic trioxide be construed as such evidence. To so construe the evidence requires the application of the doctrine of *res ipsa loquitur,* which according to the decisions of this Court the plaintiff is not entitled to call to his aid. *Enloe v. Bottling Co.,* 208 N. C., 305; *Perry v. Bottling Co.,* 196 N. C., 175; *Lamb v. Boyles,* 192 N. C., 542; *Cashwell v. Bottling Works,* 174 N. C., 324.

We are constrained to hold that his Honor erred in overruling the demurrer to the evidence and that the judgment below should be

Reversed.

STACY, C. J., dissenting: It is a *non sequitur* to say that unless the plaintiff offers evidence of other discoveries of substantially similar deleterious substances in the products manufactured by the defendant, he is thereby remitted to the doctrine of *res ipsa loquitur.* There are other ways of showing negligence. *Broadway v. Grimes,* 204 N. C., 623, 169 S. E., 194. Indeed, the propriety of admitting evidence of "other instances" was originally the subject of much debate, *Perry v. Bottling Co.,* 196 N. C., 175, 145 S. E., 14, and its admission is still hedged about with care. *Enloe v. Bottling Co.,* 208 N. C., 305, 180 S. E., 582.

Here the plaintiff has chosen a more direct method of establishing the defendant's negligence. *Dail v. Taylor,* 151 N. C., 284, 66 S. E., 135. He has shown that the bottle of Pepsi-Cola in question was put on the

market by the defendant; that it contained calcium arsenic, a deadly poison, which had settled at the bottom of the bottle on the inside, and was necessarily there when filled with Pepsi-Cola; that it could not be properly cleaned by defendant's machinery because of its crooked neck; and that, if properly inspected, its deformity, as well as its poisonous content, would have been discovered. The defendant's manager himself testifies that the bottle was defective and that if it left the defendant's plant in the condition it was when received by the plaintiff, it had not been properly inspected. This is unequivocal evidence of negligence, far more than a scintilla, and is amply sufficient to carry the case to the jury. *Hampton v. Bottling Co.*, 208 N. C., 331, 180 S. E., 584.

Instead of relying upon an inference deducible from adminicular circumstances, *Etheridge v. R. R.*, 206 N. C., 657, 175 S. E., 124, the plaintiff went straightway to the defendant's plant and elicited from its manager the direct testimony that the identical bottle from which plaintiff drank was "non-uniform, quite un-uniform . . . they are defective if they don't go through the bottle washer and receive a proper washing . . . if the least foreign substance shows up at all when the bottle is held against the light we reject that bottle . . . I would say it has not been properly inspected, if it leaves there in that case" (with foreign substance in bottle). This evidence forms the basis of plaintiff's contention that by reason of its "un-uniformity" the defendant's washing machine failed to reach all of the bottom of this bottle and dislodge the calcium arsenic therefrom, and that it was allowed to leave the defendant's plant without a proper inspection. It is difficult to perceive wherein the evidence is wanting in sufficiency to carry the issue to the jury according to the standard heretofore established and applied in such cases. *Enloe v. Bottling Co., supra; Broadway v. Grimes, supra; Dail v. Taylor, supra.*

The degree of vigilance required of the manufacturer, bottler, or packer, is due care, *i.e.*, commensurate care under the circumstances. *Small v. Utilities Co.*, 200 N. C., 719, 158 S. E., 385. "Those who manufacture or bottle beverages represented to be harmless and refreshing are subject to the duty of using due care to see that in the process of preparing the article for sale no noxious substance shall be mixed with the beverage." *Broadway v. Grimes, supra.*

"According to our standards and practice," says the defendant's manager, "proper inspection involves inspection that will show up and discover any visible foreign substance against the light." The bottle of Pepsi-Cola received by the plaintiff did contain a visible foreign substance. It was prepared at the defendant's plant and placed on the market. Was it properly bottled and inspected by the defendant? The evidence calls for the voice of the twelve.

It is not necessary to show two acts of negligence on the part of the defendant of substantially similar nature "at or about the same time" as a condition precedent to the establishment of liability for the one. The plaintiff may select a different method of proof. This is what he has done here.

SEAWELL, J., concurs in dissent.

CLARKSON, J., not sitting.

STATE v. W. D. SHERMER AND A. W. WRAY.

(Filed 3 January, 1940.)

1. Constitutional Law § 14a—

It is not required that the officers using a search warrant make the affidavit. Sec. 1½, ch. 339, Public Laws of 1937.

2. Same: Criminal Law § 77c—

Where the record fails to show that the officer issuing the search warrant did so without first requiring the complainant or other person to sign an affidavit under oath, or that he failed to examine such person in regard thereto, the warrant not being in the record, it will be presumed that it was in all respects regular.

3. Same: Criminal Law § 43—

Held: Even if it be conceded that it was not permissible to issue the search warrant authorizing an officer to search defendant's premises for gaming devices and paraphernalia, evidence discovered by the search is nevertheless competent.

4. Gaming § 5—

Evidence that lottery tickets and other gaming paraphernalia were found on the premises, and that the proprietor, in denying knowledge thereof, indicated his knowledge of their presence by stating where they were found although he was not present and had not been told where they had been found, *is held* sufficient to be submitted to the jury as to the proprietor's guilt.

5. Same—

Evidence tending to show that an employee knew of the presence of illegal gaming paraphernalia on the premises, without evidence that he had authority to permit it to remain on the premises or to require its removal, and that advertisements of lotteries or gaming devises in envelopes addressed to him were found in the rear of the building, *is held* insufficient to be submitted to the jury as to the employee's guilt.

STATE *v.* SHERMER.

APPEAL by defendants from *Alley, J.*, at September Term, 1939, of FORSYTH. Affirmed as to defendant Shermer. Reversed as to defendant Wray.

Criminal prosecution instituted in the municipal court of the city of Winston-Salem in which the defendants are charged with promoting, setting on foot and conducting a certain lottery where a game of chance is played in violation of C. S., 4428-29.

There was a verdict of guilty in the municipal court. From judgment thereon defendants appealed to the Superior Court. In the court below the jury returned a verdict of guilty as to each defendant. From judgment on the verdict the defendants appealed.

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

Phin Horton and Fred M. Parrish for defendants, appellants.

BARNHILL, J. The defendant Shermer conducts a place of business on Chestnut Street in Winston-Salem known as the Station Lunch. The defendant Wray was a waiter or assistant therein. On 29 July, 1939, police officers of the city, armed with a search warrant, searched the building in which the Station Lunch was conducted. They found a tip board, lottery tickets and advertisements of lotteries in a little shed just at the back door, about 10 feet from the back door, of the building. The lottery tickets were found at the top of a stairway which pulls down from the ceiling and which cannot be entered without unlocking it. The rear of other buildings abutted the areaway in which the shed was located.

On a shelf back of the counter in the cafe the officers found a book entitled "Gay Games," 5 Ingersol watches, a hairbrush set, money in a paper sack underneath some papers and clothes, pasteboards with scores of regular baseball games and envelopes addressed to each of the defendants, containing advertisement of skin-games and all sorts of lottery boards and other lottery advertisements. The advertising matter was stacked in a neat pile on the shelf behind the counter. Some of the flaps of the envelopes were opened. The money found was concealed and was not in the cash register. Among the advertisements there was some from the same company which issued the lottery tickets found in the shed.

At the time the officers arrived the defendant Shermer was not present. He came in after the officers had the lottery tickets and other paraphernalia spread out on the counter. He was asked about the lottery tickets. In reply he stated that he didn't know anything about the tickets that were found in the rear of his place. The officers had not told him where

the tickets were found. He was asked who told him the tickets were found in the rear. He replied: "Mr. Wray did." The officers called Wray and in Shermer's presence asked him about the tickets. He asked: "What tickets." The officer replied: "The tickets we found." He said he didn't know anything about tickets being found and had not told anyone about the officers finding any back of the place. There were two or three sacks of lottery tickets for use in connection with the World Series found in the shed.

Neither defendant offered any evidence, but at the conclusion of the evidence for the State moved to dismiss as of nonsuit, and likewise for that the search was made pursuant to a search warrant that was not issued in accordance with the provisions of sec. 1½, ch. 339, Public Laws 1937.

The record fails to disclose that the officer issuing the search warrant did so without first requiring the complainant or other person to sign an affidavit under oath or that he failed to examine such person in regard thereto. While it appears that the officers using the warrant did not make the affidavit, this is not required. As the search warrant is not included in the record we must assume that it was in all respects regular. Likewise, even if it be conceded that it was not permissible to issue a search warrant authorizing an officer to search the defendant's premises for gaming devices and paraphernalia, this can bring the defendants little comfort. Evidence discovered by a search without warrant is admissible in evidence. *S. v. McGee,* 214 N. C., 184, 198 S. E., 616, and cases there cited. The evidence offered was not incompetent by reason of the manner in which the officers obtained it.

Shermer was the proprietor of the lunch room or cafe in which the advertisements, circulars and other articles were found. His statement to the officers when questioned concerning lottery tickets indicates knowledge of the presence of the lottery tickets where found. We are of the opinion that the evidence, when considered as a whole, constitutes more than a mere scintilla as against the defendant Shermer and the court properly submitted the cause to the jury to determine its weight and sufficiency. *S. v. Jones,* 213 N. C., 640, 197 S. E., 152.

The defendant Wray was an employee of Shermer, acting as a waiter or clerk in the lunch room and beer parlor. He denied any knowledge of the lottery tickets and the evidence fails to disclose that he was in possession of the building or the shed to the extent that he had authority to permit the articles found by the officers to remain on the premises or to require their removal therefrom. He has been connected with the lottery tickets only by evidence that he was employed as a helper in the cafe and beer parlor and by testimony tending to show that there were advertisements of lotteries or games and devices in envelopes addressed

to him lying on the counter or shelf in the rear of the building. We do not deem this evidence sufficient as to this defendant to be submitted to a jury. To charge an employee with the possession of unlawful paraphernalia on the premises of his employer requires something more than mere knowledge that his employer is concealing the articles in or about his place of business. The motion of the defendant Wray to dismiss as of nonsuit should have been allowed.

Affirmed as to the defendant Shermer.

Reversed as to the defendant Wray.

E. J. LATTA, ON BEHALF OF HIMSELF AND ALL OTHER TAXPAYERS WHO DESIRE TO COME IN AND MAKE THEMSELVES PARTIES TO THIS ACTION, v. CITY OF DURHAM.

(Filed 3 January, 1940.)

Municipal Corporations § 8: Injunctions § 1—Plaintiff must show facts entitling him to the relief sought.

Plaintiff instituted this action to enjoin defendant municipality from leasing the municipal auditorium to a private firm on the ground that the city was without authority to lease the building to the entire exclusion of the public so as to preclude necessary or expedient public meetings. The terms of the proposed lease and the extent to which the public might be permitted to use the building after its execution were not made to appear. *Held:* Upon the facts established, the reasonableness of the proposed lease cannot be determined, and the restraining order was properly dissolved as premature.

APPEAL by plaintiff from *Nimocks, J.*, at May Civil Term, 1939, of DURHAM. Affirmed.

For a period of some years the city of Durham had leased the "Durham Auditorium," a building erected by the city "wherein were held public and community meetings and assemblies, school commencement exercises, political rallies and, incidentally, operas and theatrical performances for the entertainment of the general public of the city of Durham." These were presented approximately twice a week, leaving the building five days a week for the use of the public in other ways.

Some time in 1930, the governing body of the city altered the building so as to make it suitable for motion picture shows and theatrical performances and leased the building to Publix-Saenger Company, releasing the entire control of the building into the hands of said company, which has used the building seven days in the week.

The lease expired on 16 April, 1939, and the city council is planning to enter into a new lease with the North Carolina Theatres, Inc., for the use of the building.

This suit is brought by the plaintiff on behalf of himself and other taxpayers to enjoin the lease of the building as being an unreasonable restraint upon its public use, denying such use to the public for the purposes for which such building was originally erected, and for which use there is now a great necessity.

It is pointed out in the complaint "that the trend of public entertainment of the city of Durham is towards lectures, operas, concerts, and such like performances demanding large auditoriums, and that except for the Durham Auditorium there is no place in the city of Durham in which such entertainments can be held." It is further pointed out that the city of Durham has frequent conventions, ranging in attendance from one hundred to one thousand, which would have used the Durham Auditorium had it been available at a reasonable cost.

It is further alleged that the building was erected out of the public funds of the city "and its governing authorities are without right or power to enter into any lease with any private person or corporation for the sole and exclusive use of the said building and for the said private corporation's private benefit," thereby excluding the public from its use.

It is further contended that in effecting the lease the city of Durham "will have stepped down from her sovereignty and embarked with individuals in a business enterprise in competition with other motion picture houses at present established in the city of Durham, and will have entered into a rental business in competition with property owners of the city of Durham."

The defendant admits that it is planning to lease the property, the terms and conditions of which lease do not appear in the pleading.

The case was heard upon affidavits and evidence furnished by the litigant parties, but these do not disclose the nature of the lease intended.

The cause came to a hearing before Judge Q. K. Nimocks, Jr., on 3 May and 8 May, 1939, at which time a judgment was entered finding facts and dissolving the restraining order and declaring "that the defendant city of Durham, through its governing body, is hereby adjudged to possess legal power and authority to enter into leases or agreements for the use of the City Auditorium building with such person, firms, or corporations, and for such period of time and on such reasonable terms and conditions as the said governing body of the defendant, in the exercise of its judicial discretion, deems advisable." From this judgment the plaintiff appealed.

B. I. Satterfield and J. L. Morehead for plaintiff, appellant.
Claude V. Jones for defendant, appellee.

SEAWELL, J. The court below was correct in dissolving the injunction, but we think the judgment should have been based upon the ground that the action of the plaintiff was premature. As we understand it, the plaintiff did not contend that the City Council could not, under any circumstances or conditions, put a lease upon the building, but only that the entire exclusion of the public from the building by way of lease to a private party was not within their authority, thus raising the reasonableness of the expected lease. Since it does not appear upon what terms or conditions the property was to be leased, nor to what extent the public might still be permitted to use it (consistently with the theory of the plaintiff), the case was prematurely brought and injunction will not lie.

It was proper, however, to dissolve the injunction, and the order is Affirmed.

E. W. LEWIS, L. T. HALE AND LULA E. LEWIS, TRADING AS C. G. LEWIS AND COMPANY, A PARTNERSHIP, v. E. P. SANGER, A. S. LYON, ADELAIDE LYON, F. A. GAFFNER, C. C. NEVERS, J. L. GRAHAM, G. E. GRAVES AND W. J. JANE, TRADING AS LYON MERCANTILE AGENCY OR LYON FURNITURE MERCANTILE AGENCY, A PARTNERSHIP, AND CRANFORD FURNITURE COMPANY, A CORPORATION, AND J. A. ESHELMAN.

(Filed 3 January, 1940.)

1. Courts § 2a—

An appeal is properly taken to the Superior Court of Guilford County from an order of the municipal court of the county granting defendant's motion to remove to the county of its residence, ch. 699, sec. 5 (j), Public-Local Laws of 1927.

2. Venue § 1a—

Where, at the time of hearing a motion for removal, the only parties to the suit are the nonresident plaintiffs and a resident corporate defendant, defendant's motion to remove to the county of its residence is properly allowed. C. S., 466, 469, 470.

APPEAL by plaintiffs from *Ervin, Special Judge,* at May Term, 1939, of GUILFORD. Affirmed.

This is an action instituted in the municipal court of the city of High Point to recover damages alleged to have been caused by the wrongful institution of an action in the State of Alabama for goods sold and delivered and by a wrongful attempt to have their creditors place the plaintiffs in bankruptcy.

The plaintiffs are a partnership and residents of the State of Alabama. The defendant Cranford Furniture Company is a North Carolina Corporation with its principal place of business in the county of Randolph. The defendant Eshelman is a resident of the city of High Point. The other defendants are a partnership trading under the name of Lyon Mercantile Agency or Lyon Furniture Mercantile Agency and are all nonresidents of the State of North Carolina. Summons was served only on the Cranford Furniture Company and Eshelman. Under special appearances the action was dismissed as to the defendants constituting the Lyon Mercantile Agency or the Lyon Furniture Mercantile Agency. A demurrer upon the ground that the complaint did not state facts sufficient to constitute a cause of action as to the defendant Eshelman was sustained.

The defendant Cranford Furniture Company moved before the municipal court of the city of High Point to remove the case to the Superior Court of Randolph County, the county of its residence. This motion was allowed, and the plaintiffs appealed to the Superior Court of Guilford County. The order of removal of the High Point municipal court was affirmed by the judge of the Superior Court of Guilford County, and the plaintiffs appealed to the Supreme Court, assigning error.

B. L. Herman and Walser & Wright for plaintiffs, appellants.

T. Lynwood Smith and J. A. Spence for Cranford Furniture Company, appellee.

SCHENCK, J. The appeal was properly taken to the Superior Court of Guilford County. Subsection (j), section 5, chapter 699, Public-Local Laws 1927.

At the time the municipal court of the city of High Point heard the motion for and entered the order of removal the action instituted against the defendants Sanger *et al.*, constituting the partnership of Lyon Mercantile Agency or Lyon Furniture Mercantile Agency, had, under special appearances, been dismissed for want of service, and the demurrer filed by the defendant Eshelman had been sustained. No exception was taken to the order of dismissal or the order sustaining the demurrer. Hence, when the order of removal was heard by the municipal court the only parties before the court were the plaintiffs, nonresidents of the State, and the defendant Cranford Furniture Company, a corporation with its principal place of business in Randolph County. The Cranford Furniture Company made demand in writing for removal to the county of its residence (Randolph County, C. S., 466) before its time for answering expired. Whereupon it became the duty of the court to grant

the demand, C. S., 469, 470; *Roberts v. Moore,* 185 N. C., 254; *Jones v. Statesville,* 97 N. C., 86; *Mfg. Co. v. Brower,* 105 N. C., 440.

We see no error in the judgment of the Superior Court affirming the order of the municipal court removing the cause to Randolph County, and said judgment is therefore

Affirmed.

CODY REALTY & MORTGAGE COMPANY v. CITY OF WINSTON-SALEM.

(Filed 3 January, 1940.)

1. Municipal Corporations § 5—Powers of municipal corporations.

A municipal corporation has only those powers expressly granted in its charter and by the general law, construing the acts together, and those powers reasonably implied in or incident to the granted powers which are necessary to effect the fair intent and purpose of its creation, and it may exercise a sound discretion as to the means by which the purposes of its creation may be accomplished.

2. Municipal Corporations § 24—Municipality has power to employ real estate agent to procure responsible bidder at public sale.

As incidental to the power of a municipal corporation to sell at public auction parcels of land acquired by it by foreclosure of tax and street assessment liens, C. S., 2688, 2787 (2), ch. 232, Private Laws of 1927, the municipality has the authority in the exercise of its discretion in determining the means for accomplishing this purpose, to employ a real estate agent upon commission, to obtain a responsible bidder at the sale to bid a sum sufficient to protect the municipality's interest.

APPEAL by defendant from *Alley, J.,* at November Term, 1939, of FORSYTH. Affirmed.

Civil action to recover the sum of forty dollars for services rendered the defendant, pursuant to contract, in the sale of certain real property. The action was commenced in the court of a justice of the peace, and in the Superior Court, upon appeal, jury trial was waived, and it was agreed that the court should find the facts and render judgment accordingly. From judgment for plaintiff in the sum claimed, defendant appealed.

Ratcliff, Hudson & Ferrell for plaintiff, appellee.

Manly, Hendren & Womble and I. E. Carlyle for defendant, appellant.

DEVIN, J. The facts supporting plaintiff's claim were admitted by written stipulation, and the defendant rested its defense solely on want of power to enter into the contract and to pay for the services rendered.

The plaintiff, a corporation, is engaged in the real estate business in Forsyth County. The city of Winston-Salem, owning certain city lots which it had acquired at tax and street assessment foreclosure sales, advertised the property for sale at public auction. In order to obtain at such sale an amount equal to its taxes and costs of sale and to dispose of property which it had been compelled to buy to protect its interests, the city entered into contract with plaintiff to pay it a commission of five per cent if, in good faith, it procured a responsible bidder ready, able and willing to pay $800 for the property at the sale. The plaintiff performed its contract and secured a bidder for the property at that price. This was the last and highest bid, and, after the sale was confirmed, the amount was paid and deed was executed and delivered to the purchaser by the city. It was admitted that the city did not have in its regular employ any person skilled and experienced in the sale of real property; that it owns approximately seventeen hundred parcels of real property, title to which it acquired by tax and street assessment foreclosure sale, and that it would be to the best interest of the city that this property be sold as speedily as possible.

Did the city have power, under its charter and the general statutes, to enter into the contract with the plaintiff and to pay for the services rendered in accordance therewith?

It is an established principle of law that a municipal corporation has only such powers as are granted to it by the General Assembly in its charter or by the general statutes applicable to all municipal corporations, and that it can exercise only the powers expressly granted and those necessarily implied in or incident to those expressly granted. "But it is also true that a municipal corporation may exercise all the powers within the fair intent and purpose of its creation which are reasonably necessary to give effect to the powers expressly granted, and in doing this it may exercise discretion as to the means to the end. *Smith v. New Bern,* 70 N. C., 14; McQuillin Municipal Corp., sec. 367." *Riddle v. Ledbetter, ante,* 491; *Kennerly v. Dallas,* 215 N. C., 532, 2 S. E. (2d), 538.

Both by the statutes relating to municipal corporations (C. S., 2688, 2787 [2]), and by the charter of the city of Winston-Salem (ch. 232, Private Laws 1927) power is given to the city to sell at public auction real property which it may own (*Asheville v. Herbert,* 190 N. C., 732, 130 S. E., 861), and to appropriate the proceeds to public purposes not inconsistent with its granted powers. *Adams v. Durham,* 189 N. C., 232, 126 S. E., 611.

Applying these principles to the facts in the instant case, we conclude that, as incident to the power of the city to sell the property in question at public outcry, in order to secure liquidation of real estate holdings

acquired for the protection of its revenues, the city was vested with discretion as to the method of effectuating that purpose in the public interest within the limits of its powers, and that the employment of the services of an experienced real estate broker, like that of an auctioneer, was an expense incident to the sale which it was not beyond the power of the city to contract. The necessity of securing qualified assistance in making the sale flowed from the evident fact that on previous auction sale or sales no responsible bid in an amount sufficient to reimburse the city for its taxes and costs of sale had been obtained.

The contract sued on, under the circumstances disclosed by the stipulation and findings of the court below, will not be held invalid for want of power on the part of the city to enter into the contract or to pay for the services admittedly rendered thereunder.

This view finds support in numerous decisions in other jurisdictions, notably: *Childs v. Newark,* 151 Atl., 203, 8 N. J. Misc., 597; *State ex Rel. Woods v. Cole,* 63 Pac. (2), 730 (Oklahoma); *Stewart v. Council Bluffs,* 58 Iowa, 642; *Tietjen v. Savannah,* 161 Ga., 125; *Fitts v. Birmingham,* 224 Ala., 600; *Armstrong v. Fort Edward,* 159 N. Y., 315; *Bridgeman v. Derby,* 104 Conn., 1.

The judgment of the Superior Court is

Affirmed.

RUFUS L. PATTERSON, JOHN F. WILY AND J. LATHROP MOREHEAD, TRUSTEES, AND THE FIDELITY BANK, TRUSTEE BY ASSIGNMENT, ON BEHALF OF THEMSELVES AND ALL THOSE SIMILARLY SITUATED, v. HENRIETTA MILLS.

(Filed 3 January, 1940.)

Corporations § 16—Right to accrued preferred dividends may not be defeated by charter amendment.

Plaintiffs were holders of preferred stock in defendant corporation entitling them by provision of the charter to cumulative dividends before dividends should be set aside or paid on any other stock theretofore or thereafter issued. The charter further provided that no stock having priority over or equal to the preferred stock should be issued without the consent of holders of 75 per cent of such preferred stock. By charter amendment, approved by the holders of over 75 per cent of the preferred stock, the corporation effected a reorganization providing for an exchange of new preferred stock having a lower dividend rate for the old preferred stock and terminating the right to accrued dividends on the original stock. *Held:* There being nothing in the original charter agreeing to retroactive annulment of the vested right to accrued dividends, the right thereto cannot be destroyed except by consent on the part of the stockholders

adversely affected, no matter how few in number, and judgment of involuntary nonsuit in the action of holders of preferred stock to protect their rights was improperly entered.

APPEAL by plaintiff from *Ervin, Special Judge,* at October Term, 1939, of DURHAM. Reversed.

A. W. Kennon, Jr., and Marshall T. Spears for plaintiffs, appellants.

Smith, Leach & Anderson, Robert M. Gantt, and John E. Lawrence for defendant, appellee.

SEAWELL, J. The plaintiffs, some of them directly and others in a trust capacity, were the holders of 134 shares of 7% preferred stock in the defendant corporation bearing cumulative dividends at the rate of 7%. At the time of this action, dividends had accrued in the amount of $10,251.00.

They brought this action to have a corporate reorganization, with amendments to the charter, declared invalid as to them, to protect their right to accrued dividends on preferred stock claimed to be unlawfully invaded or defeated by the reorganization, to have the same paid prior to the payment of dividends on reorganization stock, and to restrain defendant from prior payment of such dividends on the new stock until dividends on the plaintiffs' preferred stock should have been paid.

Dating from 1923, and by amendment, the corporate charter, under which the plaintiffs held this stock, provided: ". . . The holders of said Preferred stock are entitled to receive, and the Company is bound to pay, a fixed, annual, guaranteed, cumulative dividend at the rate of, but not exceeding, 7% per annum, payable quarterly on the first days of October, January, April and July of each year, before any dividends shall be set apart or paid on any other stock, preferred or common, heretofore or hereafter issued by this corporation. The corporation shall not, without the consent of the holders of 75% or so much of this issue of the Preferred stock as may then be outstanding, be entitled to create any lien, directly or indirectly, upon its real estate or manufacturing plant upon any account whatsoever, or to issue stock having priority over or equal rank with this issue of Preferred stock . . ." (R., p. 11).

After certain negotiations, and after consideration of various plans of reorganization, on 18 August, 1937, a reorganization plan was adopted, by a vote of more than the 75% required by the charter. This plan provided for the issue of new preferred stock bearing cumulative dividends at a lower rate, and provided a method of substitution of the new stock for prior preferred stock, or a change in existing stock. The intention and effect of the reorganization is, to quote from the charter

amendment: ". . . intending by this Amendment wholly to eliminate, cancel and terminate the rights appertaining to said shares of Preferred Stock of the par value of $100 per share and said shares of Common Stock of the par value of $100 per share, including the right of the holders of such Preferred Stock of the par value of $100 per share to receive any dividends now accrued and in arrears thereon and to substitute for any such rights so eliminated, canceled and terminated the rights which pursuant to the provisions herein set forth shall appertain to the shares into which the said shares of Preferred Stock of the par value of $100 per share and said shares of Common Stock of the par value of $100 per share shall be and hereby are changed as aforesaid."

Under the 1923 amendment to the corporation charter new issues of preferred stock might be made "having priority over or equal rank with" the issue of preferred stock then held by plaintiffs or those preceding them in title, but there is nothing in the charter contract to make such action retroactive so as to defeat the vested right of plaintiffs in accrued cumulative dividends agreed to be paid "before any dividends shall be set apart or paid on any other stock, preferred or common, heretofore or hereafter issued by the corporation," *Patterson v. Hosiery Mills,* 214 N. C., 806, 200 S. E., 906; nor does such a charter provision warrant a plan of reorganization which provides for cancellation of prior stock issues and accrued dividends thereon and the arbitrary substitution of other stock of less total value and bearing less dividends, or the drastic changes in plaintiffs' holdings effected by the cited amendment.

While the reorganization plan was adopted by more than the three-fourths majority stock vote required, since the particular plan of reorganization was not contemplated in the then existing charter, it became a question of consent on the part of the stockholders adversely affected, no matter how few in number.

Questions of notice, of agency, of representation, of consent, of laches, were all argued as arising upon the evidence in the case. To what extent any or all of them are actually involved it is not necessary here to say. It is true, however, that upon these questions, and upon the evidence, the court is not justified as a matter of law in a finding adverse to the plaintiffs.

For the purposes of this review, we must assume that the judgment of nonsuit was predicated upon insufficiency of evidence, since it was responsive to motions made for such defect at the conclusion of the plaintiffs' evidence and at the conclusion of all the evidence. The particular form of the judgment is immaterial. The evidence is sufficient to be submitted to the jury upon the cause of action stated in the complaint, and the judgment of involuntary nonsuit is

Reversed.

STATE v. CLARENCE ROGERS.

(Filed 3 January, 1940.)

1. Criminal Law § 33—

A voluntary confession is presumed to flow from the strongest sense of guilt, and is deserving of the highest credit, but an involuntary confession is inadmissible and merits no consideration.

2. Same—

The competency of a confession is a preliminary question for the trial court, and its ruling thereon will not be disturbed when supported by any competent evidence, and an objection to the admission of a confession in evidence cannot be sustained when there is nothing on the face of the record to show that it is incompetent and no reason is assigned for the objection.

3. Criminal Law § 81c—

Defendant admitted an intentional killing with a deadly weapon. The court used an inadvertent expression in connection with the *quantum* of proof required of a defendant to rebut the presumption of murder in the second degree, but later corrected the inadvertence. *Held:* No harm resulted to defendant in this respect, and the inadvertence cannot be held for reversible error.

APPEAL by defendant from *Nimocks, J.*, at February Term, 1939, of DURHAM.

Criminal prosecution tried upon indictment charging the defendant with the murder of one Howard Moore.

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 Patton for the State.

Sigmund Meyer and C. W. Hall for defendant.

STACY, C. J. The record discloses that at an early hour in the morning of 19 November, 1938, the defendant induced Howard Moore, a boy about seventeen years of age and employed as a news carrier, to go with him into a wooded area in the city of Durham for the purpose of fellation. This accomplished, the defendant then slew his victim by striking him over the head with a stick and cutting his throat with a razor, according to his later confession made to the officers while in jail. In this confession, the reason assigned for the killing was, that the defendant "was afraid he would tell it on him."

On the trial, the defendant testified that he slew the deceased in self-defense, and because of his perverted mind or mental irresponsibility. The defendant's pleas of self-defense and insanity were rejected by the jury. *S. v. Jones,* 203 N. C., 374, 166 S. E., 163.

It is contended that the confession made by the defendant to the officers while in jail was incompetent as evidence against him and should have been excluded. No reason is assigned for this position, and its tenableness has not been made to appear on the record. *S. v. Stefanoff,* 206 N. C., 443, 174 S. E., 411; *S. v. Jones, supra.*

A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt. *S. v. Moore,* 210 N. C., 686, 188 S. E., 421. An involuntary confession, on the other hand, is inadmissible in evidence and merits no consideration. *S. v. Gibson, ante,* 535.

The voluntariness of a confession, and therefore its competency, is a preliminary question for the trial court, *S. v. Andrew,* 61 N. C., 205, to be determined in the manner pointed out in *S. v. Whitener,* 191 N. C., 659, 132 S. E., 603, and the court's ruling thereon will not be disturbed, if supported by any competent evidence. *S. v. Alston,* 215 N. C., 713, 3 S. E. (2d), 11.

In the beginning of the charge the court used an inadvertent expression in connection with the *quantum* of proof required of a defendant, who admits an intentional killing with a deadly weapon, to rebut the presumption of murder in the second degree. *S. v. Gregory,* 203 N. C., 528, 166 S. E., 387. However, this was later corrected, and we perceive no harm as having come to the defendant in this respect. *Jones v. R. R.,* 194 N. C., 227, 139 S. E., 242; *S. v. Baldwin,* 178 N. C., 693, 100 S. E., 345.

A careful perusal of the record leaves us with the impression that the case has been tried without material error. The jury returned a verdict of murder in the first degree, and the judgment of death as the law commands has been entered thereon. Upon the record as presented, the verdict and judgment will be upheld.

No error.

J. C. WIMBERLY v. WASHINGTON FURNITURE STORES, INC.

(Filed 3 January, 1940.)

1. Appeal and Error § 37e—

In reference cases, the findings of fact, approved or made by the judge of the Superior Court, if supported by any competent evidence, are not subject to review on appeal, unless some error of law has been committed in connection therewith.

2. *Limitation of Actions* § 4—

In an action grounded on fraud, the statute of limitations begins to run from the discovery of the fraud or from the time it should have been discovered in the exercise of reasonable diligence. C. S., 441 (9).

3. Same—Evidence held to sustain finding that action was instituted within the time allowed from discovery of fraud or time fraud should have been discovered.

This action was instituted by a stockholder to recover the value of his stock in a corporation which was "reorganized" or taken over by defendant corporation without notice and in fraud of his rights. Plaintiff's evidence tended to show that he did not learn of the fraud until about one year before the institution of the action when he undertook to sell his stock in the old corporation, that the new corporation continued with the same stock of merchandise, with the same manager, and with only a slight change in name, and that plaintiff, after discovering that the new corporation had been formed could find no record of the dissolution of the old corporation or how it ceased to exist. *Held:* The evidence sustains the referee's finding, approved by the judge of the Superior Court, that plaintiff's cause was not barred. C. S., 441 (9).

APPEAL by defendant from *Ervin, Special Judge,* at May Term, 1939, of GUILFORD.

Civil action to recover value of stock in corporation taken over by defendant.

There was a reference under the Code. The referee found that the plaintiff owned 15 of the 59 outstanding shares of stock in the Washington Street Furniture Company, Incorporated, which was "reorganized" or taken over by the defendant corporation in December, 1931, without notice to the plaintiff and in fraud of his rights.

The value of plaintiff's stock, or 15/59ths of the net worth of the assets of the old corporation, was found to be $454.63, and judgment entered accordingly.

The defendant appeals, assigning errors.

John R. Hughes and William E. Comer for plaintiff, appellee.
Walser & Wright and M. W. Nash for defendant, appellant.

STACY, C. J. In reference cases, the findings of fact, approved or made by the judge of the Superior Court, if supported by any competent evidence, are not subject to review on appeal, unless some error of law has been committed in connection therewith. *Dent v. Mica Co.,* 212 N. C., 241, 193 S. E., 165; *Corbett v. R. R.,* 205 N. C., 85, 170 S. E., 129; *Wallace v. Benner,* 200 N. C., 124, 156 S. E., 795.

The principal question presented is whether plaintiff has offered sufficient evidence to repel the plea of the three-year statute of limitations, C. S., 441, subsection 9, it appearing that the fraud of which the plaintiff

complains occurred in December, 1931, and this action was instituted 23 September, 1937. The plaintiff testifies that he did not learn of the fraud until about 19 August, 1936, when he undertook to sell his stock in the old corporation. The new corporation "continued with the same stock of merchandise and had the same manager." There was only a slight change in name. Even after the plaintiff discovered that a new corporation had been formed, he could find no record of the dissolution of the old or how it ceased to exist.

The authorities are to the effect that, in an action grounded on fraud, the statute of limitations begins to run from the discovery of the fraud or from the time it should have been discovered in the exercise of reasonable diligence. *Peacock v. Barnes,* 142 N. C., 215, 55 S. E., 99; *Stancill v. Norville,* 203 N. C., 457, 166 S. E., 319; *Ollis v. Board of Education,* 210 N. C., 489, 187 S. E., 772.

Tested by this standard, there is evidence on the record to support the referee's finding which has been approved by the judge of the Superior Court, that the plaintiff's cause of action is not barred by laches. It results, therefore, that the judgment must be upheld.

Affirmed.

STATE v. MRS. MARGIE MARSHALL McIVER.

(Filed 3 January, 1940.)

Indictment and Warrant § 20—Held: There was fatal variance between the warrant and special verdict and judgment of not guilty was proper.

Defendant was tried upon a warrant charging that she permitted persons in her employ to practice as apprentices without certificate of registration as registered apprentices or registered cosmetologists. The jury returned a special verdict to the effect that defendant permitted unlicensed students to work in her school. *Held:* There is a fatal variance between the warrant and the special verdict and a failure of proof, and the adjudication that defendant was not guilty is affirmed.

APPEAL by the State from *Alley, J.,* at October Term, 1939, of FORSYTH. Affirmed.

Attorney-General McMullan for the State.
Jones & Brassfield for plaintiff, appellant.
Roy L. Deal and Eugene Trivette for defendant, appellee.

DEVIN, J. The defendant was charged in the warrant with violation of the act regulating the practice of cosmetic art (ch. 179, Public Laws

1933), in that she permitted persons in her employ to practice as apprentices without certificates of registration as registered apprentices, or registered cosmetologists. Upon a special verdict the defendant was adjudged not guilty, and the State appealed.

The following findings were contained in the special verdict: "The defendant in connection with the operation of her school of beauty culture in Winston-Salem, North Carolina, has employed two or more licensed beauticians approved as teachers by the State Board. Students in the defendant's school work under the personal supervision and direction of said instructors, including defendant herself. The defendant has made certain charges for work done by students in her school, . . . the work in each instance being done by an unlicensed student in the school under the supervision of one of said instructors. . . . It is necessary that students in such schools have actual practice on patrons of the school, it not being practical for them to get such practice by giving treatments to each other."

The defendant is not charged with violation of the regulations prescribed by the State Board of Cosmetic Art Examiners prohibiting charges by students, nor does it appear that these regulations have been approved by the State Board of Health as required by section 23 of the act. The charge set out in the warrant relates only to apprentices and cosmetologists. The special verdict relates to students, and finds facts not specifically charged in the warrant. Hence there is a variance and failure of proof, and the ruling of the court below that the defendant is not guilty as charged must be upheld. The question of the power of the State Board of Cosmetic Art Examiners to make regulations prohibiting charges by students is not presently presented, nor is the constitutionality of the act itself raised in this appeal. *Associated Cosmetologists v. Ritchie,* 206 N. C., 808, 175 S. E., 308.

The judgment of the court below is

Affirmed.

L. M. GRIMES v. CITY OF LEXINGTON.

(Filed 3 January, 1940.)

1. Pleadings §§ 7, 28—Allegation not relating to personal transaction may be denied on information and belief.

Plaintiff instituted this action to recover interest on certain refunding bonds issued by defendant municipality, alleging he was the holder in due course and that proper demand for payment had been made and refused. Defendant stated in answer to each material allegation of the complaint "that the defendant does not have sufficient information to form a belief and, therefore, for the purposes alleged by plaintiff, denies the same." *Held:* Since the material allegation that plaintiff is a holder in due course

of said bonds is not an allegation relating to a personal transaction, it may be traversed on information and belief, C. S., 519, and the granting of plaintiff's motion for judgment on the pleadings was error.

2. Municipal Corporations § 48—

The city manager of a municipal corporation is its "managing or local agent" and is authorized to verify the municipality's answer in an action instituted against it. C. S., 531, 483.

APPEAL by defendant from *Sinclair, Emergency Judge,* at May Term, 1939, of DAVIDSON.

Civil action to recover interest on bonds.

The complaint alleges that the plaintiff is the holder in due course of certain refunding bonds issued by the defendant; that there is now due and owing the plaintiff by the defendant the sum of $3,311.91 as evidenced by past due coupons and interest thereon; that proper demand for payment has been made and refused, etc. The complaint was duly verified.

An answer was filed by the defendant, verified by the City Manager, stating in answer to each material allegation of the complaint, "that the defendant does not have sufficient information to form a belief and, therefore, for the purposes alleged by the plaintiff, denies the same."

From judgment on the pleadings for want of denial and properly verified answer, the defendant appeals, assigning errors.

Burgin & Pickard for plaintiff, appellee.
P. V. Critcher for defendant, appellant.

STACY, C. J. The case turns on the sufficiency of the defendant's answer to withstand a motion for judgment on the pleadings.

Firstly, it is contended that the disavowal of information sufficient to form a belief and the cautious denial "for the purposes as alleged by the plaintiff," render the pleading ineffectual in law, *Streator v. Streator,* 145 N. C., 337, 59 S. E., 112, and thus entitle the plaintiff to judgment for want of an answer as a matter of right. *Alford v. McCormac,* 90 N. C., 151; *Harkey v. Houston,* 65 N. C., 137.

The position would doubtless be correct if all the material allegations of the complaint related to personal transactions, which are required to be answered positively and not on information and belief. *Avery v. Stewart,* 136 N. C., 426, 48 S. E., 775; *Machine Co. v. Mfg. Co.,* 91 N. C., 74. Here, however, the material allegation that plaintiff is the holder in due course of certain bonds issued by the defendant may be traversed on information and belief. C. S., 519; *Campbell v. Patton,* 113 N. C., 481, 18 S. E., 687.

Secondly, it is asserted that the City Manager of the city of Lexington, whose duties are administrative only, has no authority to verify an

answer for the defendant, and this position prevailed in the court below. We think otherwise.

True, it was held in *Nevins v. Lexington,* 212 N. C., 616, 194 S. E., 293, that the City Manager of the city of Lexington was not the "proper municipal authority" or the "lawful municipal authority" to whom a claim against the city should be presented for audit and allowance, as required by C. S., 1330, before an action could be maintained thereon. The trial court concluded, therefore, that if the City Manager had no authority to receive plaintiff's claim for audit and allowance, he would not be permitted to verify an answer denying it. The conclusion is a *non sequitur.*

It is provided by C. S., 531, that when a corporation is a party, the verification of a pleading may be made by "any officer, or managing or local agent thereof upon whom summons might be served." And C. S., 483, provides that if the action is against a corporation, summons shall be served by delivering copy thereof "to the president or other head of the corporation . . . managing or local agent thereof." It follows, therefore, that as the City Manager of the defendant is its "managing or local agent," he is authorized to verify its answer filed herein. *Best v. Mortgage Co.,* 131 N. C., 70, 42 S. E., 456.

Formerly, it was held that under section 258 of the Code, an officer of a corporation was alone authorized to make verification of a pleading in court. *Phifer v. Ins. Co.,* 123 N. C., 410, 31 S. E., 716. However, this section was amended by ch. 610, Public Laws 1901, and now provides that when a corporation is a party, the verification of a pleading may be made by any "managing or local agent thereof." *Godwin v. Tel. Co.,* 136 N. C., 258, 48 S. E., 636.

There was error in treating the answer as insufficient in law to raise an issue of fact.

Error.

STATE OF NORTH CAROLINA v. C. A. McCOLLUM.

(Filed 3 January, 1940.)

1. Criminal Law § 68a—

The State may appeal only upon a judgment upon a special verdict, upon a demurrer, upon a motion to quash, or upon arrest of judgment. C. S., 4649.

2. Same—State may not appeal from adjudication that the duty to make payments required as special condition of probation had terminated.

In a prosecution for manslaughter, judgment was entered providing that prayer for judgment and sentence be continued and that the defendant be

placed on probation for a period of five years, with further order that as a special condition of probation the defendant should pay a designated sum weekly into the office of the clerk for a period of five years for the use of the mother of the deceased. Upon defendant's petition filed after the death of the mother within the five-year period, the court adjudged that the requirement for the payment of the sum had terminated and abated on her death. *Held:* The State may not appeal from the order, there being no statutory authority for appeal by the State in such circumstances.

3. Criminal Law § 56—

A motion in arrest of judgment is one made after verdict and to prevent entry of judgment, and is based upon the insufficiency of the indictment or some other fatal defect appearing on the face of the record, and the granting of defendant's petition that he be relieved of further payments required of him by prior order as a special condition of probation, is not equivalent to arrest of judgment.

APPEAL by the State from *Alley, J.*, at October Term, 1939, of FORSYTH. Appeal dismissed.

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

Winfield Blackwell, amicus curæ.

Elledge & Wells for defendant.

DEVIN, J. This case comes to us upon an appeal by the State from a judgment rendered by the court below upon the petition of the defendant for the construction of the judgment heretofore entered in the cause. The material facts are these. At June Term, 1938, the defendant McCollum pleaded guilty to the charge of manslaughter for the unlawful slaying of one Melton Fields. The judgment entered by the judge presiding at that term provided that the prayer for judgment and sentence be continued, and that defendant be placed on probation for a period of five years, under the supervision of the North Carolina Probation Commission. It was further ordered that as a special condition of probation the defendant should "pay into the office of the clerk of the Superior Court for the use and benefit of Lola Fields, mother of the deceased, the sum of six dollars per week for a period of five years." In March, 1939, Lola Fields died. Defendant thereupon petitioned the court that he be relieved of further payments. A counter petition was filed by Essex Fields, father of the deceased Melton Fields and husband of Lola Fields, praying that the judgment be construed to require continuance of payments by defendant for the benefit of himself or the brothers and sisters of deceased.

The court below found that the defendant had complied with all the terms of the probation order, and adjudged that the requirement for the

payment of six dollars per week for the use and benefit of Lola Fields had terminated and abated on her death, and authorized defendant to discontinue further payments. The State excepted and appealed.

Under the common law no appeal lay from a judgment adverse to the sovereign, and there is no statute in North Carolina authorizing an appeal by the State under the circumstance disclosed by the record in this case. *S. v. Jones,* 5 N. C., 257; *S. v. Swepson,* 82 N. C., 541; *S. v. Savery,* 126 N. C., 1083, 36 S. E., 22. The statute, C. S., 4649, provides that an appeal to this Court may be taken by the State in the following cases, and no other: (1) Upon a special verdict, (2) upon a demurrer, (3) upon a motion to quash, (4) upon arrest of judgment.

In *S. v. Swepson, supra,* it was held the State did not have right of appeal from the denial of its motion to amend, *nunc pro tunc,* the record of a previous trial. To the same effect is the holding in *S. v. Hinson,* 123 N. C., 755, 31 S. E., 854, and *S. v. Davidson,* 124 N. C., 839, 32 S. E., 957.

The cases cited by appellant are not in point. In *S. v. Beatty,* 66 N. C., 648, a bastardy case under the law then in force, the appeal was taken by the relator; and in *S. v. Parsons,* 115 N. C., 730, 20 S. E., 511, another bastardy case, the prosecutrix appealed.

Nor may the appeal be entertained on the ground that the ruling below was equivalent to the allowance of a motion in arrest of judgment. The phrase "arrest of judgment," as used in the statute, must be understood in its ordinary legal significance. *S. v. Moody,* 150 N. C., 847, 64 S. E., 431. A motion in arrest of judgment is one made after verdict and to prevent entry of judgment, and is based upon the insufficiency of the indictment or some other fatal defect appearing on the face of the record. *S. v. Roberts,* 19 N. C., 541; *S. v. Bordeaux,* 93 N. C., 560; *S. v. McKnight,* 196 N. C., 259, 145 S. E., 281; *S. v. Bittings,* 206 N. C., 798, 175 S. E., 299; *S. v. Linney,* 212 N. C., 739, 194 S. E., 470.

Appeal dismissed.

STATE v. GLENN MAXWELL.

(Filed 3 January, 1940.)

Homicide § 30—

The jury's verdict of guilty of murder in the first degree and the judgment thereon must be upheld when the evidence is properly submitted to the jury under a charge free from error and none of defendant's exceptions to the admission of evidence can be sustained and nothing appears on the record to justify a disturbance of the verdict and judgment.

APPEAL by defendant from *Clement, J.,* at May Term, 1939, of ALLEGHANY.

Criminal prosecution tried upon indictment charging the defendant with the murder of one Charlie Shepherd.

Verdict: "Guilty First Degree Murder."

Judgment: Death by asphyxiation.

The defendant appeals, assigning errors.

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

W. B. Austin and Trivette & Holshouser for defendant.

STACY, C. J. The record discloses that on the afternoon of 14 April, 1938, the defendant shot and killed his neighbor, Charlie Shepherd, under circumstances which the jury has found to be murder in the first degree. See same case as reported on former appeal, 215 N. C., 32, 1 S. E. (2d), 125. The deceased was hoeing in his mother's garden. The defendant, armed with a shotgun, approached him with the inquiry, "Charlie, what did you hit my boy with an axe for?" The deceased replied, "Why, Glenn, I never hit your boy with an axe." Whereupon, the defendant opened fire, shot the deceased once, reloaded his gun and threatened to shoot the mother of the deceased as she pleaded with him to desist. He then fired two more shots at the deceased and killed him. The defendant himself says, "I went over there to ask him about this here (meaning the injury to his boy), and you see he just raised up and you see I just flew all to pieces."

The case was properly submitted to the jury under a charge free from reversible error, and none of the exceptions addressed to the admission of evidence can be sustained. The facts are few and simple and only slightly in dispute. There is nothing on the record to justify a disturbance of the verdict and judgment. They will be upheld. Decree accordingly.

No error.

STATE v. ROBERT WILLIAMS, ALIAS ROBERT McNAIR.

(Filed 3 January, 1940.)

Criminal Law § 80—Appeal dismissed for failure of defendant to file statement of case on appeal within the time allowed.

Where the record contains no entry of appeal, although defendant was allowed to appeal *in forma pauperis*, and the clerk certifies that no case on appeal has been filed and that defendant's counsel state that they do not intend to enter appeal or perfect same, and that the time for filing case on appeal has expired, the motion of the Attorney-General to docket and dismiss will be allowed, but when defendant has been convicted of a

capital felony this will be done only after an inspection of the record fails to disclose any apparent error. Rule of Practice in the Supreme Court, No. 17.

MOTION by State to docket and dismiss appeal.

Attorney-General McMullan for the State.

STACY, C. J. At the March Term, 1939, Cumberland Superior Court, the defendant herein, Robert Williams, *alias* Robert McNair, was tried upon indictment charging him with rape, which resulted in a conviction of the capital offense and sentence of death as the law commands on such verdict.

From the judgment thus entered, the defendant was allowed to appeal *in forma pauperis.* However, the record contains no entry of appeal, *Mfg. Co. v. Simmons,* 97 N. C., 89, 1 S. E., 923, and the clerk certifies that no case on appeal has been filed in his office and that the time for filing same has expired. He further states in his certificate, "I have inquired of defendant's counsel and they state that they do not intend to enter appeal or perfect an appeal." *S. v. Stovall,* 214 N. C., 695, 200 S. E., 426.

In the absence of any apparent error, which the record now before us fails to disclose, the motion of the Attorney-General to docket and dismiss under Rule 17 will be allowed. *S. v. Moore, ante,* 543.

Judgment affirmed. Appeal dismissed.

ARTHUR V. MERTENS v. PROVIDENT MUTUAL LIFE INSURANCE COMPANY OF PHILADELPHIA.

(Filed 3 January, 1940.)

Insurance § 34c—

Evidence that insured worked continuously as a bookkeeper at a salary of $1,800 per year until he was over sixty-seven years of age, though enfeebled by physical infirmities and lessening eyesight, *is held* sufficient to sustain insurer's motion to nonsuit in an action on a clause in a life policy providing for benefits if insured should become disabled prior to his sixty-fifth birthday.

APPEAL by plaintiff from *Ervin, Special Judge,* at June Term, 1939, of FORSYTH. Affirmed.

This was an action to recover for total and permanent disability under policy of insurance issued by defendant. Disability was defined in the policy as follows: "Disability caused by bodily injury or disease,

which wholly prevents the insured and presumably will for life continuously and permanently wholly prevent him from engaging in any business or occupation or performing any work for compensation, gain or profit."

At the close of plaintiff's evidence, motion for judgment of nonsuit was allowed, and plaintiff appealed.

Winfield Blackwell and Vaughn & Graham for plaintiff, appellant.
Manly, Hendren & Womble and I. E. Carlyle for defendant, appellee.

PER CURIAM. Under the terms of the policy, the disability for which claim is made must have been sustained before the insured became sixty-five years of age. He reached that age 23 July, 1934. He alleged total and permanent disability prior to that date. The evidence disclosed that he worked continuously as a bookkeeper at a salary of $1,800 per year until May, 1937, though enfeebled by physical infirmity and lessening eyesight.

The ruling of the court below in sustaining the motion for nonsuit must be upheld and the judgment dismissing the action

Affirmed.

ROBAH JAMES WHITMAN AND WIFE, NELLIE VIOLA WHITMAN, v. PILOT LIFE INSURANCE COMPANY.

(Filed 3 January, 1940.)

Insurance § 34b—

Insured's evidence that he became disabled prior to the due date of a certain premium and failed to pay same or any subsequent premium, but that he failed to give notice of such disability until more than two years thereafter because he thought his disability temporary and not permanent, fails to disclose proof of disability during the life of the policy as required by the disability clause, or sufficient excuse for failure to give such notice, and insured's action on the disability clause was properly nonsuited.

APPEAL by plaintiff from *Johnston, Special Judge,* at May Term, 1939, of FORSYTH.

Civil action for recovery of benefits under disability provision in policy of life insurance.

On 15 September, 1925, defendant issued a policy of insurance upon the life of plaintiff, Robah James Whitman, for two thousand dollars, in which his wife, Nellie Viola Whitman, was named as beneficiary. This

policy contained a provision for payment of benefits for total and permanent disability as therein defined, and for waiver of premiums during such disability, "upon receipt and approval of proof satisfactory to the company, while this policy is in full force and effect . . ." Evidence for plaintiff tends to show that the premium due 15 September, 1936, was not paid, nor was any premium thereafter paid; that plaintiff filed with defendant proof of disability in January, 1939, and that while he was disabled prior to 15 September, 1936, he thought it temporary, and he did not then know, and did not discover until December, 1938, that his disability was total and permanent.

At the close of plaintiff's evidence the court granted motion for judgment as in case of nonsuit. Plaintiff appeals therefrom to Supreme Court and assigns error.

Fred M. Parrish for plaintiff, appellant.

Smith, Wharton & Hudgins, Manly, Hendren & Womble, and I. E. Carlyle for defendant, appellee.

PER CURIAM. The evidence on this appeal fails to show that plaintiff filed proof of total and permanent disability while the policy of insurance was effective, and lacks sufficient excuse for such failure. The judgment as of nonsuit must be

Affirmed.

WILLIAM BRUMSEY v. CLYDE MATHIAS AND GLADYS MATHIAS.

(Filed 3 January, 1940.)

Automobiles § 19—

In an action by a guest in an automobile against the driver to recover for injuries sustained in an accident occurring in the State of Virginia, judgment for plaintiff is error when the jury finds that the defendant was not guilty of gross negligence, since such finding is necessary to a recovery by a guest under the laws of that state.

APPEAL by defendants from *Carr, J.*, at March Term, 1939, of CURRITUCK. Reversed.

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

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

"2. Was the negligence of the defendants gross negligence? Ans.: 'No.'

"3. Did the plaintiff contribute to his injury by his own negligence, as alleged in the answer? Ans.: 'No.'

"4. What damages, if any, is the plaintiff entitled to recover of the defendants? Ans.: '$500.00.' "

The court below rendered judgment on the verdict against the defendants for $500.00. The defendants made numerous exceptions and appealed to the Supreme Court.

A. H. Scales, Chester R. Morris, M. B. Simpson, and R. Clarence Dozier for plaintiff.

J. Henry LeRoy for defendants.

PER CURIAM. The injury to plaintiff occurred in the State of Virginia. The evidence indicates that plaintiff was a guest. Under the law of Virginia a guest cannot recover except for gross negligence.

From a careful reading and re-reading of the record and briefs, we cannot say that the conduct of defendants amounted to gross negligence. *Farfour v. Fahad,* 214 N. C., 281.

The judgment is

Reversed.

MRS. J. C. McNEILL, WIDOW OF J. C. McNEILL, DECEASED EMPLOYEE, v. C. A. RAGLAND CONSTRUCTION COMPANY, EMPLOYER, AND AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, CARRIER.

(Filed 3 January, 1940.)

Master and Servant §§ 40e, 55d—Finding of Industrial Commission that fatal injury was not caused by accident arising out of and in course of the employment is conclusive when supported by evidence.

Evidence tending to show that a night watchman employed to watch over one section of a highway under construction came over to a night watchman employed to watch over another section thereof, and engaged in an altercation relating to matters foreign to the employment, and that one of them killed the other as a result thereof, *is held* sufficient to support the finding of the Industrial Commission that the deceased's death was not the result of an accident arising out of and in the course of the employment, and therefore such finding is conclusive on the courts, and judgment of the Superior Court that the facts found established as a matter of law the right of the dependents of the deceased employee to recover, is error.

APPEAL by defendants from *Alley, J.,* at July Term, 1939, of ASHE.

Bowie & Bowie for claimant, appellee.

Sapp & Sapp for defendants, appellants.

PER CURIAM. This is a claim for compensation under the Workmen's Compensation Act filed by the widow of a deceased employee.

The claimant's decedent was a night watchman over a certain section of a highway being constructed by the defendant construction company, and during the night of 2 May, 1939, engaged in an acrimonious colloquy with one Horton Woodie, another night watchman of the defendant company, who at the time had left the section over which he was watching and come to the section over which the decedent was watching, and as a result of the colloquy, which related to matters foreign to the duties of a night watchman, Woodie shot and fatally wounded said decedent.

The hearing Commissioner found that the injury to the employee, J. C. McNeill, resulting in his death, was not caused by an accident arising out of and in the course of his employment and denied compensation. Upon appeal to it the Full Commission affirmed the findings of fact, conclusions of law and the award of the hearing Commissioner denying compensation. The claimant appealed from the decision of the Full Commission to the Superior Court.

The judge of the Superior Court, after adopting the findings of fact of the Full Commission, made "the following conclusions of law: (1) That J. C. McNeill came to his death by accident arising out of and in the course of his employment," and reversed the award of the Full Commission and adjudged that the claimant recover the statutory compensation and death benefits to be awarded by the Industrial Commission as provided by law.

From the judgment of the Superior Court the defendants appealed to the Supreme Court, assigning error.

The trial judge concluded that the facts found by the Commission established as a matter of law the right of the claimant to recover. In this there was error. Even if it be conceded that the facts found would support the conclusion that the claimant's decedent's fatal injury resulted from an accident arising out of and in the course of his employment, this is not the only reasonable conclusion that may be drawn therefrom. This being true, and the Commission being the judge of the credibility, weight and sufficiency of the testimony, its conclusion must stand. The finding of the Commission that the fatal injury of the decedent was not caused by an accident arising out of and in the course of his employment, being supported by some evidence, was conclusive upon the Superior Court, *Lockey v. Cohen, Goldman & Co.*, 213 N. C., 356, and his Honor's reversal thereof was without authority, and for that reason the judgment below must be

Reversed.

STATE v. J. P. HARRIS.

(Filed 2 February, 1940.)

1. Constitutional Law §§ 12, 13: Taxation § 1—Act providing for licensing of dry cleaners held unconstitutional as being discriminatory.

Chapter 30, Public Laws of 1937, providing for the licensing of dry cleaners and pressers by the commission set up in the act, construed *in pari materia* with chapter 337, Public Laws of 1939, exempting from the provision of the act fourteen counties of the State, *is held* unconstitutional, whether the license fee therein imposed in addition to the license prescribed by the Revenue Act be considered a State tax or not, since it places a burden upon those engaged in the specified business in a portion of the State which is not imposed upon those engaged in the same business in other parts of the State without any reasonable basis of classification, and therefore discriminates within the class and accords a privilege and immunity to some not accorded to others, Constitution of North Carolina, Art. V, sec. 3; Art. I, sec. 7; Art. I, sec. 17.

2. Statutes § 5a—

A statute providing for the licensing of those engaged in a particular business or profession must be construed *in pari materia* with a later statute exempting designated counties from the act, in determining whether the statute is unconstitutional as being discriminatory.

3. Constitutional Law § 4c—Delegation of power to commission in licensing dry cleaners held unconstitutional.

Chapter 30, Public Laws of 1937, as amended by chapter 337, Public Laws of 1939, providing for the licensing of those engaged in the business of dry cleaning by the commission set up in the act, *is held* an unconstitutional delegation of legislative authority, in that the act fails to set up the standards or provide reasonable limitations to guide the administrative board in admitting or excluding persons from the business, but leaves such power in the unlimited discretion of the administrative board.

4. Constitutional Law § 8—Extent of police power in regulating businesses and occupations.

While the Legislature, in the exercise of the State police power, may protect the public against incapacity, fraud and oppression by establishing standards of personal fitness and requiring the examination and licensing of those desiring to engage in the learned professions and occupations requiring scientific or technical knowledge or skill, or which involve a trust relationship with the public, it may not impose such restrictions upon those wishing to engage in the ordinary trades or occupations which are harmless in themselves, since the right to choose and pursue a means of livelihood is a property right and a personal liberty guaranteed by the Constitution, which right may be interfered with only when necessary to the protection of the public safety or welfare. Constitution of North Carolina, Art. I, sec. 1; Art. I, sec. 17.

5. Same—

The power of the Legislature to impose prohibitive regulations on those seeking to engage in a business or occupation does not include every business or occupation "clothed with a public interest," since this term in its broadest meaning includes all businesses and occupations, but the right to impose such regulations is confined to those businesses or occupations which by reason of some intrinsic distinguishing feature, or the manner in which they are ordinarily conducted, may produce substantial injury to the public peace, health, or welfare, if unregulated.

6. Same: Constitutional Law § 6b—Expediency of legislation within constitutional limitations is a matter for the General Assembly; whether statute is within those limitations is for the courts.

Whether a particular business or occupation should be regulated is not merely a question of public policy within the exclusive province of the Legislature which is not reviewable by the courts, but it is for the courts to determine whether a particular business or occupation bears such substantial relationship to the public peace, health, or welfare as to bring its regulation within the State police power, and the Legislature may not preclude judicial review by a fact-finding declaration that the regulation sought to be imposed is necessary in the public interest.

7. Constitutional Law § 8—

The power of the Legislature to impose restrictions preventing persons from engaging in particular businesses or occupations is much more limited than its power to impose purely regulative restrictions on those engaged therein.

8. Same—Legislature may not prescribe prohibitive regulations upon business of cleaning and pressing.

The business of operating cleaning and pressing plants does not afford any peculiar opportunities for fraud, require scientific or technical training, or involve any exceptional dangers to those engaged therein or to the public, and therefore it is not a business or occupation having such substantial relationship to public peace, health, or welfare as to bring it within the police power of the Legislature to impose prohibitive regulations upon those desiring to engage therein.

9. Constitutional Law § 12—Act imposing restrictive regulations on cleaning and pressing business is unconstitutional as creating monopoly.

Since the Legislature is without authority in the exercise of the police power to regulate those engaged in the business of operating cleaning and pressing plants, the provision of chapter 30, Public Laws of 1937, as amended by chapter 337, Public Laws of 1939, delegating power to the commission set up by the act to impose prohibitive regulations upon those desiring to engage in the business is unconstitutional as creating a monopoly. Constitution of North Carolina, Art. I, sec. 31.

10. Constitutional Law § 3a—

The Constitution must be construed in the light of its history, Art. I, sec. 29, and must be liberally construed in aid of progress, but a liberal construction is especially required in interpreting those provisions safeguarding individual liberty.

11. Constitutional Law § 8—

Historically and fundamentally the constitutional guaranties of individual liberty protect the individual in the selection and pursuit of the ordinary occupations against the unwarranted invocation of the police power.

12. Constitutional Law § 6b—

While the courts will not declare an act of the Legislature unconstitutional unless it is clearly so, when it clearly appears upon the facts presented that an act of the Legislature clearly violates the restrictions placed upon it by the fundamental law, it is the solemn duty of the court to uphold the Constitution and declare the statute void.

STACY, C. J., concurs in result.

DEVIN, J., concurring.

APPEAL by defendant from *Bone, J.*, at June Term, 1939, of VANCE.

This prosecution was begun by a warrant in the municipal court in the city of Henderson, whence, from a judgment of guilty, the defendant appealed to the Superior Court of Vance County, where the case was heard before Judge Bone upon the original warrant.

The warrant charged the defendant with engaging in the business of dry cleaning without first having procured a license so to do, in violation of chapter 30, Public Laws of 1937, as amended by chapter 337, Public Laws of 1939. The license referred to in the warrant was not that required of dry cleaners under the Revenue Act, but was a license authorized to be issued by the State Dry Cleaners Commission, created by section 2 of the statute above cited. The indictment is under sections 5 and 7 of the act, to which more specific reference is made below.

On the trial the defendant admitted that he was engaged in the business defined in the statute, but denied that he was guilty of any offense. The statute, he contends, is unconstitutional and void in a number of particulars discussed in the opinion, but chiefly because it interferes with his right of choice and pursuit of one of the innocuous ordinary callings of life in his endeavor to earn a livelihood.

For convenience in discussion we refer to the following provisions of the law:

Among the definitions in section 1, we find the following:

"a. 'State Dry Cleaners Commission' means the State agency created by this act for the dry cleaning, pressing, and/or dyeing business.

"b. 'Cleaning and dyeing business' includes any place or vehicle where the services of dry cleaning, wet cleaning as a process incidental to dry cleaning, dyeing, spotting, and/or finishing any fabric is rendered for hire, or is sold, resold or offered for sale or resale; and also includes the acceptance of any clothing or other fabric to be dry cleaned, dyed and/or pressed, and where said work is actually done and performed by other parties than those accepting it.

"c. 'Pressing' means the pressing of clothes or other fabric by whatever manner used; and shall include those persons, associations of persons, firms or corporations who accept clothes or other fabric for pressing, when the actual pressing is done and performed by other parties.

"d. 'Person' means any person, firm, corporation or association.

"e. 'Retail outlet' includes any establishment or vehicle where dry cleaning, dyeing, and/or pressing service is sold, or offered for sale, directly to the consumer, but where none of the processes of dry cleaning, dyeing and/or pressing is actually performed by such retail outlets and where the retail outlets are not owned or controlled by a retail or wholesale processing establishment.

"f. 'Press shop' includes any dry cleaning, dyeing and/or pressing establishment owning or having pressing equipment for the purpose of pressing clothes or other fabrics by whatever manner used, but where the actual process of dry cleaning and/or dyeing is not performed on the premises but is contracted out to a wholesale plant.

"g. 'Retail plant' includes any person, firm, corporation or association operating a cleaning and/or dyeing establishment performing dry cleaning, dyeing and pressing for sale directly to the consumer."

The act proceeds to create, for the business thus defined, a commission to be known as the "State Dry Cleaners Commission." The commission consists of five members, "three of whom shall have been engaged in the dry cleaning, dyeing and/or pressing business in the State of North Carolina for at least five years next preceding his appointment, and two of whom shall not be connected with said business but shall be from the public at large." The members of the commission are to receive $5.00 a day while attending commission meetings and necessary traveling expenses. The commission elects its chairman and vice chairman, and adopts rules and by-laws for its organization and proceeding and adopts and uses the seal. It is further authorized and empowered to "incur any and all expenses deemed necessary by it for the administration and enforcement of this act, and to appoint a secretary who need not be a member of the commission, and such other clerks, inspectors and other assistants as it may deem necessary for the administration and enforcement of this act, and fix their duties, compensation, and terms of service, as well as the employment of such lawyers as may be approved by the Attorneys-General, all of which shall be paid out of the funds collected by the commission as provided in this act."

We quote section 3 in full: "Sec. 3. The functions, duties and powers of the 'State Cleaners Commission' shall be as follows:

"(1) To adopt and promulgate rules and regulations as may be necessary to control and regulate the dry cleaning, dyeing and/or pressing business in the following particulars:

"a. Identification to the public of all persons, firms, corporations or associations licensed by the commission to engage in said businesses, as well as their agents or representatives.

"b. Enforcement of existing fire, sanitation and labor laws where applicable to the industry, and all other laws applicable to the industry now on the statute books of North Carolina.

"c. Prohibit false or misleading statements, advertisements or guaranties either in form or content.

"d. Form of application required by commission for license and form of license to be issued by commission.

"e. Require examination of persons not entitled to have issued to them a license as provided in this act, such examination to cover subjects deemed necessary to promote the public health, safety and welfare of the people of the State of North Carolina.

"(2) To grant licenses to conduct the business of dry cleaning, dyeing and/or pressing to persons, firms, corporations, or associations in accordance with the provisions of this act and the rules and regulations of the commission. This commission may decline to grant a license, or may suspend or revoke a license already granted, after due notice and after hearing, on the grounds of any violation of the provisions of this act or the rules and regulations promulgated by said commission, not in conflict with the provisions of this act: Provided, however, that any party accused shall have the right to appeal from the decision of the commission, in the event of a refusal to grant or the suspension or revocation of any license, to the Superior Court of the county in which the place of business of the accused party is located. Such appeal shall operate as a *supersedeas* with respect to decision or ruling of said commission in the refusal to grant or the revocation or suspension of such license: Provided that, pending appeal, the accused party shall execute a bond in the sum of five hundred dollars ($500.00) before the clerk of the court in which the appeal is pending, the surety to be approved by the clerk of said court and conditioned not to violate any of the provisions of this act.

"(3) To act, for the purpose of this act, as a competent authority in connection with the matters pertinent thereto."

Section 5 of the act provides as follows: "Sec. 5. No person, firm, corporation or association shall engage in the business of dry cleaning, dyeing and/or pressing, as herein defined, within the State of North Carolina without first obtaining a license therefor from the said commission, which said license shall be valid for a period of one year and no more, unless sooner revoked or suspended by said commission under the provisions of this act." Applicable to defendant's business, as designated in this section, was $25.00 for license as "retail plant."

Section 7 provides: "Except pending an appeal, as hereinbefore provided, any person who shall engage in the business of dry cleaning, dyeing and/or pressing, as herein defined, without first having secured a license or certificate from said commission so to do, or who shall continue to do the business of dry cleaning, dyeing and/or pressing after the suspension or revocation of a license issued by the commission, shall be guilty of a misdemeanor under the laws of the State of North Carolina, and upon conviction thereof shall be punished by a fine of not less than ten dollars, nor exceeding one hundred dollars, and each day during which this violation shall continue shall be deemed a separate offense."

Section 8 reads as follows: "Licenses in this act shall be imposed as an additional State license fee for the privilege of carrying on the business, exercising the privilege, or doing the acts named herein, and nothing in this act shall be construed to relieve any person, firm, corporation, or association of persons from the payment of the fee prescribed under section five hereof."

The provisions of the Constitution on which defendant relies are reproduced for convenient reference:

"Article I, section 1: That we hold it to be self-evident that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the enjoyment of the fruits of their own labors, and the pursuit of happiness.

"Article I, section 17: No person ought to be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed or exiled, or in any manner deprived of his life, liberty or property, but by the law of the land.

"Article I, section 29: A frequent recurrence to the fundamental principles is absolutely necessary to preserve the blessings of liberty.

"Article I, section 31: Perpetuities and monopolies are contrary to the genius of a free state and ought not be allowed."

Attorney-General McMullan and John W. Caffey (amicus curiæ) for the State, appellee.

Gholson & Gholson and Ira Julian for defendant, appellant.

SEAWELL, J. Defendant's appeal raises questions of public policy as well as of law. We are concerned with the law, of course, but matters of public policy which began long before our time, and which may be found to have underwritten the fundamental laws we are asked to apply, cannot be disregarded in their interpretation.

Statutes regulating trades and occupations by the delegation of governmental power to boards and commissions formed largely of the groups affected, intended primarily to control the personnel of the business, have

become so common as to affect progressively and importantly the social and economic life of the State. A large number of laws of that character may be listed which not only regulate but organize into autonomous corporations occupations ranging from the learned professions to the ordinary trades. U. N. C. Law Review, Vol. 17, p. 1.

No independent administrative supervision is provided over these organizations. No report of their activities is made to any responsible branch of the government. No audit is made by the State, except where items may incidentally affect the State Treasury. These matters are left to internal control. The organizations are, so to speak, legislatively launched and put on their own.

The stage of internal protest has been reached. In marginal cases controversies in the courts have arisen as to whether the organization has captured a sufficient *quantum* of public purpose to operate as an agency of the government, or whether the police power of the State, ostensibly exercised for a public purpose, is not really farmed out to a private group to be used in narrowing the field of competition, or in aid of exploitation by creating remunerative positions in administration. *Roach v. Durham,* 204 N. C., 587, 169 S. E., 149; *S. v. Lawrence,* 213 N. C., 674, 197 S. E., 586. Without the aid of the statute these groups would be mere trade guilds, or voluntary business associations; with it they become State agencies, retaining, however, as far as possible, distinctive guild features. An exclusive self-governing status is achieved by the device of securing a majority membership on the administrative boards or commissions, and in aid of this the power of the State is heavily invoked by way of prosecution in the criminal courts of those who are unable to secure the approval of the board and obtain license to engage in the occupation.

It is this power of exclusion of fellow workers in the same field that gives to the subject its social significance, and invites our most serious consideration of the constitutional guaranties of personal liberty and individual right called to our attention.

The statute is meager in its expression of purpose in this regard. But the implication conveyed in the power to "examine those who ought not to be admitted," and to make rules and regulations in the interest of the public health, safety, and welfare in connection with such examinations, supports the suggestions in defendant's brief and argument that it was the purpose of the statute to empower the commission to apply standards of educational and moral fitness to those who desire to choose and carry on the business, occupation, or trade—however it may be called. Indeed, if that is not its purpose, we fail to find anything else in the statute in the nature of a public purpose which would necessarily preserve the organization created as a State agency.

The statute before us seems to overshoot the mark in several respects: In the discrimination produced by its territorial limitations; in the attempted delegation of the legislative function to create standards, and its failure to fix limits within which the discretion of the commission may be exercised; and, in the more fundamental respect of its invasion of personal liberty and the freedom to choose and pursue one of the ordinary harmless callings of life—a right which we conceive to be guaranteed by the Constitution.

1. Reference to section 8 of the statute shows that the license issued by the commission is not on a parity with the license usually issued by trade or professional organizations of this kind created as State agencies. The fee charged is imposed as an *"additional State license fee for the privilege of carrying on the business, exercising the privilege, or doing the acts named,"* and it is expressly stated that the payment of the license fee and the issuing of the license under the Revenue Act shall not "relieve any person, firm, corporation, or association of persons from the payment of the fee prescribed under section five hereof." In close analogy to the revenue tax, the charge is graduated according to the population of the town in which the business is carried on. Any departure from that analogy may be found in section 6, which provides an immediate expropriation of the money covered into the treasury to the use of the commission in the enforcement of the act, the only apparent items of expenses being the per diem of the commission, the salaries of officers, and the salary or fees of attorneys selected by the board. Whether such a method of dealing with State funds is permissible, we need not now discuss.

The Constitution, Article V, section 3, requires that "the power of taxation shall be exercised in a just and equitable manner." It cannot be successfully maintained that a tax which is levied on a part of the citizens of the State for the privilege of engaging in a business is equitably levied when a large number of the counties of the State are not included and citizens therein engaged in a like business are left immune from the tax. See 1939 amendment, excluding 14 counties.

But whether we regard the imposition of the license fee as a State tax or otherwise, any law which, purporting to operate on a particular class, places upon those engaged in the business in a portion of the State a burden for the privilege which is exercised freely and without additional charge by those engaged in the business in other parts of the State is arbitrary in classification because it discriminates *within* the class orginally selected and extends to the latter a privilege and immunity not accorded to those who must, under the law, pay the additional exaction or quit the business. Constitution, Article I, section 7; *Simonton v. Lanier,* 71 N. C., 498, 503; *Plott Co. v. Ferguson,* 202 N. C., 446,

163 S. E., 688; *S. v. Fowler,* 193 N. C., 290; *Edgerton v. Hood,* 205 N. C., 816, 172 S. E., 481; *Frazier v. Shelton,* 320 Ill., 253, 150 N. E., 696, 43 A. L. R., 1086. The imposition of local taxes on professions and trades is another matter. *State ex rel. Wooldridge v. Morehead,* 100 Neb., 864, 161 N. W., 569.

As stated, the 1939 amendment to the 1937 act above quoted exempts certain counties, fourteen in number, from the operation of the general act. If these two acts are construed *in pari materia,* it leaves the combined legislation clearly open to the objection of unlawful discrimination in the respect mentioned.

The exception made by the 1939 amendment is important, material, and inseparable, and leaves no room to inquire *quo animo* it was made. We can neither cancel the exception nor free the rest of the statute from its unconstitutional taint. *Springfield Gas & Electric Co. v. Springfield,* 292 Ill., 236, 126 N. E., 739, 18 A. L. R., 929, Aff. 257 U. S., 66, 66 L. Ed., 131; *Dorchy v. Kansas,* 264 U. S., 286, 68 L. Ed., 686; 11 Am. Jur., p. 843, note 20.

2. The statute authorizes the commission (sections 3 [1] [e]), to "require examination of persons not entitled to have issued to them a license as provided in this act, such examination to cover subjects deemed necessary to promote the public health, safety, and welfare of the people of the State of North Carolina." Subsection (2) of this section provides for the suspension or revocation of licenses, after notice and hearing, "on the grounds of any violation of the provisions of this act or the rules and regulations promulgated by said commission not in conflict with this act," and provides the right of appeal upon such suspension and revocation. Thus, an unlimited discretion is given to the commission to set up standards of their own for admission to the business of "dry cleaning and/or pressing," according to whatever rules or regulations they may conceive to be related to the "public health, safety, and welfare of the people."

In licensing those who desire to engage in professions or occupations such as may be proper subjects of such regulation, the Legislature may confer upon executive officers or bodies the power of granting or refusing to license persons to enter such trades or professions only when it has prescribed a sufficient standard for their guidance. 16 C. J. S., p. 373, and cases cited. Where such a power is left to the unlimited discretion of a board, to be exercised without the guide of legislative standards, the statute is not only discriminatory but must be regarded as an attempted delegation of the legislative function offensive both to the State and the Federal Constitution. *Yick Wo v. Hopkins,* 118 U. S., 356, 30 L. Ed., 220; *Thomas v. Mills,* 117 Ohio State, 114, 157 N. E., 488, 54 A. L. R.,

1220; *J. W. Hampton, Jr. & Co. v. United States,* 276 U. S., 394, 72 L. Ed., 624; *People v. Monterey Fish Products Co.,* 195 Calif., 548, 234 P., 398, 38 A. L. R., 1186; *Panama Refining Co. v. Ryan,* 293 U. S., 388, 432, 79 L. Ed., 446; *A. L. A. Schechter Poultry Corp. v. United States,* 295 U. S., 495, 79 L. Ed., 1570, 97 A. L. R., 947; *Durham Provision Co. v. Daves,* 190 N. C., 7, 128 S. E., 593.

While the power to make rules and regulations to carry into effect the laws confided to them for administration is often given to administrative bodies, and while in instances there may be some doubt as to whether the proposed regulation is legislative in character or in pursuance of a delegable power, it is clear that in a statute of this kind, giving the important power of admitting or excluding persons from a business, trade, or profession, only the Legislature can create the standards and provide the reasonable limits within which the power must be exercised. 11 Am. Jur., p. 947, sec. 234, note 3; Annotation: 12 A. L. R., 1436, 54 A. L. R., 1105, 92 A. L. R., 403.

But we do not mean to say that it was within the power of the Legislature itself to invoke the police power and set up standards of the kind suggested which might exclude persons from the ordinary non-professional and non-skilled occupations which, neither inherently nor in the ordinary manner of their conduct, present a menace to the public welfare. It is only necessary to say in this connection that if the Legislature had the power, the attempt to delegate it to this commission in the manner attempted is not consistent with constitutional limitations.

3. It will simplify discussion if we bear in mind that the controversy in this case does not concern the propriety of minor regulations of business and occupations which may be, and are, imposed generally on the principle *sic utere tuo ut alienum non laedas,* or to the still broader field of regulation under the police power which does not involve the question of exclusion from the business, trade, or occupation made the subject of regulation. There is a great body of decision upon that subject altogether too general for satisfactory application to the question before us. Appellant challenges the power of the Legislature to impose or authorize the imposition of standards such as are contemplated in the law under review which might exclude him from one of the ordinary callings of life on the ground of educational or moral unfitness or for the want of technical, scientific skill and knowledge. He refers to the provisions of the Constitution above quoted, and claims that they should protect him in the choice and pursuit of the occupation with which this controversy is concerned.

It is not contended, of course, that these provisions of the Constitution confer upon any person the absolute right to choose and pursue any occupation he pleases, regardless of the public interest. The Legislature

may, through appropriate laws, protect the public against incapacity, fraud, and oppression where, from the nature of the business or occupation or the manner of its conduct, the natural consequence may be injurious to the public welfare. 11 Am. Jur., p. 1032. And in the exercise of this power it is well established that standards of personal fitness may be created and enforced by laws requiring the examination and licensing of those desiring to engage in the learned professions, and in occupations requiring scientific or technical knowledge and skill, some of which bring about a relation of trust or confidence between those who practice the trades or occupations and the clientele they serve. *In re Applicants for License,* 143 N. C., 1, 55 S. E., 635; *S. v. Van Doran,* 109 N. C., 864, 14 S. E., 32; *S. v. Call,* 121 N. C., 643, 28 S. E., 517; *S. v. Hicks,* 143 N. C., 689, 57 S. E., 441; *S. v. Siler,* 169 N. C., 314, 84 S. E., 1015; *Lambert v. Yellowbey,* 272 U. S., 581, 71 L. Ed., 422, 49 A. L. R., 575; *Louisiana State Med. Examiners v. Fife,* 162 La., 681, 111 So., 58, 54 A. L. R., 594, Aff. 274 U. S., 720, 71 L. Ed., 1324; *State ex rel. Marshall v. District Ct.,* 50 Montana, 289, 146 P., 743; *State v. Wood,* 51 S. D., 485, 215 N. W., 487, 54 A. L. R., 719; Annotation, 55 A. L. R., 303. At the other end of the occupational scale are the ordinary trades and occupations, harmless in themselves, in many of which men have engaged immemorially as a matter of common right, as to which it is uniformly held such standards may not be applied. *Smith v. Texas,* 233 U. S., 630, 58 L. Ed., 1129; *Bessette v. People,* 193 Ill., 334, 62 N. E., 215; *Dasch v. Jackson,* 176 Md., 251, 183 A., 534. Somewhere between these extremes the slendering thread of police authority must come to an end, and constitutional guaranties of personal liberty must supervene.

On the factual situation presented in this case we are of the opinion that the occupation in which appellant desires to engage belongs to the latter class and that he is within the protection of constitutional guaranties in its pursuit. The exigencies of decision in this case do not lead us far from a consideration of the character of the business or occupation itself, the probability, if any, of injury to the public welfare for lack of regulation, and the appropriateness of the drastic method of exclusion proposed as a means of preventing such harm to the public. But, in a large part, the argument has been addressed to the theory that the trend of recent decisions adopting a more liberal attitude toward regulation of business under the police power has largely reduced the case before us to a question of mere expediency in the enactment of the statute, which is a matter within the sound judgment of the Legislature and unreviewable by the courts. It is insisted that the business is "clothed with a public interest," and it is thought that there is thus provided a smooth path for legislative action without imbrications due to constitutional guaranties. The argument is not without a suggestion that the Court should yield to

the Legislature the ultimate determination of the relative importance of the social interests involved in maintaining or overruling applicable constitutional guaranties.

It is the fault of the argument, not of its candid restatement, if it falters at critical points. Under it there is not a calling or trade, however simple and harmless, that may not be preëmpted and monopolized by the first group that stakes out its claim and raises over the camp the "keep-off sign." If the Court should adopt a theory of that sort it cannot thereafter hope to protect the rights of any man under these constitutional provisions from the grossest aggression.

Those who are versed in the history of this expression ("clothed with a public interest") will understand our disinclination to make the rights either of society or the individual to depend on a play upon words. *Tyson & Bro.—United Theatre Ticket Office v. Banton,* 273 U. S., 418, 71 L. Ed., 718, 58 A. L. R., 1236. There are many social and public interests which logically form no basis for police interference with private business or for withdrawing the protection of constitutional guaranties. Society is always interested in the trades and occupations which underlie it; there is a social interest arising from the mutuality of patronage and service; and there are many situations in the social complex that may create a desire on the part of one group to improve the conditions of contact and pressure with another, none of which as social or public interest is comparable with the importance of the social interest involved in the maintenance of personal liberty guaranteed by the Constitution. *Tyson & Bro.—United Theatre Ticket Office v. Banton, supra; Ribnik v. McBride,* 277 U. S., 350, 72 L. Ed., 913, 56 A. L. R., 1327. Compare: *Louisville & N. R. Co. v. Kentucky,* 161 U. S., 677, 40 L. Ed., 849; *Munn v. Illinois,* 94 U. S., 113, 24 L. Ed., 77; *Chas. Wolff Packing Co. v. Court of Industrial Relations,* 262 U. S., 522, 67 L. Ed., 1103, 27 A. L. R., 1280.

Nebbia v. New York, 291 U. S., 502, 78 L. Ed., 940, upon which the prosecution seems to lean rather heavily, deals with the suggested test—"whether the business is clothed or affected with a public interest"—and while it recognizes the impracticality of the formula, the technique employed leaves us in doubt whether the Court intended to dismiss it altogether—through the process of benevolent dispersion—and adopt a new liberalism toward governmental control of business, or to stick to the formula in a much expanded sense and give to the new adjustment between social demands and constitutional restraint the color of historic authenticity. Annotation: 119 A. L. R., 985, 986.

Miami Laundry Co. et al. v. Florida Dry Cleaning and Laundry Board et al., 183 So., 759, 119 A. L. R., 956, another cited case, also uses the touchstone "clothed with a public interest" and apparently

regards the validity of police regulation as deriving its sanction from the formula.

Neither of these cases deals with the question of excluding persons from the occupations which were the subject of regulation. Whatever importance they may have in the general field affected by the decisions, the generalizations reached are too remote to control decision upon the more fundamental issues raised by the facts in the case at bar.

The constitutional provisions under consideration are categorically directed to restraint of the police power in its attempted exercise in the respects named. They have a direct and special relation to the choice and pursuit of an occupation—both as a property right and as a matter of personal liberty. Their scope and effect upon proposed legislation in this field must be left with the Court, or the guaranties might as well never have been written into the Constitution, and all the struggle and achievement which they represent is frustrated.

The mere expediency of legislation is a matter for the Legislature, when it is acting entirely within constitutional limitations, but whether it is so acting is a matter for the courts, and more especially legislative determinations in this field are subject to review. *S. v. Williams,* 146 N. C., 618, 61 S. E., 61; *Sterling v. Constantin,* 287 U. S., 378, 77 L. Ed., 375. We quote from 11 Am. Jur., p. 1060: "The determination of what businesses are affected with a public interest is primarily for the Legislature. It must be considered, however, that in spite of the fact that it is entitled to great respect, a mere declaration by the Legislature that a business is affected with a public interest is not conclusive of the question whether its attempted regulation on that ground is justified. The matter is one which is always open to judicial inquiry. Private business may not be regulated or converted into public business by legislative fiat." *Tyson & Bro.—United Theatre Ticket Office v. Banton, supra; Hirsh v. Block,* 50 App. D. C., 56, 267 F., 614, 11 A. L. R., 1238; *Wolf v. Fuller,* 87 N. H., 64, 174 Atl., 193, 94 A. L. R., 1067. The Legislature cannot, by preamble or fact-finding declaration, attribute to a business or occupation a character which it does not have according to common knowledge and experience and thus withdraw the legislation from judicial review. *Hoblitzel v. Jenkins,* 204 Ky., 122, 263 S. W., 764; *Chas. Wolff Packing Co. v. Court of Industrial Relations, supra; MacRae v. Fayetteville,* 198 N. C., 51, 150 S. E., 810; *Otis v. Parker,* 187 U. S., 606, 47 L. Ed., 323.

We think, on practical analysis of cases presented, the rule will still hold good that regulation of a business or occupation under the police power must be based on some distinguishing feature in the business itself or the manner in which it is ordinarily conducted, the natural and

probable consequence of which, if unregulated, is to produce substantial injury to the public peace, health, or welfare. When such classifications are made, the Court will pass on their reasonableness and determine as to the validity of the legislation.

But the power to regulate a business or occupation does not necessarily include the power to exclude persons from engaging in it. *Replogle v. City of Little Rock,* 166 Ark., 617, 267 S. W., 353, 36 A. L. R., 1333; *People ex rel. Durham Realty Corp. v. La Fetra,* 230 N. Y., 429, 130 N. E., 601; *State v. Porter,* 94 Conn., 639; *State of Ohio v. Helvering,* 292 U. S., 360, 78 L. Ed., 1307. When this field has been reached, the police power is severely curtailed. "The right of a citizen to pursue any of the ordinary vocations on his own property and with his own means, can neither be denied nor unduly abridged by the Legislature, for the preservation of such right is the principal purpose of the Constitution itself. In such cases, the limit of legislative power is regulation, and that power must be cautiously and sparingly exercised, unless the business is of such character as places it within the category of social and economic ills." *Ex Parte Dickey,* 76 W. Va., 576, 85 S. E., 781; 2 Cooley's Constitutional Limitations, 8th Ed., p. 1329.

Referring to industrial trades, it is said in the article on Constitutional Law, 11 Am. Jur., 1048: "As to them, the power of regulation is comparatively slight, when they are conducted and carried on upon private property and private means." In such cases the lawmaking body is usually relegated to restrictions distinctly regulative rather than prohibitive. The principle justifying requirements of personal fitness as a condition for engaging in an occupation is a narrow exception to pertinent constitutional guaranties of personal liberty which cannot be enlarged beyond its proper scope without such violence to their purpose as would be subversive of the freedom which has been universally attributed to the American system. It follows that there is a well recognized gap between the regulation of a business or occupation and restrictions preventing persons from engaging in them to which courts must pay careful attention. While many of the rights of man, as declared in the Constitution, contemplate adjustment to social necessities, some of them are not so yielding. Among them the right to earn a living must be regarded as inalienable. Conceding this, a law which destroys the opportunity of a man or woman to earn a living in one of the ordinary harmless occupations of life by the erection of educational and moral standards of fitness is legal grotesquery.

In one respect authorities are agreed: It is necessary to a valid exercise of the police power that the proposed restriction have a reasonable

and substantial relation to the evil it purports to remedy. *Leggetts v. Baldridge,* 278 U. S., 105, 111; *Meyer v. Nebraska,* 262 U. S., 390, 67 L. Ed., 1042, 29 A. L. R., 1446. Is there anything in this business, or calling, constituting a substantial menace to the public peace, health or welfare to which such restriction has a reasonable relation? Groping in a meager field, even with the diligent aid of counsel, we are unable to find it. Looking at the dry cleaning and/or pressing business in the light of the record and briefs and applying such common knowledge of the subject as we are permitted to use, we are confirmed in our view that it is an ordinary, simple occupation which, conducted in the normal way, involves no special danger to the public peace, health, or welfare, and requiring no regimentation of personnel to keep it in safe channels. If so, exclusion of persons from its enjoyment as a means of livelihood must be attributed to some other purpose to be accomplished by the law, and is violative of constitutional guaranties.

We do not recall that it has been contended that the occupation is one requiring a background of learning or scientific training or a special degree of technical skill; the facts would not warrant such contention. Nor has it been suggested that there is any greater opportunity for fraud in the business than that found in hundreds of other ordinary callings of life.

We do not attach importance to the manner in which the results are obtained—whether the material is cleansed by water or fuller's earth or soap or gasoline, or whether smoothness and smartness has been imparted to garments by drying on a flat stone or using a sad iron, roller or press. All of these methods have been employed at one time or another in this most ancient of trades. Physical improvements in the trade have not so changed its character as to alter its relation to the public.

It is argued that the danger to workmen from the use of inflammable liquids in the cleaning process justifies the "examination" and exclusion of persons from the occupation. Such a danger is properly the subject of general State laws, but as considered here it is a matter more related to intelligence and prudence than to education. Besides, we do not apply such standards to filling station attendants, cooks, and many others exposed to similar dangers, which are comparable to a thousand others from which no ordinary occupation is entirely free. We cannot rest decision on a plausibility that might properly be regarded as a pretext to save the statute. On the contrary, it would be our duty to hold that the danger suggested might be met with less drastic regulation and, looking through the form to the substance, to declare that the objectives sought by the statute, in so far as any public purpose is concerned, are merely ostensible. *Lochner v. New York,* 198 U. S., 45, 49 L. Ed., 937.

Turning to the argument that the statute is justified as a measure intended to protect the public against fraud, we may observe that there is no business or occupation which is not likely to have its quota of dishonest men. The danger to the public comes from the character of the man and not from any unusual opportunity afforded him in the business, which is inherently amoral. Like any other business, morality is imparted to it only by the character of the men engaged in it. We would probably fail in the attempt to secure honesty as a by-product of industry through the process of starving out original sin. " 'If occasional opportunity for fraud is to be the test, then there is no reason why every grocer, every merchant, every automobile dealer, every keeper of a garage, every manufacturer, and every mechanic who deals more frequently with the public in general, and whose opportunities for fraud are far greater than those of the real estate agent or salesman, may not be put on the same basis. If that be done, then only those who, in the opinion of certain boards or the courts, have the necessary moral qualifications will be permitted to engage in the ordinary occupations of life. The result will be that all others who fail to establish their moral fitness will not only be deprived of their means of livelihood, but will become a burden either on their families and friends or the community at large. In our opinion, the right to earn one's daily bread cannot be made to hang on so narrow a thread. Broad as is the police power, its limit is exceeded when the State undertakes to require moral qualifications of one who wishes to engage or continue in a business which, as usually conducted, is no more dangerous to the public than any other ordinary occupation of life.' " *Rawls v. Jenkins,* 212 Ky., 287, 292, 279 S. W., 350.

If the act is defective, as we think it is, in failing to disclose a justifiable relation to a reasonably necessary public purpose, it is clearly a monopoly offensive to Art. I, sec. 31, of the Constitution. Socially considered, this is its most serious offense.

Monopoly, as originally defined, consisted in a grant by the sovereign of an exclusive privilege to do something which had theretofore been a matter of common right. 41 C. J., 82. The exclusion of others from such common right is still considered a prominent feature of monopoly, and the consequent loss to those excluded of opportunity to earn a livelihood for themselves and their dependents, the danger of becoming a public charge, with attendant humiliation and insecurity, has been considered the prime reason for the public policy then adopted into the Constitution. But here, the Constitution itself does not analyze—it condemns. The ordinary trades and occupations are specialized forms of service developed through the necessity of division of labor in civilized life. The Government did not create them, does not own them,

and the grant of the privileges of such trades and occupations to a limited group of citizens is "contrary to the genius of a free State and ought not to be allowed."

The set-up in this type of organization, with complete internal control and power given to interested members of the group to control admission to the trade, and with little else of importance relating to regulation, raises a suspicion as to its public purpose. Not of itself sufficient to invalidate the statute, it invites the scrutiny of the Court as to the public nature of the objectives really pursued, which might readily be found in a desire to limit the field of competition. That we have indulged this form of group organization, to the extreme limit of constitutional barriers, should be by this time convincingly evident.

There is a definite obligation of law to progress which should not be ignored in the interpretation of the Constitution. But the liberal formulæ in which this relation is usually expressed are mere abstractions when applied to the instant case. It has not been made to appear that progress has made any substantial change in the relation between those engaged in the occupation under consideration and those whom they serve that would require a reappraisal of the Constitution. The changes which have been brought to our attention are rather in the social and political viewpoint respecting the relation between society and the individual, in which the importance of personal liberty is under constant attrition, in the desire for more sweeping governmental control in private affairs and in the development of pressure groups which are unable to reach their objectives through voluntary association and, for reasons not entirely altruistic, demand the powerful aid of law. The usual symptom is an endemic desire to have the public protected against them, although the public is not sensible of any harm which they may do it, or any need of protection. This *beau geste* should not blind the Court to the fact, when it exists, that the kind of protection afforded, resting on the principle of exclusion of fellow workers, is more related to obvious benefits accruing to the group in its private character than to the merely colorable advantage to the public.

The admonition of the Constitution requiring frequent recurrence to fundamental principles is politically sound. Only in this way may we avoid a break with tradition that preserves the spirit, and often the letter of the law. One of the cardinal rules of construction as applied to the Constitution is that it must be interpreted in the light of its history. This is peculiarly demanded in this case, when we are dealing with principles which have a key position in our political set-up, and endeavoring to give them the scope and effect the framers of the Constitution, and the people to whose genius it was acceptable at the time of

its adoption, intended them to have. *Whitman v. National Bank,* 176 U. S., 559, 44 L. Ed., 587; *Steele M. & H. Co. v. Miller,* 92 Ohio St., 115, 110 N. E., 648; *Story v. Richardson,* 186 Cal., 162, 198 P., 1057. "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 in the minds of the people agreeing to it." *Cooley, C. J., People v. Harding,* 53 Mich., 481, 19 N. W., 155. *Missouri v. Illinois,* 180 U. S., 208, 45 L. Ed., 497.

Knowledge of the sources from which these provisions of the Constitution came, and the political conditions which gave rise to them, is a part of the common learning of all English speaking peoples. There is nothing in government more dangerous to the liberty and rights of the individual than a too ready resort to the police power. It is a sufficient reference to history to recall that these restraints were the outcome of an appreciation of that fact, born of experience. They are categorically addressed to that issue. They are the product of an individualistic age, and there is little room to doubt their intended scope and purpose as affecting decision in the instant case. Resort to the police power to exclude persons from an ordinary calling, finding justification only by the existence of a vague public interest, often amounting to no more than a doubtful social convenience, is collectivistic in principle, destructive to the historic values of these guaranties, and contrary to the genius of the people who did all that was humanly possible to secure them in a written constitution. We believe that they were intended to give to the individual a larger endowment of personal liberty than could be otherwise guaranteed; a greater opportunity for initiative, and the acquisition of those interests which make for responsible citizenship. A departure from these standards may be regarded as social retrogression. No good can come to society from a policy which tends to drive its members from the ranks of the independently employed into the ranks of those industrially dependent, and the economic fallacy of such a policy is too obvious for comment.

We violate no precedent in referring to the important function these guaranties of personal liberty perform in determining the form and character of our Government. They are not accidental or unrelated. They fall into the pattern of democracy upon which our institutions are founded. In no other part of the fundamental law is caught and held the aspiration for this sort of freedom. If those whose duty it is to uphold tradition falter in the task, these guaranties may be defeated temporarily, or permanently lost through obsolescence. But it is idle to hope that the superstructure will survive its foundation stones. We learn from Biblical story that Jeremiah stood by the ruined walls of the

once glorious Jerusalem and exclaimed in amazement and anguish: "Is it nothing to you, all ye that pass by?"

We are aware of our duty to sustain an act of the Legislature where its constitutionality may be merely a matter of doubt. *Wells v. Housing Authority,* 213 N. C., 744, 197 S. E., 693; *Gunter v. Sanford,* 186 N. C., 452, 120 S. E., 41. But this principle does not require that the defendant be made the victim of two mistakes—one by the Legislature and another by the Court. *Marbury v. Madison,* 1 Cranch (U. S.), 137, 2 L. Ed., 60; *McCray v. United States,* 195 U. S., 27, 49 L. Ed., 78; *State v. Williams, supra.* These cases are not cited *pro forma* to maintain a principle universally recognized—the power of the Court to declare an act void for unconstitutionality. They are selected because they bear upon the conditions requiring such a decision and the solemn duty resting upon the Court to uphold the Constitution according to the obligations of office.

Under the challenge which the Constitution itself makes to the prosecution, the proponents of the drastic measure of exclusion have not been able to show to the Court a single substantial evil connected with the business under which such a restriction may be justified, or any reason at all the adoption of which would not embarrass the Court. In its factual setting the case departs completely from those in which this Court has approved regulation of this kind. In this situation there does not seem to be much room for a discussion as to the rules under which the Court approaches its duty of applying the constitutional test to this act of the Legislature. Any presumptions or burdens which may exist are satisfied when the facts are laid bare to the Court and the situation is found to be wanting in those conditions and those circumstances upon which alone the power of the Legislature in its exercise of the police power must depend. Obedience to the Constitution on the part of the Legislature is no more necessary to orderly government than the exercise of the power of the Court in requiring it when the Legislature inadvertently exceeds its limitations. "It has been frequently stated, in cases where the questions are presented for judicial review, that in order to sustain legislation under the police power, the courts must be able to see that its operation tends in some degree to prevent some offense or evil or to preserve public health, morals, safety, and welfare, and that if a statute discloses no such purpose, has no real or substantial relation to these objects, or is a palpable invasion of rights secured by fundamental law, it is the duty of the courts so to adjudge and thereby give effect to the Constitution." 11 Am. Jur., p. 1087, sec. 306. In such a situation the duty of the Court is clear. "There is a fundamental canon or construction that a Constitution should receive a liberal interpretation in favor of a citizen, especially with respect to those provisions which were

designed to safeguard the liberty and security of the citizen in regard to both person and property." 11 Am. Jur., p. 670.

We hold the act to be unconstitutional, in that its application to only a part of the whole class engaged in the occupation is discriminatory, in that it is an attempted delegation of the legislative function in the creation of standards by the commissioners created in the act, and in that it attempts to exclude from an ordinary harmless occupation, upon insufficient grounds, those who are entitled under the constitutional guaranties to engage in it, and thereby creates a monopoly in the group to which such privilege is extended.

The conviction under the statute is of no effect.

The judgment is

Reversed.

STACY, C. J., concurs in result.

DEVIN, J., concurring: I concur in the decision that the statute under which the defendant was tried is inoperative and insufficient to sustain his conviction of a criminal offense. The statute transgresses constitutional limits in some respects and the rights of the appellant are thereby injuriously affected. This invokes the judicial power to declare the act void.

In our representative democracy the Legislature peculiarly represents the popular will. Its power is limited only by the restrictions placed upon it by the people themselves in the Constitution, and by the powers granted to the Federal Government in the Constitution of the United States. It is only when it is made to appear clearly that the Legislature has exceeded the limitations upon its powers that the courts will interpose to protect constitutional rights which have been invaded or threatened. The power of the Legislature to impose reasonable restrictions generally upon the conduct of persons or businesses in the public interest, and for the promotion of the general welfare, may not be questioned. If the dry cleaning business, considering the proportions to which it has grown in the life of today, is affected with a public interest, the courts may not deny the power of the Legislature to impose regulations upon it. The decision that it is affected with a public interest is primarily for the Legislature, though always open to judicial inquiry.

While this business may not be regarded as one requiring a high degree of learning or scientific knowledge, it is conceivable that there may be sound reason for promulgating general regulations about it to safeguard the public against injury from ruined clothing or from infection by the germs of disease. The courts should not attempt to set up arbitrary distinctions between what are denominated the ordinary callings of life and the learned professions in respect to the constitutional

limits upon legislative power. The courts may not undertake to say that a particular business is not affected with a public interest, contrary to legislative declaration, in the absence of a proper basis for determination. Nor should the proponents of legislation be required to show affirmatively that the particular expression of the legislative will is supported by facts and social and economic conditions sufficient to satisfy the courts. Does not the presumption that the Legislature acted within the limits of the Constitution lead to the conclusion that its declaration of policy should be followed by the courts, unless clearly shown to be unwarranted, arbitrary, or discriminatory? In the proper effort to protect individual freedom of conduct and the right to engage in a particular business free from regulation, the power of the Legislature to prescribe regulations in the public interest should not be unduly restricted, nor should there be imposed upon those seeking to uphold legislative regulation the burden of showing affirmatively that the lawmaking body has not thereby exceeded the limits upon its power fixed by the Constitution.

In the consideration of the questions raised by this appeal, as well as those of like nature which may hereafter arise, the judicial philosophy expressed by *Mr. Justice Holmes* in *Tyson v. Banton*, 273 U. S., at page 446, seems appropriate: "I think the proper course is to recognize that a state legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the state, and that courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular court may happen to entertain."

SHENANDOAH LIFE INSURANCE COMPANY, INC., v. W. P. SANDRIDGE, SUBSTITUTED TRUSTEE; MAUDE MILLER, MRS. EFFIE M. VINSON, BERTHA M. ROSE, C. A. BURKE, GUARDIAN FOR DORIS ELIZABETH BURKE, MARY PAULINE BURKE AND MARTHA EUGENIA BURKE.

(Filed 2 February, 1940.)

1. Estoppel § 2—Cestui held estopped by deed releasing land from deed of trust from claiming interest therein by reason of subsequent purchase from stranger to the instrument of note secured by the deed of trust.

The corporate purchaser of land executed a purchase money deed of trust to secure the balance of the purchase price. Upon maturity of one of the notes secured thereby, the president of the corporation borrowed money on his personal note from a stranger to the instrument, used the

proceeds to pay the purchase money note and had the purchase money note transferred to him individually and pledged same as collateral security for his personal note. In order to finance improvements on part of the land, the corporation acquired a quitclaim deed for that part from the trustee and the holders of the notes secured by the deed of trust except the holder of the pledged note, the quitclaim deed expressly reciting that it should forever bar the grantors therein from asserting any claim against the said tract, and then the corporation deeded the tract to its president individually, who borrowed money from plaintiff to make the improvements, and secured same by another deed of trust, the holders of the purchase money notes, other than the note pledged as collateral security, obtaining a part of the loan as consideration for the quitclaim deed, with knowledge that plaintiff was relying on the quitclaim deed and believed that its deed of trust constituted a first lien on the property. Defendant, the holder of one of the notes secured by the original deed of trust, who had signed the quitclaim deed, thereafter purchased, long after its maturity, the pledged note to prevent foreclosure by the pledgee, and then instituted this action to foreclose the original deed of trust. *Held:* Defendant is estopped by the quitclaim deed and the matters *in pais* from asserting any interest in the land as against the *cestui* who bought the land under foreclosure of the instrument securing its debt, the language of the quitclaim deed that the grantors therein should be forever barred from asserting any claim against the property being sufficient to estop the assertion of an after-acquired title based upon the lien of the original deed of trust, and an express warranty not being necessary to support an estoppel.

2. Estoppel § 6h—Under facts of this case, knowledge of attorney held not such as to preclude plaintiff from asserting estoppel.

The corporate purchaser of land executed a purchase money deed of trust to secure the balance of the purchase price. Upon maturity of one of the notes secured thereby, the president of the corporation borrowed a sum of money on his personal note from a stranger to the instrument, used the proceeds to pay the purchase money note and had the purchase money note transferred to him individually and pledged same as collateral security for his personal note, the pledge being drawn by an attorney. Thereafter in refinancing the property to obtain funds for improvements, a quitclaim deed was executed by the trustee and the holders of the notes secured by the original deed of trust, except the holder of the pledged note, and a new deed of trust was executed to the lender. The title was looked up by an associate in the office of the attorney who had drawn the pledge, who relied on the quitclaim deed and the affidavit of the president of the corporation stipulating the unpaid notes secured by the original deed of trust, which affidavit failed to name the pledged note. A holder of one of the notes secured by the original deed of trust, who had signed the quitclaim deed, subsequently bought the pledged note after maturity and sought to foreclose the original deed of trust. *Held:* The knowledge of the attorney, under the facts and circumstances of this case, does not preclude the *cestui* from asserting an estoppel against the purchaser of the pledged note.

APPEAL by defendants from *Hamilton, Special Judge,* at September Term, 1939, of FORSYTH. Affirmed.

This is an action brought by plaintiff against defendants and W. P. Sandridge, substituted trustee. The defendant Maude Miller claims the nonpayment of a $10,000 bond made 16 April, 1926, to Doris M. Burke, by Englewood, Inc., and assigned to J. A. Bolich, Jr., who made a bond to George W. Edwards for $10,000 and placed the bond with other collaterals, which were afterwards purchased by Maude Miller, defendant, on 11 February, 1937, for $4,345.47 (now claiming about $11,000) and to restrain W. P. Sandridge, substituted trustee, from selling the lot securing said bond now claimed by plaintiff—it having purchased same under trustee sale of E. Lee Trinkle *et al.*

The evidence on the part of plaintiff:

(1) Deed, dated 16 April, 1926, from Gaston E. Miller, widower, and Doris M. Burke and her husband, C. A. Burke, to Englewood, Inc., $10,000 and other valuable considerations. Description: Lying and being in the city of Winston-Salem, North Carolina, measuring 100 feet on West Fourth Street, and of that width extending northwardly 200 feet to 4½ Street, being bounded on the north by 4½ Street, east by Lot No. 290, south by Fourth Street, and west by Lot No. 292. The above described lot being known and designated on the plat of Winston as Lot No. 291, being the same lot conveyed to said Gaston E. Miller by J. S. Miller and wife and G. L. Miller and wife, on 20 March, 1880. See Book of Deeds No. 21, pages 16 and 17, register of deeds' office, Forsyth County.

(2) On 16 April, 1926, Englewood, Inc., the owner of the land deeded to it by Gaston E. Miller, and Doris M. Burke, made and executed a deed of trust to R. J. Franklin, trustee, to secure an indebtedness of $90,000, evidenced by bonds, as follows: 1 bond for $10,000.00, payable to Doris M. Burke, or order, due one year after date; 1 bond for $10,000.00, payable to Doris M. Burke, or order, due two years after date; 1 bond for $10,000.00, payable to Doris M. Burke, due three years after date; 1 bond for $10,000.00, payable to Gaston E. Miller, or order, due four years after date; 1 bond for $10,000, payable to Doris M. Burke, or order, due five years after date; 1 bond for $40,000.00, payable to Gaston E. Miller, or order, due five years after date. This was balance purchase money on land deeded to it by Miller and Burke, the consideration was $100,000.00—$10,000 paid in cash. The property consisted of (1) the L-shaped Bowling Alley lot, (2) the 60 by 100 foot lot. This deed of trust was duly recorded in Book 209, p. 218, registry of Forsyth County, North Carolina.

(3) Deed dated 28 August, 1930, from Englewood, Inc., to J. A. Bolich, Jr., one dollar and assumption of the balance due on a certain debt secured by a deed of trust bearing date of 16 April, 1926, recorded in Book 209, page 218. Description: Tract 1—L-shaped Bowling Alley

lot; Tract 2—a lot 60 x 100 feet on the north side of West 4th Street. Probated and filed 8 September, 1930; recorded in Book 329, page 296.

(4) Deed of trust, dated 27 August, 1930, from J. A. Bolich, Jr., and wife, Rosalie F. Bolich, to E. Lee Trinkle, W. L. Andrews and J. P. Saul, Jr., trustees for Shenandoah Life Insurance Company, Inc., securing $60,000 due and payable three years after date, with interest at six per cent. Description: The L-shaped Bowling Alley lot. The plaintiff claims only the Bowling Alley lot, having purchased same under the sale of its deed of trust.

(5) Deed, dated 20 November, 1930, from J. A. Bolich, Jr., and wife, Rosalie F. Bolich, to Bolich Holding Corporation. Ten dollars and assumption of deed of trust to E. Lee Trinkle *et al.*, trustees, in the sum of $60,000.00, recorded in Book 277, page 53; a deed of trust to R. J. Franklin, trustee, and Gaston E. Miller and Doris M. Burke, recorded in Book 209, page 218; a deed of trust to A. P. Grice, trustee, securing the sum of $40,000.00, recorded in Deed of Trust Book 202, page 101 (property not in controversy); and deed of trust to J. H. McKeithan, for the sum of $12,000.00, recorded in Book ....., page .....; and all taxes and assessments due the county of Forsyth and city of Winston-Salem for the year 1930. Description: Tract No. 1—the L-shaped Bowling Alley lot (this is the only piece in controversy); Tract No. 2—lot on the north side of West Fourth Street, 60 x 100 feet; Tract No. 3—not in controversy. Recorded in Book 332, page 43.

(6) Quitclaim deed. "State of North Carolina; Forsyth County. Know all men by these presents, that we, Maude Miller (single), Mrs. Effie M. Vinson and husband, Luby Vinson, and Mrs. Bertha M. Rose and husband, Samuel Rose, C. A. Burke, Guardian of Doris Elizabeth Burke, Mary Pauline Burke and Martha Eugenia Burke, C. A. Burke, Administrator of the estate of Mrs. Doris M. Burke, and W. E. Franklin, Trustee, and C. A. Burke, of Forsyth County, state aforesaid, for divers good causes and considerations thereunto moving, and more particularly for Ten Thousand Dollars and other valuable considerations received of Englewood, Inc., have remised, released and forever quitclaimed and by these presents do, for ourselves and our heirs and assigns, justly and absolutely remise, release and forever quitclaim unto Englewood, Inc., and to its heirs and assigns forever, all such right, title and interest and estate as we have or ought to have in or to all that place, parcel or lot of land lying in Winston Township, Forsyth County, State of North Carolina, and described as follows: BEGINNING at a point on the north side of West Fourth Street in the city of Winston-Salem, said point being the southeast corner of Lot No. 292, as shown on the plat of Winston, and being also the southwest corner of Lot No. 291, and running thence north 5 degrees 30′ west 208 feet to 4½ Street; thence north

84 degrees east 100 feet along 4½ Street to a point, the northwest corner of Lot No. 290; thence south 5 degrees 30′ east 108 feet along the west line of Lot No. 290 to a point; thence south 84 degrees west 80 feet to a point; thence south 5 degrees 30′ east 100 feet to a point in the north line of West Fourth Street; thence along West Fourth Street 20 feet to the point of beginning. Being a strip of land fronting 20 feet on West Fourth Street and extending back northwardly 100 feet, and another tract adjoining and north thereof 100 feet x 108 feet, both being parts of Lot No. 291 as shown on plat of Winston. (L-shaped Bowling Alley lot.) The purpose of the above quitclaim being to release the owner, Englewood, Inc., of the above described property from the effect of the deed of trust recorded in Book 209, page 218. TO HAVE AND TO HOLD the above-released premises, unto it said Englewood, Inc., its successors and assigns, to it and their only proper use and behoof forever; so that neither we, nor either of us, nor any other person, in our name and behalf, shall or will hereafter claim or demand any right or title to the premises, or any part thereof; but they and every one of them shall, by these presents, be excluded and forever barred. IN WITNESS WHEREOF, we, the said parties of the first part, have hereunto set our hands and affixed our several seals, this ..... day of August, 1930. Maude Miller (Seal), Effie M. Vinson (Seal), Luby Vinson (Seal), Bertha M. Rose (Seal), Samuel Rose (Seal), C. A. Burke, Admr. of Mrs. Doris M. Burke (Seal), C. A. Burke, Guardian of Doris Elizabeth Burke, Mary Pauline Burke and Martha Eugenia Burke (Seal), W. E. Franklin, Trustee (Seal), C. A. Burke (Seal)." All acknowledgments were taken by Josephine L. Maxwell, notary public, on 27 August, 1930. This instrument was probated and filed for recordation 10 September, 1930, and registered in Deed Book 330, page 15. As to the administrator and guardian for the minors signing the above paper writing, a petition was duly filed giving the facts before the clerk, who made an order allowing the "releasing said property from the deed of trust," etc., for a consideration set forth. This was approved by the judge of the Superior Court.

(7) On 10 August, 1937, the defendant W. P. Sandridge was appointed substitute trustee, under the laws of North Carolina, of a deed of trust executed by Englewood, Inc., a corporation of the State of North Carolina, under date of 16 April, 1926, to R. J. Franklin, trustee, recorded in Book of Deeds of Trust 209, page 218, in the office of the register of deeds for Forsyth County, North Carolina, the said R. J. Franklin, original trustee under said deed of trust, being dead. Doris Elizabeth Burke, Mary Pauline Burke and Martha Eugenia Burke are minors. C. A. Burke was duly appointed guardian by the clerk of the Superior Court on 11 March, 1930, and is now the duly acting guardian

for said minors. They are the children of Doris M. Burke, who died on 25 February, 1930.

(8) The note in controversy is as follows: "$10,000.00. Winston-Salem, N. C., April 16, 1926. Two years after date we promise to pay to the order of Mrs. Doris M. Burke Ten Thousand and 00/100 Dollars with interest from date at the rate of 6% per annum and payable annually until paid. Secured by Deed of Trust of even date to R. J. Franklin, Trustee, and providing if this bond is not promptly paid at maturity thereof, then and in that event the entire debt secured by said deed of trust shall instantly become due and payable. Purchase money in part for land conveyed by said deed of trust. Payable at ....., Value received. Englewood, Inc., By. J. A. Bolich, Jr. Attest: J. H. McCabe (Seal), Secretary. No. ..... Due April 16, 1928." On the back: "Int. pd. to Apr. 16, 1927. Transferred without recourse to J. A. Bolich, Jr. Mrs. Doris M. Burke—Crt. $195.37 Oct. 16, 1929 J. A. Bolich, Jr." By proportionate part of proceeds of foreclosure of part of security. $6,228.37.

(9) Trustee's deed, dated 14 June, 1938, from W. P. Sandridge, substituted trustee, to Maude Miller, individually, Maude Miller, Mrs. Effie M. Vinson and Mrs. Bertha M. Rose, executrices of the estate of Gaston E. Miller, and C. A. Burke, guardian of Doris Elizabeth Burke, Mary Pauline Burke and Martha Eugenia Burke, reciting deed of trust from Englewood, Inc., dated 16 April, 1926, to R. J. Franklin, trustee, recorded in Deed of Trust Book 209, at page 218; default in the payment of the obligation secured thereby, due advertisement and sale on 16 May, 1938, and purchased at such sale by the grantees for the sum of twenty-five thousand dollars ($25,000.00). Description: 60 by 100 feet lot. Filed for registration 5 July, 1938; recorded in Book 435, page 99.

(10) Stipulation. The defendants, Maude Miller, Effie M. Vinson and Bertha Rose, executrices of Gaston E. Miller, deceased, and C. A. Burke, guardian, have foreclosed the tract of land fronting 60 feet on Fourth Street and running back 100 feet under the deed of trust from Englewood, Inc., to R. J. Franklin, trustee, dated 16 April, 1926, recorded in Deed of Trust Book 209, at page 218, and have acquired title thereto by a trustee's deed which has been duly recorded. The defendant W. P. Sandridge, substituted trustee, at the direction of the other defendants named herein, advertised for sale all of the lands described in both the Miller and Shenandoah Life Insurance Company, Inc., deeds of trust, the sale to be held at the courthouse door at noon on 15 January, 1938. This action was to restrain the sale of the land in controversy and to declare plaintiff the sole owner.

The following issue was submitted to the jury: "Is the plaintiff, the Shenandoah Life Insurance Company, Inc., the owner and in the posses-

sion of Tract No. 1, described in the deed of trust recorded in Book of Deeds of Trust 277, at page 53, in the office of the register of deeds for Forsyth County, in fee simple, free and clear of any claim, right, title or interest of the defendants, or any of them, as alleged in the complaint?" The jury answered the issue "Yes."

His Honor, Oscar O. Efird, judge of the Forsyth County Court, rendered judgment on the verdict. Defendants made numerous exceptions and assignments of error and appealed to the Superior Court. The Superior Court overruled the exceptions and assignments of error made by the defendants. The defendants 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.

Roy L. Deal for plaintiff.

Manly, Hendren & Womble, L. K. Martin, and W. P. Sandridge 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. N. C. Code, 1935 (Michie), sec. 567. The court below refused these motions, and in this we can see no error.

The judge of the Forsyth County Court charged the jury that "If you believe the evidence in this case and find from that evidence and by its greater weight," setting forth certain evidence, and finally charged: "The effect of my instructions to you, which you will remember and take in connection with what I am now saying was, in effect, that if you believed the evidence and found the facts to be true as testified to and as shown by the record evidence, and found therefrom, from that evidence and by its greater weight, certain facts which I outlined to you in my charge, that then you would answer that issue 'Yes.' My further instruction was that if you did not believe the evidence and the records introduced and the admissions of the parties, or if you failed to find the facts to be true and failed to find certain facts from the evidence and by its greater weight, that then you would answer that issue 'No.'" The issue was answered "Yes."

A nonsuit was taken in the suit of George W. Edwards against Englewood, Inc. Shenandoah Life Insurance Company, Inc., was made a party defendant at the instance of the Millers and Burkes, but not at the instance of George W. Edwards. George W. Edwards never mentioned to C. A. Burke, husband of Doris M. Burke (deceased) and administrator and guardian of her children, that he held the $10,000 bond in controversy until some time prior to 1934. He never did mention it to Mrs. Vinson, Mrs. Rose, or Maude Miller. He was induced

to take a nonsuit to foreclose part of Lot No. 291 only after he received from Maude Miller $4,345.47 for the $10,000 Englewood, Inc., bond held by him as collateral to Bolich's note with the other collateral—viz., one hundred shares of the preferred stock in Carolina Building, Inc., of the par value of one hundred ($100.00) dollars; fifty shares of common stock in Carolina Building, Inc., of no par value.

This bond and the collateral put up by Bolich were all sold to Maude Miller after the paper writing, dated 27 August, 1930, was signed by Maude Miller. Bolich and wife sold the property in controversy (the L-shaped Bowling Alley lot) with other property on 20 November, 1930, to Bolich Holding Corporation, and it assumed the payment of the $60,000 loan made by plaintiff and other indebtedness. At the time Edwards was secretary and treasurer of the Bolich Holding Corporation. On 18 March, 1930, he purchased $43,500 preferred stock in the corporation. Bolich was president. Edwards, as secretary and treasurer, made disbursements for the corporation and signed all the checks and received rents, etc. He discussed the business plans with Bolich, the president. The offices of the Bolich Holding Corporation were directly across the street from the Bowling Alley Building (L-shaped lot), which plaintiff had taken a lien on for $60,000, to help pay for building same. It was in evidence that his dealings with Bolich were many and important over a series of years. All this time the $10,000 bond was never mentioned. Bolich testified: "In my opinion, the fair market value of the Carolina Building, Inc., stock pledged with Mr. George W. Edwards at the time of its pledge was fifty cents on the dollar." . . . "I simply overlook the $10,000 obligation of Englewood, Inc., payable to Doris M. Burke, which was pledged with Mr. Edwards as security for my loan. I considered this note paid and apparently forgot about it."

Maude Miller taught school for about thirty years. On 11 February, 1937, she purchased from George W. Edwards the note of J. A. Bolich, Jr., dated 12 April, 1928, and paid him $4,345.47 for that note, and the collaterals before mentioned—viz., the note of Englewood, Inc., dated 16 April, 1926, payable to Doris M. Burke, or order, maturing two years after date, in the sum of $10,000. When Maude Miller purchased the note and collateral above named, on 11 February, 1937, for $4,345.47, she had theretofore, when plaintiff was lending the $60,000, received $19,595.85 of the loan. So that plaintiff could obtain a first lien on the L-shaped Bowling Alley lot, she was the first to sign the paper writing reading, in part: "To Have and to Hold, the above-released premises, unto it said Englewood, Inc., its successors and assigns, to its and their only proper use and behoof forever; so that neither we, nor either of us, nor any other person, in our name and behalf, shall or will hereafter claim or demand any right or title to the premises, or any part thereof;

but they and every one of them shall, by these presents, be excluded and forever barred." W. E. Franklin, trustee in the deed of trust, also under seal signed the paper writing.

Maude Miller testified, in part: "We divided this sum between us. When I got a check for $19,595.85, I knew that it was part of the proceeds of a loan made on the L-shaped Bowling Alley lot. I knew at the time of executing the quitclaim deed or instrument recorded in Book 330, at page 15, that the reason for executing it was in order that the company lending the money should get a first lien on the L-shaped Bowling Alley lot." In the very teeth of this solemn agreement, under seal, which plaintiff relied and acted upon, dated 27 August, 1930, she purchased this bond in controversy, dated 16 April, 1926, due at 2 years, on 11 February, 1937—nearly 11 years thereafter—for $4,345.47, and is now making claim against plaintiff for some $11,000, contrary to her solemn agreement under seal, which she signed and which plaintiff relied and acted on. "So that neither we, nor either of us, nor any other person, in our name and behalf, shall or will hereafter claim or demand any right or title to the premises, or any part thereof." See *Edwards v. Buena Vista Annex, Inc., ante,* 706.

The defendant, Maude Miller, in her brief makes the following important admission in this respect: "In the case at bar it was undoubtedly the purpose of the grantors to release the described property from their claims under this purchase money deed of trust, and the grantors undoubtedly thought that they held all of the notes (bonds), which were secured by that deed of trust."

In defendants' brief is the following: "Why did Maude Miller buy this note? Miss Maude Miller did not buy this note voluntarily as a business transaction. She bought it as a matter of self-preservation. (1) Mr. Edwards was seeking to foreclose all the security left for the notes she and her sisters, as heirs of Gaston Miller, and her nieces, as the infant heirs of Doris Miller Burke had; and she was compelled to buy this note to protect the little security which they had left. (2) Mr. Edwards, a well-to-do man, could have bought up this 60 by 100 foot lot. As he was claiming the face of his note ($10,000) with interest for over nine years—a total of more than $15,000—his note alone approximated the value of the 60 by 100 foot lot. (3) There was no market for this lot when Mr. Edwards instituted his suit to foreclose and at the foreclosure it would have brought an inadequate price. (4) Miss Maude Miller bought the note for less than Mr. Edwards was claiming and for less than he would have recovered. Mr. Edwards claimed more than $15,000, and Miss Maude Miller bought it for $4,345.47." We think that Maude Miller is estopped by her conduct and solemn covenant under seal, to make the contention she now makes. The language and

intentions are clear and unequivocal in the paper writing, under seal. She was an intelligent woman *sui juris* when she signed the paper writing.

In *Seawell v. Hall,* 185 N. C., 80 (82-3), it is written: "Discussing the question in *Gudger v. White,* 141 N. C., 513, *Walker, J.,* pertinently said: 'It is not difficult by reading the deed to reach a satisfactory conclusion as to what the parties meant, and we are required by the settled canon of construction so to interpret it as to ascertain and effectuate the intention of the parties. Their meaning, it is true, must be expressed in the instrument; but it is proper to seek for a rational purpose in the language and provisions of the deed and to construe it consistently with reason and common sense. If there is any doubt entertained as to the real intention, we should reject that interpretation which plainly leads to injustice and adopt that one which conforms more to the presumed meaning, because it does not produce unusual and unjust results. All this is subject, however, to the inflexible rule that the intention must be gathered from the entire instrument "after looking," as the phrase is, "at the four corners of it,"' " citing a wealth of authorities.

In *Woody v. Cates,* 213 N. C., 792 (794), is the following: "In *Williams v. R. R.,* 200 N. C., 771, 158 S. E., 473, *Adams, J.,* speaking for the Court, states the principle as follows: 'Where a grantor executes a deed in proper form intending to convey his right, title and interest in land, and the grantee expects to become vested with such estate, the deed, although it may not contain technical covenants of title, is binding on the grantor and those claiming under him, and they will be estopped to deny that the grantee became seized of the estate the deed purports to convey.' To the same effect is *Crawley v. Stearns,* 194 N. C., 15, 138 S. E., 403." *Hallyburton v. Slagle,* 132 N. C., 947 (952); *Weeks v. Wilkins,* 139 N. C., 215.

In 19 Amer. Jurisprudence, sec. 18, p. 617, it is written: "Most courts in the United States have acceded to the position adopted by the Supreme Court that if the intention of the parties to a conveyance is to convey a fee or some other estate of a particular interest or quality, such intention will be given preëminent consideration and the grantor will be estopped to assert an after-acquired title, in spite of the absence of a covenant of warranty. Only a few courts cling to the position that a warranty, express or implied by statute, is essential to effect an estoppel. It is considered unnecessary that there be a formal covenant of warranty to estop the grantor in a deed from setting up against his grantee an after-acquired title and that a deed be given that effect if it sets forth by way of recital or averment that it is to operate as an absolute deed in fee," etc. *Van Rensselaer v. Kearney,* 11 Howard U. S., 297, 13 Law Ed., 703.

We have set forth the conduct of George W. Edwards in relation to

this $10,000 bond. For years, as secretary and treasurer of the Bolich Holding Corporation, of which Bolich was president, he had dealings with Bolich. He purchased $43,500 preferred stock in said corporation. The Bolich Holding Corporation, of which he was secretary and treasurer, was liable for the payment of the indebtedness of $60,000, which it had assumed. No mention was made by him for years of this bond of Doris M. Burke, assigned without recourse to Bolich and which he held with other collateral to secure Bolich's $10,000 bond to him. No evidence that any attempt was made to collect the bond from Bolich or to sell any of the other collateral to pay the bond, which at the time was valuable. Bolich said, "I considered this note (bond) paid and apparently forgot about it."

J. H. McKeithan, a practicing attorney in North Carolina, associated with Parrish & Deal, Attorneys, testified, in part: "I investigated the title to the L-shaped Bowling Alley lot on which the Shenandoah Life Insurance Company, Inc., deed of trust was given. . . . I reported that upon the discharge of the release of the L-shaped Bowling Alley lot from the operation of the deed of trust held by the Millers and Burkes, and the payment of taxes and assessments that the deed of trust to the Shenandoah Life Insurance Company, Inc., would constitute a first lien on the property described in it. . . . At the time of looking up this title and making the certificate I had no knowledge of a transaction occurring in April, 1930, between Mr. Bolich and Mr. Edwards and Mrs. Burke, whereby Mrs. Burke's bond was assigned by Mr. Bolich to Mr. Edwards."

The attorney relied on the agreement under seal and also on an affidavit made by J. A. Bolich, Jr., as to the balance due which did not include this $10,000. J. P. Saul, Jr., vice president and general counsel of the Shenandoah Life Insurance Company, Inc., testified, in part: "This check represents the loan of $60,000 made by the Shenandoah Life Insurance Company, Inc., to Mr. Bolich, evidenced by the deed of trust recorded in Deed of Trust Book 277, at page 53, in the office of the register of deeds of Forsyth County. At the time this loan was made the Shenandoah Life Insurance Company, Inc., caused an examination to be made of the title to the property covered by the deed of trust recorded in Deed of Trust Book 277, at page 53. The Shenandoah Life Insurance Company, Inc., made this loan upon the belief that this deed of trust constituted a first lien. The officials of the Shenandoah Life Insurance Company, Inc., had knowledge of the quitclaim deed recorded in Deed Book 330, at page 15, before making this loan. We relied upon this quitclaim deed in making the loan. We were furnished, by counsel investigating the title for us, with an affidavit or certificate executed by J. A. Bolich, Jr. . . . Tract 1 in the deed of trust to

E. Lee Trinkle, J. A. Andrews and J. P. Paul, Jr., trustees, is the L-shaped Bowling Alley lot. The lien of this deed of trust was presumably a first lien upon Tract 1, which is the L-shaped Bowling Alley lot, and a second lien upon the other two tracts mentioned in that deed of trust. Tracts 2 and 3 have been foreclosed under prior liens. It is my understanding that Mr. Bolich turned over to our local attorneys the sum of $60,000 to be disbursed and that those attorneys disbursed the sum of $60,000 representing this loan. As one of the surviving trustees in this deed of trust, I conducted a foreclosure sale. At this sale the Shenandoah Life Insurance Company, Inc., became the purchaser of the L-shaped Bowling Alley lot. . . . At the time the Shenandoah Life Insurance Company, Inc., foreclosed its deed of trust on the L-shaped Bowling Alley lot, there was something in excess of $80,000 due on the mortgage. The payments made on the note (or bond) had not been sufficient to keep up interest and taxes and insurance. This property was bid in in January, 1938, by the Shenandoah Life Insurance Company, Inc., for $40,000. The Shenandoah Life Insurance Company, Inc., has no other security for this debt. When this loan was made we were furnished by Parrish & Deal, attorneys at law of Winston-Salem, with an abstract of title. In that abstract of title the deed recorded in Deed Book 330, at page 15, was referred to."

The defendants in their brief say: "The plaintiff had actual notice through its attorneys that the note (or bond) was outstanding. The argument about to be made is not regarded by the authors of this brief as essential to the determination of this case. The argument is advanced as an additional reason why the defendants should prevail." From the facts in this case, we do not think that plaintiff had such actual notice that would affect plaintiff's rights. *Arrington v. Arrington,* 114 N. C., 151; *Wood v. Trust Co.,* 200 N. C., 105.

Under all the facts of the record, written and *in pais,* it would be inequitable, unjust and unconscionable for Maude Miller to recover from plaintiff the bond in controversy. She is estopped and the charge of the judge of Forsyth County Court was correct—there was no error in the judgment of the Superior Court.

For the reasons given, the judgment is

Affirmed.

HOME REAL ESTATE LOAN & INSURANCE COMPANY, AND W. F. SHAFFNER, v. TOWN OF CAROLINA BEACH.

(Filed 2 February, 1940.)

1. Dedication § 1—Sale of lots in subdivision with reference to plat effects dedication of streets shown by plat.

When the owner of lands, located within or without a town or city, subdivides and plats same into lots and streets, and sells and conveys any of the lots with reference to the plat, nothing else appearing, he thereby dedicates the streets, and all of them, to the use of the purchasers, and those claiming under them, and of the public.

2. Dedication § 3—Purchasers' easements in streets shown by plat are not dependent upon acceptance of dedication by municipality.

Those who purchase lots in a subdivision with reference to a plat acquire an easement by dedication in all the streets shown by the plat, which easements are not dependent upon the acceptance of the dedication by the public or by the town in which the land is situate, and the purchasers have the right to have the streets which are not actually opened kept at all times free to be open to the full extent shown by the plat, both as to length and width, and such right attaches to all of the streets shown by the plat and not only those adjacent to or in the immediate vicinity of the lots purchased.

3. Dedication § 4—Purchasers' easements in streets shown by plat may not be defeated by revision of plat by owner of subdivision.

The corporate owner of land subdivided same and sold lots therein with reference to a plat showing lots and streets, which plat showed the street in question as being 99 feet wide, to which width the street was laid out, surveyed and staked, and was opened and used by the public for a part of its width. Thereafter the corporation made a revised plat showing the said street to be 80 feet in width, which revised plat was first recorded. Plaintiffs claimed title to the 19 feet sought to be withdrawn from the dedication by *mesne* conveyance from the corporation. The lands were later incorporated within the limits of a municipality and it acquired title to lots sold with reference to the original plat. *Held:* The right of those purchasing lots with reference to the original plat to have the land kept open so that the street in question could be maintained for the full width of 99 feet is not affected by the subsequent action of the corporate owner in seeking to withdraw 19 feet from the width of the street, and the municipality, being in privity with the purchasers of such lots, may force the corporate owner or its successors to abide by the dedication of the street for the full width as shown by the plat.

4. Dedication § 5—Use and maintenance of street by municipality is acceptance of dedication precluding revocation of dedication as to any part of street.

Where a street in a subdivision is dedicated to the purchasers of lots and to the public by the sale of lots with reference to a plat of the sub-

division showing the street, and the street is actually opened and used by the public even for a part of the width shown by the plat, such use precludes the owner from revoking the dedication under provision of chapter 174, Public Laws of 1921 (Michie's Code, 3846 [rr]), even as to the portion of the width of the street not used and maintained by the municipality.

5. Dedication § 4: Constitutional Law § 18—Granting of municipal charter cannot have effect of defeating rights of individual purchasers to easements in streets shown by plat.

Lots in a subdivision were sold with reference to a plat showing the street in question to be 99 feet in width. At the time the charter was granted to a municipality embracing the lands, the only plat recorded was a revised one showing the street as 80 feet wide. *Held:* The granting of the charter cannot be construed as having the effect of limiting the width of the street to 80 feet so as to defeat the vested right of purchasers of lots with reference to the original plat to compel the owner to abide by its dedication of the street for the full width as shown by the plat. Constitution of North Carolina, Art. I, sec. 17; 14th Amendment to the Constitution of the United States.

6. Dedication § 3—Failure of town to use and maintain full width of street dedicated may not affect easements of individual purchasers.

Where a street is dedicated by sale of lots with reference to a plat showing it as being 99 feet wide, a resolution of a municipality in which the land is situate limiting the width of the street to 80 feet does not affect the rights of those purchasing lots with reference to the original plat to have the land remain so that the street may be open for its full width as occasion may require, since the easement of the original purchasers is not dependent upon acceptance of the dedication by the municipality, and a subsequent resolution rescinding the prior resolution and declaring the street to be 99 feet in width constitutes an acceptance of the street for the full width as shown by the original plat.

7. Trial § 54—

Where cause is heard by the court by consent, its written judgment granting defendant's motion as of nonsuit is equivalent to a finding that all the evidence, considered in the light most favorable to plaintiffs, is insufficient to show facts entitling plaintiffs to recover on any issue raised by the pleadings, and is a sufficient finding of facts by the court as required by C. S., 569.

APPEAL by plaintiffs from *Harris, J.*, at April Term, 1939, of NEW HANOVER.

Civil action to recover land and remove cloud upon title.

Plaintiffs in their complaint substantially allege that they are the owners of a specifically described strip of land nineteen feet wide on the east side of Lake Park Boulevard, as a street eighty feet wide, between Cape Fear Boulevard on the south and Harper Avenue on the north, within the corporate limits of the town of Carolina Beach, North Carolina; that in the year 1913 between the first of June and the first of

September the New Hanover Transit Company, a corporation, from whom plaintiffs derived title by *mesne* conveyances, owning in fee simple a boundary of land then unincorporated, but on which the town of Carolina Beach is now situated, caused a map thereof to be prepared, platting same into lots and streets; that this map was not registered until 13 April, 1928, when it was recorded in Map Book 2, page 133, in the office of the register of deeds of New Hanover County; that one of the streets laid down on said map, Lake Park Boulevard, was shown to be of the width of ninety-nine feet, including the strip of land in question, but that same was never actually located upon the ground; that New Hanover Transit Company sold a few lots with reference to said map, but that no one of the lots so sold fronted on said boulevard, but in the main were east of it.

Plaintiffs further allege that prior to January, 1916, the New Hanover Transit Company caused said map to be revised by cutting off nineteen feet of Lake Park Boulevard as originally platted, thereby reducing it to eighty feet in width; that the map so revised was registered on 12 July, 1916, in Map Book 2, page 1, in the office of said register of deeds, and that later a copy of same was registered in said Map Book 2, page 106; that thereafter all lot owners, who had acquired lots from the New Hanover Transit Company according to the previous plan, and the public generally, accepted and treated the map so revised as the correct plan of Carolina Beach; that those purchasers of lots previously acquired acquiesced in said revised plan and claimed their lots according to it; that numerous lots were sold with reference to the map recorded on Map Book 2, page 1, to various purchasers, who relied upon same as correctly representing the location of lots, streets and avenues platted thereon.

Plaintiffs further allege that on 4 May, 1935, "New Hanover Transit Company, pursuant to the provision of section 3846 (rr) of the Consolidated Statutes of North Carolina, caused to be recorded in the office of the register of deeds of New Hanover County . . . a notice of a declaration that Lake Park Boulevard as it appeared upon the map or drawing first above mentioned as a 99-foot street or highway had not been accepted or used for a period of twenty years, and that the tract of land hereinbefore described as now belonging to the plaintiffs was withdrawn as a boulevard or highway of 99 feet in width and that the dedication thereof had never been accepted."

Plaintiffs further allege that the town of Carolina Beach was created and exists under and by virtue of an act of the Legislature, chapter 117, Private Laws 1925, as amended by chapter 195, Private Laws 1927, and chapter 188, Private Laws 1933.

Plaintiffs further allege that on 21 May, 1935, the board of aldermen of the town of Carolina Beach passed a resolution declaring Lake Park Boulevard to be eighty feet in width; and that the eastern nineteen feet strip of the ninety-nine feet originally platted as a part of said boulevard is not in fact a part thereof; but that on 5 July, 1935, the board of aldermen adopted another resolution, fully set forth in the complaint, in which, after reciting that the resolution of 21 May, 1935, was adopted under a misapprehension of facts, rescinded the same, and declared "that said Lake Park Boulevard be held by the said town as a 99-foot street as originally dedicated as shown on map as recorded in Map Book 2, page 133," and that the strip of land nineteen feet in width, specifically described, eliminated in former resolution, "be and the same is hereby declared to be a part of the said Lake Park Boulevard."

Plaintiffs further allege that defendant town of Carolina Beach is now claiming that the strip of land in question by virtue of the map dated June-September, 1913, and the law of North Carolina, was and is dedicated and belongs to defendant as a part of its street, or is held by the plaintiffs subject to an easement and vested right which the defendant claims to have to use said strip as a part of Lake Park Boulevard, and that said claim and map are a cloud upon their title which they are entitled to have removed to the end that they may be able to sell and use said lot as owners thereof, freed and discharged of any public servitude.

Plaintiffs further allege that upon obtaining deed including the strip of land in question, on 7 February, 1927, they took actual physical possession of the strip in question and erected on the eastern boundary of Lake Park Boulevard as shown on the map recorded in Map Book 2, page 106, as eighty feet wide, a line of posts to prevent the use thereof as a street, and that defendant wrongfully and unlawfully trespassed and removed said posts, and has endeavored to incorporate said strip of land as a boulevard to their damage.

Plaintiffs further allege that by reason of the acts and things alleged in the complaint the defendants and the public generally and all property owners within the corporate limits of the defendant town are estopped to claim that Lake Park Boulevard is ninety-nine feet wide.

Defendant in answer filed denies that plaintiffs are the owners of the strip of land in question, and avers that same was dedicated by the New Hanover Transit Company as a part of the public street designated as Lake Park Boulevard. Defendant denies that the map registered in Map Book 2, page 1, purported copy of which is registered on Map Book 2, page 106, has the effect of reducing the width of Lake Park Boulevard to eighty feet, and further avers that the attempted reduction of said boulevard was not authorized by the board of directors of the New Hanover Transit Company. Defendant further denies that the

registered written instrument which by its terms purports to revoke the dedication therein said to have been made by the New Hanover Transit Company in June-September, 1913, is effective for the purpose indicated, and denies that the town of Carolina Beach has not recognized and exercised dominion and control over the street and each part thereof of the width of ninety-nine feet.

The defendant further avers that the board of aldermen was without authority to pass the resolution of 21 May, 1935, and acted under a misapprehension of existing facts, and that all declarations in said resolution purporting to reduce the width of Lake Park Boulevard from ninety-nine feet to eighty feet are void and of no effect, and were rescinded by the resolution of 5 July, 1935.

Defendant, while admitting its claim to the strip of land in question as a part of Lake Park Boulevard, a public street in the town of Carolina Beach, denies that plaintiff has any right, title, interest or estate in and to the same. Defendant further denies all other material allegations.

Defendant further avers that in two civil actions, one Carolina Beach Corporation and Town of Carolina Beach *v.* J. R. Bame *et al.*, at the March Term, 1929, and the other Pate Hotel Company, Inc., *v.* Town of Carolina Beach, October Term, 1934, it was adjudged that the Lake Park Boulevard had been dedicated as a street ninety-nine feet in width, and same are pleaded in bar of this action.

When plaintiffs rested their case, on the trial below, the evidence tended to show substantially these facts: In the year 1913 New Hanover Transit Company, a corporation, owned in fee simple the tract of land, fronting on the Atlantic Ocean, on which the town of Carolina Beach is now located, and including the lot in question. In that year, between 1 June and 1 September, the owner caused to be prepared a map of said area of land, then unincorporated, platting thereon lots and streets on which Lake Park Boulevard, the third street west of and practically parallel to the shore line (Carolina Avenue and First Avenue being the first and second, respectively), was shown to be of the width of ninety-nine feet. The map indicates that from the lake on the south as Lake Park Boulevard extends north, Atlantic Avenue, Fayetteville Avenue, Hamlet Avenue, Cape Fear Boulevard and Harper Avenue in the order named are cross streets. This map is referred to, but was not introduced in evidence for plaintiffs. A. W. Pate, who was president of New Hanover Transit Company, testified that Lake Park Boulevard was laid out, surveyed and staked as ninety-nine feet in width. He further stated: "We didn't pave any of the streets. Just opened the place hard enough to travel on;" that Lake Park Boulevard was opened and used as a street prior to 1916, and "it has been used continuously from that time until now for a street"; and that "the only question is as to the width of the street."

After the map of June-September, 1913, was made and prior to February, 1916, lots were sold and conveyed and contracted to be sold by the New Hanover Transit Company with reference to said map. Of the lots so sold are nine in Block 64 at the corner of Cape Fear Boulevard and Third Avenue, one block west of Lake Park Boulevard, which are now owned and occupied by the defendant, and several other lots west of the Lake Park Boulevard. Likewise, two unnumbered lots (a) the Pate lot and (b) the Loughlin lot were conveyed by deeds dated in 1913 and describing them with reference to, and as being east of the intersection of Lake Park Boulevard and Cape Fear Boulevard at the time when the map showed Lake Park Boulevard to be ninety-nine feet. In February, 1916, two of the stockholders, who owned practically all of the stock in New Hanover Transit Company, and who were president and secretary and treasurer, respectively, of the corporation, without corporate authority, caused the original map of June-September, 1913, to be changed by cutting off nineteen feet of Lake Park Boulevard on the east side extending from the lake on the south to Harper Avenue on the north, thereby reducing it to eighty feet in width, and by taking off portions of lots facing the east side of said boulevard south of Hamlet Avenue, so as to take care of erosion affecting the ocean front lots already sold and, as the said president testified, "to help us in the sale of other lots." The strip taken from Lake Park Boulevard covers the strip in controversy here. The map as changed was registered 12 July, 1916, in Map Book 2, at page 1, in the office of the register of deeds in New Hanover County. Thereafter, a purported copy of it was registered in Map Book 2, at page 106, in the office aforesaid. After the map was changed, numerous lots situated in various parts of the subdivided area were sold in the name of the New Hanover Transit Company with reference thereto. Of all the lots now sold, only a small percentage of them were sold with reference to the original map.

On 2 October, 1919, New Hanover Transit Company conveyed a boundary of land, comprising the strip in question and subject to numerous exceptions, to Carolina Beach Railway Company, which later went into receivership, and the receivers conveyed to Maurice H. Moore "all of the real estate of the Carolina Beach Railway Company located in Federal Point Township, New Hanover County, N. C., . . . the same being located at or near Carolina Beach, . . ." and the title thus acquired passed through Carolina Beach Corporation to plaintiffs.

The evidence further tended to show that on 21 May, 1935, J. L. Becton and Lucy W. Hall, who had acquired and were the owners of lots abutting on Lake Park Boulevard, desiring to erect dwelling houses thereupon and desiring to know whether said boulevard was, under the circumstances, a street eighty feet wide or ninety-nine feet wide, caused

the question to be submitted to the board of aldermen of the town of Carolina Beach, chartered as alleged, and that on said date said board passed a resolution, therein set forth, in which, after reciting *inter alia* that "Whereas, said Lake Park Boulevard was never actually laid out upon the ground as a 99-foot street, but was laid out as an 80-foot street and the eastern 19 feet of said strip of land has never been used for the purpose for which it was, or may have been made, and the said 19-foot strip of land on said eastern side of said Lake Park Boulevard has never been used for the purpose for which it was dedicated. And, whereas, said New Hanover Transit Company has filed in the office of the register of deeds of New Hanover County a revocation of the attempted dedication of said 19-foot strip of land therein and hereinafter described," it was resolved that Lake Park Boulevard be and is declared to be an eighty foot street or boulevard and that the strip of land specifically described as the nineteen-foot strip east of the boulevard reduced to eighty feet in width except where it crosses other streets is declared not to be any part of Lake Park Boulevard; that immediately after the passage of said resolution, J. L. Becton and Lucy W. Hall began the construction of their dwelling houses upon their respective lots on the basis of said boulevard being eighty feet wide; and that "a little while later" the board "revoked that resolution."

The evidence further tended to show that in 1937 the board of aldermen of town of Carolina Beach, in connection with a resolution by which Lake Drive surrounding Carolina Lake as shown on maps of Carolina Beach, was abandoned, a map of Carolina Beach was attached on which, by the rule, Lake Park Boulevard measured eighty feet, though not so specified.

The evidence further tended to show that in the minutes of a meeting of the board of aldermen held 5 April, 1932, there appears a resolution in which the board, formally requesting the chairman of State Highway Commission to change the location of Route 40 through the town of Carolina Beach, "extension of Lake Park Boulevard," said that "the above improvement . . . will give you an open roadway of eighty (80) feet instead of the present thirty (30) feet."

There is evidence, elicited on cross-examination of witnesses for plaintiffs, tending to show that in the judgments in the two suits pleaded in the further answer of defendant in bar of this action, it was adjudged that Lake Park Boulevard is ninety-nine feet wide.

It appears that defendant through counsel admitted in open court that "after the plaintiffs got their deed plaintiffs took possession of the 19 feet in controversy and erected a line of stakes on the eastern edge thereof and thereafter the town tore down the stakes and took possession of said 19 feet as a part of the public highway." There is also

evidence tending to show that prior previous owners in the chain of title, beginning with New Hanover Transit Company, had continuous possession of the unsold portion of the land covered by their respective deeds.

At the close of evidence for plaintiffs the court sustained motion of defendant for judgment as in case of nonsuit, and from written judgment in accordance therewith, plaintiffs appeal to the Supreme Court and assign error.

Hackler & Allen and E. K. Bryan for plaintiffs, appellants.
Isaac C. Wright for defendant, appellee.

WINBORNE, J. Appellants except to the judgment below upon two grounds: (1) That the court erred in holding as a matter of law that the evidence taken in the light most favorable to plaintiffs is insufficient to make out a case to be submitted to the jury; (2) that the court erred in signing the judgment without finding the facts.

It is our opinion, and we hold, that the exceptions are untenable.

1. At the outset it is noted that the evidence discloses that defendant owns and occupies lots sold with reference to the original map prior to the change of map in 1916.

It is a settled principle that if the owner of land, located within or without a city or town, has it subdivided and platted into lots and streets, and sells and conveys the lots or any of them with reference to the plat, nothing else appearing, he thereby dedicates the streets, and all of them, to the use of the purchasers, and those claiming under them, and of the public. *S. v. Fisher,* 117 N. C., 733, 23 S. E., 158; *Moose v. Carson,* 104 N. C., 431, 10 S. E., 689; *Conrad v. Land Co.,* 126 N. C., 776, 36 S. E., 282; *Collins v. Land Co.,* 128 N. C., 563, 39 S. E., 21; *Davis v. Morris,* 132 N. C., 435, 43 S. E., 950; *Hughes v. Clark,* 134 N. C., 457, 47 S. E., 462; *Bailliere v. Shingle Co.,* 150 N. C., 627, 64 S. E., 754; *Green v. Miller,* 161 N. C., 24, 76 S. E., 505; *Sexton v. Elizabeth City,* 169 N. C., 385, 86 S. E., 344; *Wheeler v. Construction Co.,* 170 N. C., 427, 87 S. E., 221; *Elizabeth City v. Commander,* 176 N. C., 26, 96 S. E., 736; *Wittson v. Dowling,* 179 N. C., 542, 103 S. E., 18; *Stephens Co. v. Homes Co.,* 181 N. C., 335, 107 S. E., 233; *Irwin v. Charlotte,* 193 N. C., 109, 136 S. E., 368; *Michaux v. Rocky Mount,* 193 N. C., 550, 137 S. E., 585; *Gault v. Lake Waccamaw,* 200 N. C., 593, 158 S. E., 104; *Somersette v. Stanaland,* 202 N. C., 685, 163 S. E., 804.

In *Hughes v. Clark, supra,* the Court, referring to the cases of *Moose v. Carson, supra; Conrad v. Land Co., supra; Collins v. Land Co., supra;* and *Rives v. Dudley,* 56 N. C., 126, said: "The effect of the foregoing decisions is that where lots are sold and conveyed by reference

to a map or plat which represents a division of a tract of land into subdivisions of streets and lots, such streets become dedicated to the public use, and the purchaser of a lot or lots acquires the right to have all and each of the streets kept open; and it makes no difference whether the streets be in fact opened or accepted by the governing boards of town or city, if they be within municipal corporations. There is a dedication, and if they are not actually opened at the time of the sale they must be kept at all times free to be opened as occasion may require . . ." *Wheeler v. Construction Co., supra.*

In *Sexton v. Elizabeth City, supra,* it is said: "It is held that the original grantor, who sold by the map or diagram of the lands as laid out in blocks and lots, streets and avenues, and those claiming under him, are estopped to deny the right of prior purchasers of lots to an easement in the streets represented on the map."

As stated in *Green v. Miller, supra,* "The reason for the rule is that the grantor, by making such a conveyance of his property, induces the purchasers to believe that the streets and alleys, squares, courts, and parks will be kept open for their use and benefit, and having acted upon the faith of his implied representations, based upon his conduct in platting the land and selling accordingly, he is equitably estopped, as well in reference to the public as to his grantees, from denying the existence of the easement thus created."

In *Collins v. Land Co., supra,* it was held "that a map or plat, referred to in a deed, becomes a part of the deed as if it were written therein, and that, therefore, the plan indicated on the plat is to be regarded as a unity, and the purchaser of a lot acquires a right to have all and each of the ways and streets on the plat, or map, kept open." To support this view, the Court quotes with approval the following from Elliott on Roads, sec. 120: "It is not only those who buy lands or lots abutting on a road or street laid out on a map or plat that have a right to insist upon the opening of a road or street, but where streets and roads are marked on a plat and lots are bought and sold with reference to the map or plat, all who buy with reference to the general plan or scheme disclosed by the plat or map acquire a right to all the public ways designated thereon and may enforce the dedication. The plan or scheme indicated on the map or plat is regarded as a unity, and it is presumed, as well it may be, that all the public ways add value to all lots embraced in the general plan or scheme. Certainly, as every one knows, lots with convenient cross streets are of more value than those without, and it is fair to presume that the original owner would not have donated land for public ways unless it gave value to the lots. So, too, it is just to presume that the purchasers paid the added value, and the donor ought not, therefore, to be permitted to take it from them by revoking part of his dedication."

Under these principles, the New Hanover Transit Company, having made a map of its land, platting it into lots and streets, showing Lake Park Boulevard as a street ninety-nine feet wide, and having sold lots with reference to such map, thereby irrevocably dedicated the streets, including Lake Park Boulevard, to the use of the purchasers of lots so sold, and those claiming under them, and is estopped to deny the right of such purchasers, and those claiming under them, to an easement in all the streets represented and as represented on the map at the time of the purchase and conveyance with reference to it—irrespective of whether the town, when it was incorporated, accepted and opened the streets to their full width. The right of prior purchasers, and those claiming under them, to this easement was unaffected by the change of the map in 1916, even if it be conceded that the change was made pursuant to corporate action. There is no evidence that any of those who purchased lots with reference to the original map and prior to the change in 1916 have released rights acquired as appurtenant to the purchase. Hence, defendant, standing in privity to a purchaser of lots so conveyed, could compel New Hanover Transit Company, and those claiming under it, to abide by its dedication of the street. *Somersette v. Stanaland, supra.*

The evidence fails to show nonuser or abandonment of Lake Park Boulevard as a street. The evidence is to the contrary. Hence, the statute, Public Laws 1921, ch. 174, referred to in the complaint as C. S., 3846 (rr), regulating the dedication of streets for public use and limiting the time within which such dedication shall be accepted by the public, is here inapplicable. The statute provides that when the "strip, piece or parcel of land . . . dedicated to public use as a . . . street . . . by any deed, grant, map, plat or other means, shall not have been actually opened and used by the public within twenty years from and after the dedication thereof, shall be thereby conclusively presumed to have been abandoned by the public for the purpose for which same shall have been dedicated." But here all the evidence shows that Lake Park Boulevard as originally platted on the map of June-September, 1913, was actually surveyed, staked and opened to use and has been used as a street continuously, certainly from the first of the year 1916 to the present time. While this use did not extend to the full width of the street, the unused portion has not by reason of it lost the character of street, for which it was originally dedicated. 44 C. J., 907. Hence, the registration of the written instrument of 4 May, 1935, attempting to withdraw Lake Park Boulevard as a street ninety-nine feet in width is without force and effect.

Further, plaintiffs call attention to the fact that when the charter was granted to town of Carolina Beach, Private Laws 1925, ch. 117, and when amended, Private Laws 1927, ch. 195, the only registered map

showed Lake Park Boulevard to be eighty feet wide. They contend that in view of the fact that the map of June-September, 1913, was not registered until April, 1928, the Legislature, by these acts, recognized that the streets should be as shown on the registered map of 1916. However, perusal of those acts, as well as of chapter 188, Private Laws of 1933, leads to the conclusion that the Legislature undertook to do no more than fix the corporate limits of the town. To have deprived those who purchased lots with reference to the original map, and those claiming under them, of appurtenant rights in and to the streets, for the purpose of vesting such rights in another merely for private use would run counter to provisions of the Constitution of North Carolina, Art. I, sec. 17, and to the 14th Amendment to the Constitution of the United States. See *Moose v. Carson, supra.* Compare *Sheets v. Walsh,* 217 N. C., 32.

Moreover, it may be granted that so far as the general public is concerned, acceptance is requisite to dedication. *Wittson v. Dowling, supra; Irwin v. Charlotte, supra; Gault v. Lake Waccamaw, supra; Somersette v. Stanaland, supra.* That the charter did not have the effect in law of an acceptance of Lake Park Boulevard as ninety-nine feet or eighty feet wide may also be conceded. *Hughes v. Clark, supra.* However, the board of aldermen, acting under the charter and pertinent laws, has the discretionary power as to the extent to which the street as dedicated to public use will be accepted, and may thereby limit the responsibility of the town for maintenance. But it has no right to relinquish or give away the unaccepted portion of the dedicated street. In the event of acceptance of portion of street, as dedicated by plat of owner and sale of lots with reference thereto, the unaccepted portion would remain exactly as it was before it became a part of the town, dedicated to public use, though not kept in repair by the town, and is not to be obstructed because it must at all times be free to be opened as occasion may require. *Hughes v. Clark, supra; Wheeler v. Construction Co., supra.*

Therefore, if it be conceded that at the time Lake Park Boulevard as originally laid out had not been accepted by the public, the resolution of the board of aldermen, 5 July, 1935, rescinding the resolution of 21 May, 1935, and declaring the boulevard to be ninety-nine feet in width as originally dedicated as shown on map as recorded in Map Book 2, page 133, constituted an acceptance of it for the public.

After careful consideration, we fail to find sufficient evidence in support of plaintiffs' allegations to take the case to the jury on the issues raised.

2. The statute, C. S., 556, provides in part that "an issue of fact must be tried by a jury unless a trial by jury is waived or a reference

ordered." It is further provided in C. S., 569, that "upon trial of an issue of fact by the court, its decision shall be given in writing, and shall contain a statement of the facts found, and the conclusions of law separately." While in the present case the court made no specific findings of fact, the effect of the written judgment is that when taken in the light most favorable to plaintiffs, all the evidence is insufficient to support a favorable finding for plaintiffs on any issue raised by the pleadings. We think this is sufficient compliance with the statute.

The judgment below is

Affirmed.

MAY H. CRAWFORD v. SEARS, ROEBUCK & COMPANY AND GASTON GREER.

(Filed 20 September, 1939.)

APPEAL by plaintiff from *Pless, J.*, at May Term, 1939, of BUNCOMBE.

Civil action for recovery of damages for injuries alleged to have resulted from the explosion of can goods while being canned in a "pressure cooker" sold to her by defendant, Sears, Roebuck & Company, through its salesman, Gaston Greer.

Before the time for answering expired, defendant Sears, Roebuck & Company filed a petition, accompanied by bond, as required by law, for the removal of the action to the United States District Court for the Western District of North Carolina, alleging as grounds for removal separable controversy and fraudulent joinder of individual defendant for sole purpose of preventing removal to the United States District Court. The clerk of Superior Court granted the petition and signed order of removal. Plaintiff appealed therefrom to the Superior Court, where the petition was again heard. The court, holding it to be a proper case for removal, affirmed the order of the clerk and ordered the cause to be removed.

Plaintiff appeals therefrom to Supreme Court, and assigns error.

George B. Patton and Vonno L. Gudger for plaintiff, appellant.
Johnson & Uzzell for defendants, appellees.

PER CURIAM. This appeal presents no new question of law. The rules which relate to the right of removal from the State court to District Court of the United States are stated in *Crisp v. Fibre Co.*, 193 N. C., 77, 136 S. E., 238, and followed in many cases. The petition

here, accompanied by bond as required, sufficiently raises issues of fact which are determinable only by the District Court. Hence, the judgment below is

Affirmed.

FLOYD A. FISHER, ADMINISTRATOR, v. TOWN OF WAYNESVILLE.

(Filed 20 September, 1939.)

APPEAL by defendant from *Alley, J.*, at May Term, 1939, of HAYWOOD.

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

Upon denial of liability, the case was tried upon the usual issues of negligence, contributory negligence and damages, and resulted in a verdict and judgment for plaintiff.

Defendant appeals, assigning errors.

Grover C. Davis and Sale, Pennell & Pennell for plaintiff, appellee.
Morgan & Ward and F. E. Alley, Jr., for defendant, appellant.

PER CURIAM. The exceptions to the admission and exclusion of evidence, the rulings on the motions to nonsuit, and the assignments of error directed to portions of the charge apparently present no new question of law or one not heretofore settled by a number of decisions. Our impression is that no serious harm has come to the defendant in the particulars pointed out by its exceptions. The verdict and judgment will be upheld.

No error.

MARY LOUISE KEARNEY, BY HER NEXT FRIEND, FANNIE BULLOCK, v. A. L. PURRINGTON, JR.

(Filed 20 September, 1939.)

APPEAL by plaintiff from judgment of involuntary nonsuit by *Thompson, J.*, at April Term, 1939, of EDGECOMBE.

Fountain & Fountain for plaintiff, appellant.
Henry C. Bourne and R. Brookes Peters, Jr., for defendant, appellee.

PER CURIAM. We are of opinion, and so hold, that this case is governed by *Ballinger v. Thomas,* 195 N. C., 517, and that the judgment of involuntary nonsuit was properly entered.

Affirmed.

ARLENA BOYD MILLER, BY HER NEXT FRIEND, HAZEL RUSSELL, v. SOUTHERN RAILWAY COMPANY, HERBERT W. ROSE AND E. W. TUTWILER.

(Filed 20 September, 1939.)

APPEAL by plaintiff from *Pless, J.,* at April Term, 1939, of BUNCOMBE.

Civil action instituted in general county court of Buncombe County, North Carolina, for recovery of damages for injuries allegedly resulting from wrongful assault committed by defendants, Herbert W. Rose, a resident of North Carolina, and E. W. Tutwiler, a resident of Tennessee, in the scope and course of their employment "as special agents, officers, policemen or detectives" of the defendant Southern Railway Company, a corporation created by and existing under the laws of the State of Virginia.

Defendant E. W. Tutwiler has not been served with summons and is not in court. In due time, defendant Southern Railway Company filed petition in proper form, accompanied by bond as required by law, for removal of the action from the general county court of Buncombe to the United States District Court for the Western District of North Carolina at Asheville, alleging *inter alia* separable controversy and fraudulent joinder in that its codefendants were public officers, and acting as such in the matters and things of which plaintiff complains.

The general county court granted the petition and ordered the removal as prayed.

Plaintiff excepted and appealed to the Superior Court of Buncombe County and, on such appeal, judgment was entered affirming the judgment of the general county court.

Plaintiff appeals therefrom to Supreme Court, and assigns error.

W. K. McLean and Vonno L. Gudger for plaintiff, appellant.

W. T. Joyner and Jones, Ward & Jones for defendant, appellee.

PER CURIAM. Petition for removal presents almost identical questions based on parallel facts considered by this Court in *Tate v. R. R.,* 205 N. C., 51, 169 S. E., 816. On that decision, the judgment below is

Affirmed.

JOSEPH B. PATRICK v. SIR WALTER CHEVROLET COMPANY, A CORPORATION.

(Filed 20 September, 1939.)

APPEAL by plaintiff from *Hamilton, Special Judge,* at April Term, 1939, of BEAUFORT.

Civil action for recovery of damages for personal injury received in automobile collision, which plaintiff alleges resulted from the actionable negligence of defendant.

The material allegations of the complaint are denied by defendant.

At the close of evidence for plaintiff on the trial below the court granted motion of defendant for judgment as in case of nonsuit. From judgment in accordance therewith plaintiff appeals to the Supreme Court, and assigns error.

Grimes & Grimes for plaintiff, appellant.
Rodman & Rodman for defendant, appellee.

PER CURIAM. Plaintiff here challenges the judgment as of nonsuit.

After careful review and consideration of the evidence introduced by plaintiff and shown in the record, taken in the light most favorable to him, we concur in the ruling of the court below.

The judgment is

Affirmed.

GEORGE PRUDEN v. NATIONAL ACCIDENT & HEALTH INSURANCE COMPANY.

(Filed 20 September, 1939.)

APPEAL by defendant from *Carr, J.,* at June Term, 1939, of PASQUOTANK. No error.

Action on policy of accident and health insurance. From judgment in favor of plaintiff the defendant appealed.

Robt. B. Lowry and T. J. Markham for plaintiff, appellee.
M. B. Simpson and R. M. Conn for defendant, appellant.

PER CURIAM. Issues of fact were determined by the jury in favor of the plaintiff. On the record we find no ruling of the trial court which should be held for reversible error.

No error.

W. J. SAWYER v. W. B. COPPERSMITH, M. H. JONES AND MRS. ATTIE COPPERSMITH.

(Filed 20 September, 1939.)

APPEAL by defendants from *Carr, J.*, at June Term, 1939, of PASQUOTANK. No error.

Action to recover for the rental of a sawmill. Verdict for plaintiff. From judgment on the verdict the defendants appealed.

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

PER CURIAM. The determinative issues of fact were determined by the jury in favor of plaintiff. On the record we find no ruling of the trial court which should be held for reversible error.

No error.

THE VESTRY AND LEGAL TRUSTEES OF THE PROPERTY OF ST. PETER'S PROTESTANT EPISCOPAL CHURCH OF WASHINGTON, N. C., COMPRISING T. HARVEY MYERS, SENIOR WARDEN, AND J. D. GRIMES, JUNIOR WARDEN, AND TEN OTHERS, v. C. C. DUKE.

(Filed 20 September, 1939.)

APPEAL by defendant from *Thompson, J.*, at June Term, 1939, of BEAUFORT. Affirmed.

Controversy without action to determine the validity of the title of a tract of land which the plaintiffs contracted to convey to the defendant and the defendant agreed to purchase. The defendant declined to comply with the contract by reason of alleged defects in the title. The graveyard, about which there are certain stipulations in the will of Thomas A. McNair, Sr., is not located on the property plaintiffs propose to convey. Judgment for the plaintiffs, and the defendant appealed.

H. S. Ward for plaintiffs, appellees.
A. E. Daniel for defendant, appellant.

PER CURIAM. The questions involved on this appeal are controlled by the decision of this Court in *Church v. Bragaw*, 144 N. C., 126. The judgment below is

Affirmed.

RUTH HINTON ALLEY, SOPHIA M. HINTON, CHARLES L. HINTON AND THE FIRST & CITIZENS NATIONAL BANK OF ELIZABETH CITY, GUARDIAN FOR JOHN L. HINTON, MINOR, v. ROY McPHERSON, AND GERTIE McPHERSON.

(Filed 27 September, 1939.)

APPEAL by defendants from *Carr, J.*, at January Term, 1939, of PASQUOTANK. No error.

Civil action to recover damages for trespass upon real property and for injunctive relief against future trespass. The defendants filed a general denial of the allegations contained in the complaint. They did not plead adverse possession. The cause was tried before a jury upon appropriate issues, which were answered in favor of the plaintiffs. From judgment on the verdict, the defendants appealed.

J. Kenyon Wilson for plaintiffs, appellees.
M. B. Simpson and R. M. Conn for defendants, appellants.

PER CURIAM. The only question debated in the brief of the defendants is that of alleged error by the court below in overruling the motion of the defendants for judgment as of nonsuit. A careful examination of the record discloses that there was sufficient evidence to require the submission of the cause to the jury. In the trial below we find

No error.

HENRY BLANTON v. S. L. LAWING.

(Filed 27 September, 1939.)

APPEAL by plaintiff from *Johnston, Special Judge*, at June Term, 1939, of RUTHERFORD.

Hamrick & Hamrick and Paul Boucher for plaintiff, appellant.
Stover P. Dunagan and Woodrow W. Jones for defendant, appellee.

PER CURIAM. This was an action to recover damages for personal injuries alleged to have been caused by the negligence of the defendant. When the plaintiff had introduced his evidence and rested his case the court allowed defendant's motion for judgment as in case of nonsuit. C. S., 567. We concur in the ruling of the court upon the theory that there was no evidence of actionable negligence.

Affirmed.

F. O. CHRISTOPHER, ADMINISTRATOR OF THE ESTATE OF EARL WHITE, DECEASED, v. CHEROKEE COUNTY FAIR ASSOCIATION, A CORPORATION (WM. FAIN, PRESIDENT), AND SOUTHERN STATES POWER COMPANY, A CORPORATION.

(Filed 27 September, 1939.)

APPEAL by defendant, Southern States Power Company, from *Nettles, J.*, at January Term, 1939, of CHEROKEE. No error.

Smathers & Meekins for plaintiff, appellee.
J. N. Moody and C. E. Hyde for defendant, appellant.

PER CURIAM. This is the appeal of Southern States Power Company from a judgment upon issues submitted and involves only the objection and exception to the refusal of the trial court to allow defendant's motion for judgment as of nonsuit made at the conclusion of the plaintiff's evidence and renewed at the conclusion of defendant's evidence. The Court, being of the opinion that there was sufficient evidence to go to the jury upon the issue of negligence (*Smith v. Coach Co.*, 214 N. C., 314; *Gunn v. Taxi Co.*, 212 N. C., 540, 193 S. E., 28; *Hedgecock v. Ins. Co.*, 212 N. C., 638, 194 S. E., 86), and that the evidence on the issue of contributory negligence was not of a character to justify the withdrawal of the case from the jury as a matter of law (*Templeton v. Kelley*, 215 N. C., 577; *Sebastian v. Motor Lines*, 213 N. C., 770, 197 S. E., 539; *Manheim v. Taxi Corp.*, 214 N. C., 689, 691; *Mulford v. Hotel Co.*, 213 N. C., 603, 197 S. E., 169; *Cole v. Koonce*, 214 N. C., 188), and the jury having answered both issues in favor of the plaintiff, finds no error in the trial. The judgment is affirmed.

No error.

THE CHAMPION PAPER & FIBRE COMPANY AND C. R. McNEELY v. H. D. LEE, R. G. JENNINGS, INDIVIDUALLY, AND R. G. JENNINGS, EVAN G. JENNINGS AND J. G. VOLMER, EXECUTORS AND TRUSTEES OF THE ESTATE OF E. H. JENNINGS, DECEASED.

(Filed 27 September, 1939.)

APPEAL by defendants from *Rousseau, J.*, at April Term, 1939, of TRANSYLVANIA.

Civil action in ejectment, for recovery of damages for alleged acts of trespass and for removal of cloud upon title.

From order of compulsory reference defendants appeal to the Supreme Court, and assign error.

Geo. H. Smathers and D. L. English for plaintiff, appellee.
Lewis P. Hamlin and Ralph H. Ramsey, Jr., for defendant, appellant.

PER CURIAM. The respective contentions of the parties as disclosed by the pleadings present similar factual situation to that in No. 162 entitled "The Champion Paper & Fibre Co. *v.* H. D. Lee *et al.*," *ante*, 244. The finding upon which the order of reference is made is the same. As in that case, we find here no error in the order.

The judgment below is

Affirmed.

STATE OF NORTH CAROLINA AND BOARD OF COUNTY COMMISSIONERS OF RUTHERFORD COUNTY, ON RELATION OF STELLA HAMPTON, V. J. CAL WILLIAMS, SHERIFF OF RUTHERFORD COUNTY; HORACE NEALON, DEPUTY SHERIFF AND JAILER OF RUTHERFORD COUNTY, AND THE FIDELITY AND CASUALTY COMPANY OF NEW YORK, INC.

(Filed 27 September, 1939.)

APPEAL by plaintiffs from *Rousseau, J.*, at February Regular Term, 1939, of RUTHERFORD. Affirmed.

This is a tort action brought by plaintiff against the defendants, J. Cal Williams, sheriff of Rutherford County, Horace Nealon, deputy sheriff and jailer of Rutherford County, and the Fidelity and Casualty Company of New York, Inc.

The defendant Surety Company demurred to the complaint as follows: "(1) That the complaint upon its face fails to state and allege a cause of action against the said defendant. (2) That the plaintiff in the complaint attempts to assert a cause of action against the defendant, the Fidelity & Casualty Company of New York, on account of the alleged wrongful and criminal conduct of Horace Nealon, a deputy sheriff appointed by J. Cal Williams, sheriff of Rutherford County, and attempts to assert a cause of action against said defendant by virtue of the liability created under Policy No. 1576124, a copy of which is attached to the complaint, but this demurring defendant avers that said bond creates no liability on account of the wrongful and criminal conduct of either its principal, J. Cal Williams, or his deputy, Horace Nealon. (3) That if the defendant, Horace Nealon, committed the

crime referred to and described in the complaint, this demurring defendant, the Fidelity & Casualty Company of New York, Inc., is not liable to the plaintiff on account thereof under the terms of the official bond which it executed for J. Cal Williams, sheriff of Rutherford County, copy of which is attached to the complaint in this cause."

The judgment of the court below is as follows: "This cause coming on to be heard, and being heard before his Honor, J. A. Rousseau, Judge presiding at the February Term, 1939, of the Superior Court of Rutherford County, upon the demurrer herein filed by the defendant, the Fidelity & Casualty Company of New York, Inc., and upon consideration of said demurrer and the argument of counsel, the court being of opinion that the complaint does not allege a cause of action against said defendant, and for that reason defendant is entitled to have the demurrer sustained: It is therefore considered and adjudged by the court that the demurrer filed by said defendant, the Fidelity & Casualty Company of New York, Inc., be and the same is hereby sustained, and as to said defendant the action is dismissed. J. A. Rousseau, Judge Presiding."

The plaintiff appealed to the Supreme Court and makes as her only assignment of error the signing of the judgment appearing in the record.

Jake F. Newell, John A. McRae, and B. F. Wellons for plaintiff.

Johnson & Uzzell for defendant, the Fidelity & Casualty Company of New York, Inc.

PER CURIAM. We do not think the Surety bond covers the tort complained of by plaintiffs. The present case is governed by *Davis v. Moore,* 215 N. C., 449.

The judgment of the court below is

Affirmed.

ELSIE V. RATLEDGE v. OTTIS J. REYNOLDS ET AL.

(Filed 27 September, 1939.)

APPEAL by plaintiff from *Alley, J.,* at April Term, 1939, of SURRY.

Civil action in ejectment.

It appears from the record that on 3 January, 1925, L. E. Cockerham and wife conveyed the *locus in quo* to J. W. Brookshire and wife, Alma Brookshire.

Plaintiff and defendant both claim under J. W. Brookshire and wife, Alma Brookshire.

Plaintiff offered in evidence a connected paper chain of title from the common source and rested.

Defendant offered in evidence deed of trust from J. W. Brookshire and wife, Alma Brookshire, to Carolina Mortgage and Indemnity Company, foreclosure, etc.

The trial court held that on the record as presented, the defendant had shown the better title, and entered judgment of nonsuit. Plaintiff appeals.

R. A. Freeman, William M. Allen, and Hoke F. Henderson for plaintiff, appellant.

Earl C. James for defendants, appellees.

PER CURIAM. While a directed verdict might have been the better procedure, the plaintiff has shown no harm from the form of the judgment entered.

Affirmed.

M. N. TOXEY ET AL. *v.* W. B. MEGGS ET AL.

(Filed 27 September, 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 defendants from *Carr, J.*, at March Term, 1939, of CAMDEN.

Civil action to restrain defendants from cutting timber on plaintiffs' land, and to recover damages for trespass already committed.

From verdict and judgment for plaintiffs, the defendants appeal, assigning errors.

M. B. Simpson and McMullan & McMullan for plaintiffs, appellees.

Chester R. Morris and R. Clarence Dozier for defendants, appellants.

PER CURIAM. One member of the Court, *Winborne, J.*, not sitting, and the remaining six being evenly divided in opinion whether reversible error has been shown, the judgment of the Superior Court is affirmed, accordant with the usual practice in such cases, and stands as the decision in the instant case, without becoming a precedent. *Allen v. Ins. Co.*, 211 N. C., 736, 190 S. E., 735, and cases there cited.

Affirmed.

GEORGIA WHITE, ADMINISTRATRIX OF M. L. WHITE, DECEASED, v. JACK COULBOURN.

(Filed 27 September, 1939.)

APPEAL by plaintiff from *Bone, J.*, at May Term, 1939, of BERTIE.

Civil action for recovery of damages for alleged wrongful death resulting from injury received in a collision between a Ford automobile operated by intestate of plaintiff on U. S. Highway 17, between Windsor and Edenton, and a Chrysler automobile operated by the defendant.

On the trial below the parties through numerous witnesses presented evidence to the jury in support of their respective contentions. The jury answered in the negative the issue: "Was the plaintiff's intestate wrongfully killed by the negligence of the defendant, as alleged in the complaint?"

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

Gillam & Spruill and J. H. Matthews for plaintiff, appellant.
J. A. Pritchett for defendant, appellee.

PER CURIAM. In the light of the answer to the first issue, many of the exceptions presented on this appeal become immaterial. Careful consideration of all the exceptions fails to reveal reversible error. The case appears to have been fairly presented to the jury. In the judgment on the verdict, we find

No error.

A. W. HOWARD v. QUEEN CITY COACH COMPANY.

(Filed 11 October, 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 *Rousseau, J.*, at February Term, 1939, of MCDOWELL.

Civil action for personal injuries and property damage arising out of collision between plaintiff's automobile and defendant's bus.

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

Morgan & Morgan and Paul J. Story for plaintiff, appellee.
Williams & Cocke and W. R. Chambers for defendant, appellant.

PER CURIAM. One member of the Court, *Winborne, J.*, not sitting, and the remaining six being evenly divided in opinion whether reversible error has been shown, the judgment of the Superior Court is affirmed, accordant with the usual practice in such cases, and stands as the decision in the instant case, without becoming a precedent. *Toxey v. Meggs, ante,* 798, and cases there cited.

Affirmed.

OBERLY & NEWELL LITHOGRAPH CORPORATION v. WATSON CLARK.

(Filed 11 October, 1939.)

APPEAL by defendant from *Rousseau, J.*, at February Term, 1939, of RUTHERFORD. No error.

Action to recover the contract price of certain labels, box tops and other goods manufactured for the Clark Knitting Mill, of which it was alleged the defendant was owner or partner. From judgment for plaintiff, defendant appealed.

Paul Boucher for plaintiff.
M. P. Spears and T. J. Edwards for defendant.

PER CURIAM. Determinative issues of fact were decided by the jury in favor of the plaintiff. The evidence was sufficient to support the verdict. On the record we find no ruling of the trial court which should be held for reversible error.

No error.

STATE v. WILLIAM THOMPSON.

(Filed 11 October, 1939.)

APPEAL by defendant from *Bone, J.*, at June Term, 1939, of VANCE. No error.

Attorney-General McMullan and Assistant Attorneys-General Bruton and Patton for the State, appellee.
Gholson & Gholson for defendant, appellant.

PER CURIAM. The defendant was convicted at June Term, 1939, of Vance Superior Court, on a bill of indictment charging him with being accessory before the fact to an abortion committed upon Mary Lee Fuller by one Ayscue, and having counseled, procured, and commanded the said abortion.

This appeal is based upon an alleged variance between the proof and the indictment and upon an alleged lack of evidence to be submitted to the jury.

Upon careful examination, we are unable to sustain either objection. We find in the case no novel features which would justify an extended review.

In the trial of the case there was

No error.

MILDRED BATTEN HINES ET AL. v. PEARL ROSE PEEDIN ET AL.

(Filed 18 October, 1939.)

APPEAL by plaintiffs from *Hamilton, Special Judge,* at April Term, 1939, of JOHNSTON.

Petition for partition among remaindermen after death of life tenant.

From an order of sale for partition and directing the commissioners to pay to the heirs of J. Ransom Rose, who was one of the remaindermen, the taxes advanced by him during occupancy of the premises by the life tenant, the plaintiffs appeal, assigning error.

Otis L. Duncan for plaintiffs, appellants.
W. P. Aycock for defendants, appellees.

PER CURIAM. Affirmed on authority of what was said in *Smith v. Miller,* 158 N. C., 98, 73 S. E., 118.

Affirmed.

W. A. STEELMAN v. HANS REES' SONS, INC.

(Filed 18 October, 1939.)

APPEAL by plaintiff from *Rousseau, J.,* at July Term, 1939, of BUNCOMBE. Affirmed.

This was an action for actionable negligence brought by plaintiff against defendant in the general county court of Buncombe County,

The plaintiff contended that defendant did not exercise due care in that it negligently failed to provide plaintiff with a safe place in which to do his work. The defendant (1) denied negligence, (2) set up a plea of payment, (3) a plea of contributory negligence and assumption of risk, (4) the statute of limitations. The plaintiff in reply challenged all of the defenses made by defendant.

The issues submitted to the county court of Buncombe County were answered in favor of plaintiff. Judgment was rendered on the verdict. The defendant made numerous exceptions and assignments of error and appealed to the Superior Court. The court below rendered judgment reversing the judgment of the general county court and said: "It is further ordered, adjudged and decreed that the plaintiff be nonsuited and that he recover nothing of the defendant; that his cause be dismissed and the plaintiff pay the costs of this action to be taxed by the clerk; that the clerk of this court certify a copy of this judgment to the general county court of Buncombe County."

The plaintiff made numerous exceptions and assignments of error and appealed to the Supreme Court.

Sale, Pennell & Pennell and Don C. Young for plaintiff.
Harkins, Van Winkle & Walton for defendant.

PER CURIAM. We have read the record with care and the briefs of the litigants. We see no new or novel proposition of law presented and think the judgment of the court below is correct. The same is therefore

Affirmed.

JOHN ALPHIN v. M. M. SOUTHERLAND AND ASHLEY D. SOUTHERLAND, TRADING AS SOUTHERLAND BUS COMPANY.

(Filed 1 November, 1939.)

APPEAL by plaintiff from *Frizzelle, J.*, at June Term, 1939, of LENOIR.

J. A. Jones for plaintiff, appellant.
J. Frank McInnis, L. E. Maxwell, and Allen & Allen for defendants, appellees.

PER CURIAM. This is an action to recover damages for personal injuries and property damage sustained in a rear end collision between the automobile of the plaintiff and the bus of the defendants alleged to have been caused by the negligence of the defendants.

We have examined and considered the record and are of the opinion, and so hold, that the judgment as in case of nonsuit upon the defendants' demurrer to the evidence was properly entered.

No new questions of law requiring comment are involved.

Affirmed.

VELLA LASSITER v. GREENSBORO-FAYETTEVILLE BUS LINE, INC., AND QUEEN CITY COACH COMPANY, INC.

(Filed 8 November, 1939.)

APPEAL by defendant, Greensboro-Fayetteville Bus Line, Inc., from *Gwyn, J.*, at July Term, 1939, of RANDOLPH. No error.

T. F. Sanders and F. W. Williams for plaintiff, appellee.
Brooks, McLendon & Holderness for defendant, appellant.

PER CURIAM. The plaintiff sued to recover damages because of the wrongful act of defendant in ejecting her from one of its buses, after she had paid her fare and become a passenger thereon. The controversy involved the rights of the parties under the law regulating the separate seating of the races in passenger-carrying buses—C. S., 2613 (p).

In some aspects the evidence was favorable to the plaintiff, in others favorable to the defendant. It was submitted to the jury, under instructions, and the jury found for the plaintiff. A careful examination of the objections and exceptions discloses no prejudicial error justifying a new trial.

We find

No error.

STATE v. MRS. FANNIE McLAWHORN.

(Filed 8 November, 1939.)

APPEAL by defendant from *Stevens, J.*, at June Term, 1939, of WAKE. No error.

Criminal action tried on warrant charging the defendant with the unlawful possession of intoxicating liquor for the purpose of sale, and the unlawful sale thereof.

There was a verdict of guilty of unlawful possession of nontax-paid liquor. From judgment thereon the defendant appealed.

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

Little & Wilson for defendant, appellant.

PER CURIAM. There is no exceptive assignment of error in the record which challenges either the sufficiency of the evidence or the correctness of the court's instruction to the jury on the count charging the defendant with the unlawful possession of liquor, upon which she was convicted. As the defendant was acquitted of the unlawful sale of intoxicating liquor, any error in the trial in respect to that count is immaterial.

No error.

S. F. PACE, ADMINISTRATOR OF HAYWOOD M. PACE, v. RELIABLE TRANSPORT COMPANY, A CORPORATION.

(Filed 22 November, 1939.)

APPEAL by plaintiff from *Sinclair, J.*, at March Term, 1939, of FRANKLIN.

Civil action to recover for alleged wrongful death. C. S., 161.

Judgment as in case of nonsuit entered at close of evidence for plaintiff, who appeals to Supreme Court and assigns error.

Yarborough & Yarborough and Chas. P. Green for plaintiff, appellant.

Douglass & Douglass for defendant, appellee.

PER CURIAM. The evidence adduced on the trial below, as shown in record on this appeal, taken in the light most favorable to plaintiff, leads unerringly to the conclusion that the untimely death of the intestate was the result of an unavoidable accident for which the defendant is not liable.

The judgment below is

Affirmed.

IN THE MATTER OF THE WILL OF MOLLIE A. WALL.

(Filed 13 December, 1939.)

APPEAL of propounder from *Grady, Emergency Judge,* at April Term, 1939, of GUILFORD. No error.

Henry R. Stanley for propounder, appellant.
Glidewell & Glidewell and Sapp & Sapp for caveator, appellee.

PER CURIAM. The testatrix married A. N. Wall, a widower with four children, and subsequently a child was born to this union. After her death a paper-writing purporting to be her last will and testament was probated in common form as a holograph will. It appeared that the will originally devised the real estate of the testatrix to her husband, A. N. Wall, if living, with the remainder over to his 4 children. When the paper was submitted for probate, it appeared that the figure "4" had been erased and the figure "5" written over it. The significant controversy at the trial was as to whether this figure "5" was in the handwriting of the supposed testatrix. It was agreed that the will, with the original figure "4" in it, was written prior to the birth of this child.

If the will could not be sustained as entirely in the handwriting of the testatrix and containing provision for this child, the latter, under the law, would inherit the whole property as if no will had been made, since the 4 children of the husband were not of the blood of the testatrix. C. S., 4169; C. S., 1654. It was the contention of the caveator that the will had been altered without consent of the testatrix, and that the figure "5" was not in her handwriting.

There was no objection to the mode of trial or to the form of the issue submitted. Upon a stipulation between the parties an issue was submitted as to whether or not the figure "5" was in the handwriting of the supposed testatrix, and the jury answered the issue "No," whereupon, judgment was rendered against the will, and from this the propounder appealed.

Closely examining the exceptive assignments of error, we are unable to see that they raise any question of law which might aid the propounder.

We find

No error.

J. S. HINSON, H. L. EVANS, CARL ROSE, JOHN COLBERT, R. S. WALTERS AND J. A. LYONS v. THE BOARD OF COMMISSIONERS OF YADKIN COUNTY, D. A. REYNOLDS, J. W. SHORE AND L. L. SMITHERMAN, COMMISSIONERS.

(Filed 3 January, 1940.)

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 defendants from *Ervin, Special Judge,* at Newland, N. C., 6 July, 1939. Hearing on a restraining order, by consent, from YADKIN. Affirmed.

Barker & Hampton and Folger & Folger for plaintiffs.

Wm. M. Allen, Hoke F. Henderson, and David L. Kelley for defendants.

PER CURIAM. There is but a single question raised on this appeal: Is chapter 525, Public-Local Laws of North Carolina, 1939, applicable to Yadkin County and permitting, with a vote of the people, special school taxes to be levied as therein provided, a violation of section 29, Article II, N. C. Constitution, which declares that "The General Assembly shall not pass any local, private, or special act or resolution . . . establishing or changing the lines of school districts, . . ." and, therefore, unconstitutional?

The Court being evenly divided in opinion, *Stacy, C. J.,* not sitting, the judgment of the Superior Court is affirmed and stands as the decision of this action without becoming a precedent. *Ins. Co. v. Stinson,* 214 N. C., 97.

The judgment of the court below is

Affirmed.

W. E. McNEILL v. R. H. SUTHERLAND.

(Filed 3 January, 1940.)

APPEAL by defendant from *Alley, J.,* at July Term, 1939, of ASHE. Affirmed.

Civil action to recover damages for breach of contract.

Plaintiff alleges and offered evidence tending to show that on 3 July, 1937, defendant contracted and agreed to sell to him 180 head of beef

cattle at 8c per pound, for delivery from the first to the fifteenth of October, 1937; that the defendant breached the contract, notifying the plaintiff by letter 7 September, 1937, that he had sold the cattle to another; and that he had been damaged thereby. The defendant contended and offered evidence tending to show that he had negotiated with the plaintiff for the sale of said cattle to the State, through plaintiff as agent, but that as a condition precedent the contract was to be in writing and signed by an official of the State; that no such contract was executed and none exists.

Appropriate issues were submitted to and answered by the jury in favor of the plaintiff. From judgment thereon the defendant appealed.

C. W. Higgins, Ira T. Johnston, and W. B. Austin for plaintiff, appellee.

Bowie & Bowie for defendant, appellant.

PER CURIAM. The controverted issues of fact have been submitted to and determined by a jury adversely to the defendant. After a careful examination of the several assignments of error we are of the opinion that they fail to disclose substantial or harmful error in the trial.

The judgment below is

Affirmed.

L. E. O'BRIANT, MAYE H. O'BRIANT, EARL J. O'BRIANT, JESSIE O'BRIANT, R. D. O'BRIANT AND NEFFIE O'BRIANT BRADSHER v. MRS. E. FRANK LEE, CLAUD V. JONES, TRUSTEE; MRS. E. FRANK LEE, GUARDIAN, AND VICTOR S. BRYANT, TRUSTEE FOR ELSIE LOIS LEE.

(Filed 2 February, 1940.)

APPEAL by plaintiffs from *Parker, J.*, at May-June Civil Term, 1939, of DURHAM. No error.

To the signing of the judgment plaintiffs excepted, assigned error and made numerous other exceptions and assignments of error and appealed to the Supreme Court.

Bennett & McDonald and Guthrie & Guthrie for plaintiffs.

Brooks, McLendon & Holderness and Hedrick & Hall for defendants.

PER CURIAM. This is the third time an appeal in this case has been before this Court. In the first appeal (212 N. C., 793), the Court granted a new trial for that the court below in its charge to the jury

committed error in its charge as to the *quantum* of proof. In the second appeal (214 N. C., 723), the Court held there was error by the court below in its refusal to submit issues of fact to the jury—the issue being as to what was the intent of the parties, this being an action to have a deed absolute on its face and a contemporaneous contract by defendants' grantees to reconvey declared in equity a mortgage.

The issues were submitted to the jury, who found against the plaintiffs. On the trial in the court below the plaintiffs made numerous exceptions and assignments of error as to permitting incompetent evidence on the trial, to the exclusion of competent evidence: "That the court erred in the submission of the issues as submitted by the court and the refusal to submit the issues tendered by plaintiffs; that the court erred in its refusal to give the special instructions asked by the plaintiffs."

The above and other exceptions and assignments of error cannot be sustained. The controversy hinged mainly on a question of fact. There is no general charge of the court below in the record and the presumption is that the court below charged correctly the law applicable to the facts. The questions of fact are for the jury and their verdict should not be lightly considered or overruled unless there is prejudicial or reversible error. We see none on this record.

In the judgment of the court below we find

No error.

DISPOSITION OF APPEALS FROM THE SUPREME COURT OF NORTH CAROLINA TO THE SUPREME COURT OF THE UNITED STATES

Leonard v. Maxwell, Comr. of Revenue, 216 N. C., 89. Dismissed 13 November, 1939.

Hosiery Mills v. R. R., 216 N. C., 474. Petition for *certiorari* denied 26 February, 1940.

AMENDMENT TO ORGANIZATION OF THE NORTH CAROLINA STATE BAR

CANON D

Be it Resolved, by the Council of The North Carolina State Bar, that Article X, of the Certificate of Organization of The North Carolina State Bar, be and the same is hereby amended by adding thereto the following section:

"It shall be deemed unethical for any judge or solicitor of any criminal court inferior to the Superior Court to appear in any criminal proceeding, whether for the defendant or for the State, in other courts of his county having criminal jurisdiction, whether concurrent with, inferior to, or superior to the criminal jurisdiction of the court over which he shall preside, or over which he shall be the prosecuting officer."

NORTH CAROLINA—WAKE COUNTY.

I, Edward L. Cannon, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Certificate of Organization of The North Carolina State Bar was adopted at the regular meeting of the Council on the 14th of April, 1939, by unanimous vote of the Council. Given under my hand and the seal of The North Carolina State Bar, this the 1st day of May, 1939.

(Signed) EDWARD L. CANNON,
Secretary, The North Carolina State Bar.

(The North Carolina State Bar
SEAL
July 1, 1933.)

After examining the foregoing amendment to the Certificate of Organization of The North Carolina State Bar, it is my opinion that the amendment complies with a permissible interpretation of Chapter 210, Public Laws 1933. This the 19th day of March, 1940.

(Signed) W. P. STACY, *Chief Justice.*

Upon the foregoing certificate of the Chief Justice, it is ordered that the foregoing amendment to the Certificate of Organization of The North Carolina State Bar be spread upon the minutes of the Supreme Court and that it be published in the forthcoming volume of the Reports as provided by the Act incorporating The North Carolina State Bar. This the 19th day of March, 1940.

(Signed) SEAWELL, J., *For the Court.*

WORD AND PHRASE INDEX.

(References are to the Analytical Index, which begins on page 850. and to the case.)

ANALYTICAL INDEX.

ABATEMENT AND REVIVAL.

§ 7. Pendency of Prior Action.

Where it appears that an injured employee's action against the third person tort-feasor is instituted prior to the institution of an action by the compensation insurance carrier against the tort-feasor, chapter 449, Public Laws 1935, Michie's Code, sec. 8081 (r), defendant's plea in abatement in the employee's action on the ground of the pendency of a prior action cannot be sustained. *Thompson v. R. R.*, 554.

§ 17. Pleading of Matters in Abatement.

Demurrer on ground that complaint did not allege that transitory cause instituted against personal representative of deceased wrongdoer survived under laws of state in which cause of action arose *held* untenable, since courts of this State will take judicial notice of pertinent public laws of other states. *Suskin v. Hodges*, 333.

Where it does not appear upon the face of the complaint that a prior action is pending between the parties, the objection may be raised by answer, C. S., 517, treated as a plea in abatement. *Thompson v. R. R.*, 554.

ACTIONS.

§ 8. Method of Commencing Actions.

A civil action is commenced by issuing a summons, C. S., 475. *Cherry v. Whitehurst*, 340.

§ 9. Time from Which Action Is Instituted.

An action is commenced when the summons is issued against defendant. C. S., 404. *Cherry v. Whitehurst*, 340.

Ordinarily, summons is issued and the action is pending from the time summons leaves the hands of the clerk or the justice of the peace for service, but when summons leaves the hands of the justice of the peace two days prior to its date under instructions that it should not be served until its date, and it is actually served on its date, the summons does not leave the control of the justice of the peace for the purpose of service until the date of the summons, and the action is not instituted until that date. *Ibid.*

ADMIRALTY.

§ 1. Admiralty Jurisdiction.

The admiralty and maritime jurisdiction of the United States (Art. III, sec. 2, of the Federal Constitution) does not preclude the application of a state law when the occurrence upon which the state law is invoked has no direct relation to navigation or commerce and the application of the state law does not interfere with the harmony and uniformity of the general maritime law. *Johnson v. Lumber Co.*, 123.

AGRICULTURE.

§ 7e. Actions for Breach of Agricultural Lease Contracts.

Evidence of lease agreement to rent farm lands for a term of one year and the landlord's breach of the agreement *held* sufficient for the jury. *Harris v. Smith*, 352.

Allegations *held* sufficient to state cause of action in favor of tenant for breach of contract to divide tobacco allotment. *Williams v. Bruton*, 582.

APPEAL AND ERROR.

(Appeal in criminal cases see Criminal Law.)

§ 2. Judgments Appealable.

While a demurrer to the answer is equivalent in some respects to a motion for judgment on the pleadings, and the refusal of a motion for judgment on the pleadings is not a final judgment from which an appeal will lie, when the answer admits the allegations of the complaint and sets up new matter constituting an affirmative defense, a demurrer to the answer goes to the merits of the controversy, and an appeal will lie from an order overruling the demurrer. C. S., 525. *Cody v. Hovey*, 391.

Defendant's appeal from the denial of his motion to dismiss on the ground that the cause alleged was based on a void gaming contract is premature, the denial of the motion not being appealable. *Ibid.*

A defendant in a negligent injury action may appeal from the denial of his motion to have a third person joined as a defendant upon allegation that such third person was a joint tort-feasor, since the denial of the motion directly affects a substantial right. C. S., 632. *Freeman v. Thompson*, 484.

No appeal lies from the refusal of a motion to dismiss. *Wadesboro v. Coxe*, 545.

An order granting a motion to strike certain allegations from a pleading is subject to review. *Fayetteville v. Distributing Co.*, 596.

An appeal will lie to the Supreme Court from a judgment of the Superior Court entered on an appeal from a general county court, Public Laws of 1923, chapter 216, as amended by Public Laws of 1933, chapter 109 (Michie's Code, 1608 [cc]). *Robinson v. McAlhaney*, 674.

§ 3a. Parties Who May Appeal.

Defendant may appeal from denial of his motion to have third person joined as party defendant upon his allegations that such third person was

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. *Toxey v. Meggs*, 798; *Howard v. Coach Co.*, 799; *Hinson v. Comrs. of Yadkin*, 806.

§ 39a. Harmless and Prejudicial Error in General.

A judgment will not be set aside for error which is not prejudicial. *Metcalf v. Ratcliff*, 216.

§ 39d. Harmless and Prejudicial Error in Admission or Exclusion of Evidence.

An objection to the admission of testimony is immaterial where the same evidence is later admitted without objection. *Metcalf v. Ratcliff*, 216.

The exclusion of the death certificate of insured, offered for the purpose of showing the cause of death, *held* not reversible error, it not appearing whether the cause of death was stated therein as a fact or as an opinion, the certified copy of such record being *prima facie* evidence of the facts stated therein but not conclusions or opinions expressed therein, C. S., 7111, and it further appearing that the cause of death was not perforce material. *Rees v. Ins. Co.*, 428.

Where the record does not show what the testimony of a witness would have been had he been permitted to answer the question propounded, the ruling of the court sustaining the objection to the question cannot be held for error *In re Will of Redding*, 497.

§ 39e. Harmless and Prejudicial Error in Instructions.

Any substantial error in the portion of the charge applying the law to the facts of the case is perforce material. C. S., 564. *Templeton v. Kelley*, 487.

The failure of the court to charge that the recovery of future damages is limited to the present cash value thereof will not be held prejudicial error when there is no allegation, evidence or contention of prospective injury, and the mention thereof is a mere oversight in the general statement of the court upon the issue of damages. *Horton v. Coach Co.*, 567.

§ 39g. Harmless and Prejudicial Error in Placing Burden of Proof.

The burden of proof is a substantial right, and conflicting instructions thereon entitles appellant to new trial. *Fisher v. Jackson*, 302.

§ 40a. Review of Exceptions to Signing of Judgment.

An exception to the signing of the judgment cannot be sustained when the judgment is supported by the verdict. *In re Escoffery*, 19.

§ 40b. Review of Orders on Motions to Strike Allegations from a Pleading.

An order granting a motion to strike, where the motion is made as a matter of right or is addressed to the discretion of the court, is subject to review. *Fayetteville v. Distributing Co.*, 596.

In a proceeding to enjoin a violation of a municipal ordinance regulating the storage of gasoline within the fire district of the city, the granting of a motion to strike allegations from the answer as to what had been permitted in this respect by other cities, will not be held for error, since the granting of the motion does not prejudice defendant or deprive it of any defense it might have. *Ibid.*

APPEAL AND ERROR—*Continued.*

§ 40e. Review of Peremptory Instructions and Judgments on Motions to Nonsuit.

Upon defendant's exception to a peremptory instruction for plaintiff, the Supreme Court will consider the evidence in the light most favorable to defendant, giving him every reasonable intendment thereon and every reasonable inference therefrom, in determining the sufficiency of defendant's evidence to put at issue plaintiff's right of recovery. *Warehouse Co. v. Bank*, 246.

Where the allegations and evidence are sufficient to show an actionable wrong committed by defendant against plaintiff, judgment sustaining defendant's motion to nonsuit will be reversed on appeal, and it is unnecessary to determine whether plaintiff's cause of action is founded upon malicious prosecution or malicious abuse of process. *Jackson v. Parks*, 329.

Upon appeal from a judgment as of nonsuit, the evidence will be considered in the light most favorable to plaintiff and only the evidence favorable to plaintiff need be considered. *Butler v. Lupton*, 653.

§ 40f. Review of Judgments Upon Demurrer.

In reviewing a judgment sustaining a demurrer, the Supreme Court will accept the facts alleged in the complaint as true. *Moss v. Bowers*, 546.

§ 40h. Review of Exceptions to Evidence.

Whether sufficient foundation has been laid for the admission of secondary evidence is for the determination of the court, and if the adverse party desires the court to find the facts relative thereto he must aptly make request therefor, and in the absence of such request he waives his right and the Supreme Court will consider the record evidence in the light most favorable to the party offering the secondary evidence in determining its sufficiency to show that proper predicate had been laid. *Smith v. Ins. Co.*, 152.

§ 41. Questions Necessary to Be Determined.

When a new trial is awarded on certain exceptions, other exceptive assignments of error relating to matters not likely to arise upon the subsequent hearing need not be considered. *Templeton v. Kelley*, 487.

§ 49a. Law of the Case.

A decision of the Supreme Court must be interpreted in the light of the question presented for review, and a decision that the lower court committed no error in denying plaintiff's motion for a judgment on the pleadings is decisive on that question alone and leaves for the determination of the jury upon the subsequent hearing the issues of fact raised by the pleadings. *LaVecchia v. Land Bank*, 28.

A decision reversing a judgment as of nonsuit constitutes the law of the case as to the sufficiency of the evidence upon the subsequent hearing. *Templeton v. Kelley*, 487.

The decision of the Supreme Court on appeal becomes the law of the case both in subsequent proceedings in the trial court and upon subsequent appeal. *Robinson v. McAlhaney*, 674.

§ 50. Costs.

When appellee's brief contains a great deal of matter wholly irrelevant to the question presented by the appeal, the Supreme Court, in affirming the judgment of the lower court, will direct the clerk, in taxing the cost against the appellant, to include only a part of the cost of printing appellee's brief. *Barron v. Cain*, 282.

In this case the judgment appealed from having been modified and affirmed, it is ordered that the costs be equally divided between plaintiff and defendant. C. S., 1256. *Ebert v. Disher*, 546.

APPEARANCE.

§ 2b. Effect of General Appearance.

The general appearance of a defendant renders immaterial the writ of attachment as a basis for the service of summons by publication. *Clement v. Clement*, 240.

ASSAULT AND BATTERY.

§ 7d. Assault with Deadly Weapon.

A charge that if defendant intentionally threw a brick at a person and struck and broke the windshield of the truck such person was driving, defendant would be guilty of assault with a deadly weapon, even though he did not strike such other person, is without error. *S. v. Hobbs*, 14.

Uncontradicted evidence that assault was committed with missile large enough and thrown with sufficient force to knock a large hole in the windshield of the truck driven by the prosecuting witness, discloses an assault with a deadly weapon, and does not require the submission of the question of simple assault to the jury. *Ibid.*

§ 7f. Parties and Offenses.

An instruction upon supporting evidence that if defendant was present aiding and encouraging another who intentionally threw a brick at the prosecuting witness and broke the windshield of the truck he was driving, defendant would be guilty of an assault with a deadly weapon *is held* without error. *S. v. Hobbs*, 14.

§ 8. Warrant and Indictment.

Proof of assault with a brick or rock *held* not a fatal variance with a warrant charging assault with a brick. *S. v. Hobbs*, 14.

The use of the word "feloniously" in a warrant charging an assault with a deadly weapon is surplusage and defendant's motion in arrest of judgment in the Supreme Court (Rule of Practice in the Supreme Court, No. 21) for insufficiency of the warrant is denied. *Ibid.*

§ 10. Competency of Evidence.

Evidence tending to show ill will between the prosecuting witness and the defendant, arising from the destruction of certain whiskey stills by officers of the law, is competent for the purpose of showing motive. *S. v. Lefevers*, 494.

§ 11. Sufficiency of Evidence and Nonsuit.

Evidence that each of two men, one of them identified as defendant, made a throwing motion in unison, that immediately thereafter the windshield of the oil truck driven by the State's witness was struck and broken by a rock or brick, and that defendant had cursed and threatened the driver of another oil truck, *is held* sufficient to overrule defendant's motion to nonsuit in this prosecution for assault with a deadly weapon. *S. v. Hobbs*, 14.

Evidence *held* sufficient to be submitted to the jury as to guilt of each of defendants of assault with deadly weapon. *S. v. Lefevers*, 494.

ATTORNEY AND CLIENT.

§ 10. Lien and Collection of Fees.

Evidence *held* sufficient to be submitted to the jury in this action to recover the reasonable value of professional services rendered. *Blalock v. Whisnant*, 417.

Attorneys' fees are not part of the cost and may not be recovered by the successful litigant. *Patrick v. Trust Co.*, 525.

ATTORNEY AND CLIENT—*Continued.*

§ 11. Grounds for Disbarment.

Detention of money received in his professional capacity without *bona fide* claim thereto is ground for disbarment of attorney. *In re Escoffery*, 19.

AUTOMOBILES.

§ 7. Pedestrians.

It is unlawful for a pedestrian to cross a street between intersections at which traffic lights are maintained unless there is a marked cross-walk between the intersections at which he may cross and on which he has the right of way over vehicles, sec. 135 (c), ch. 407, Public Laws of 1937, and his failure to observe the statutory requirement is evidence of negligence but not negligence *per se*. *Templeton v. Kelley*, 487.

§ 8. Sudden Peril or Emergency.

Person is not held to exercise of same degree of care when confronted with sudden emergency, and whether defendant was guilty of negligence in striking plaintiff's car after it had skidded across highway in front of him, *held* for jury. *Hunter v. Bruton*, 540.

§ 9c. Safety Statutes and Ordinances in General.

The violation of a statute imposing regulations upon the operation of motor vehicles in the interest of public safety constitutes negligence *per se*, but such violation must be the proximate cause of injury in order to impose liability. *Holland v. Strader*, 436; *Templeton v. Kelley*, 487.

§ 13. Stopping, Starting, and Turning.

The violation of the statute requiring a motorist desiring to stop on the highway to first ascertain if he can stop in safety, and, where the movement of another vehicle may be thereby affected, to give the statutory signal for stopping, is negligence *per se*. *Holland v. Strader*, 436.

§ 18a. Negligence and Proximate Cause.

Whether the violation of a safety statute is a proximate cause of injury is ordinarily a question of fact for the determination of the jury. *Holland v. Strader*, 436.

Plaintiff's car skidded across the highway in front of defendant's car. *Held:* Whether defendant was negligent in running off the highway to the right and striking plaintiff's car under the emergency that confronted him is a question for the jury, even if plaintiff's car had come to a standstill for a minute and a half before the impact. *Hunter v. Bruton*, 540.

AUTOMOBILES—*Continued.*

§ 18d. Intervening Negligence.

Held: Accident was foreseeable under conditions of road under construction, and therefore failure of driver to have avoided injury did not insulate negligence of contractors. *Gold v. Kiker*, 511.

§ 18g. Sufficiency of Evidence and Nonsuit.

Evidence of defendant's negligence in stopping without giving statutory warning *held* sufficient to take case to the jury. *Holland v. Strader*, 436.

§ 18h. Instructions in Actions for Negligent Operation of Automobiles.

An instruction that if the jury should find by the greater weight of the evidence that the defendant failed to observe the statutory requirements in stopping on the highway, the violation of the statute would constitute negligence, and that if they further found by the greater weight of the evidence that such negligence was the proximate cause of plaintiff's injury, they should answer the issue of negligence in the affirmative, is without error. *Holland v. Strader*, 436.

Instruction that if the jury should find that defendant violated safety statute they should answer issue of negligence in affirmative *held* error in failing to charge upon proximate cause. *Templeton v. Kelley*, 487.

§ 19. Right of Action Against Driver for Injuries.

In an action by a guest in an automobile against the driver to recover for injuries sustained in an accident occurring in the State of Virginia, judgment for plaintiff is error when the jury finds that the defendant was not guilty of gross negligence, since such finding is necessary to a recovery by a guest under the laws of that state. *Brumsey v. Mathias*, 743.

§ 21. Parties Liable to Guest or Passenger.

Allegations that both drivers were intoxicated and driving on wrong side of street *held* not to allege intervening negligence on part of driver of other car insulating, as matter of law, negligence of the driver of the car in which plaintiff was riding as a guest. *Parker v. Witty*, 577.

§ 23. Liability of Owner for Driver's Negligence in General.

The owner of an automobile is not liable for its negligent operation by another merely by reason of ownership, but the owner may be held liable under the doctrine of *respondeat superior* only if the relationship of master and servant exists between him and the driver at the time of, and in respect to, the very transaction resulting in injury. *Parrott v. Kantor*, 584.

§ 24b. Scope of Employment.

A servant driving his master's automobile in the course of his employment is not required to take the most direct practical route, and the relationship is not interrupted by a detour in reason, but when the servant makes a complete departure from the course of his employment in deviating from his route solely for his personal ends, the relationship is not reëstablished until he returns to the place where the deviation occurred, or to some place where he should be in the performance of his duty, and the master is not liable for the servant's negligent operation of the automobile while on his way back to resume his duties after such complete departure. *Parrott v. Kantor*, 584.

Held: Court correctly denied nonsuit on issue of master's liability, but should have given requested instruction that master would not be liable if servant was returning to duties after complete departure. *Ibid.*

AUTOMOBILES—*Continued.*

§ 24d. Instructions on Issue of Respondeat Superior.

When recovery is sought against one defendant as the driver of the car causing the injury and against the other defendant under the doctrine of *respondeat superior*, and instruction permitting a recovery against both defendants if the issue of negligence is answered in the affirmative, without submitting the question of whether the driver, at the time, was an employee acting within the scope of his employment, is reversible error. *Templeton v. Kelley*, 487.

BAILMENT.

§ 1. Nature and Requisites.

Where the owner of a mule loans the animal to another for the convenience of such other person in harvesting his crop, the relation of bailor and bailee exists between the parties. *Falls v. Goforth*, 501.

§ 6. Actions for Failure to Surrender or Return Property.

The burden is upon the bailor to prove negligence on the part of the bailee as a basis of the recovery of damages for the failure of the bailee to make safe return of the property bailed, but such negligence is established *prima facie* by a showing that the bailee received the property in good condition and failed to return it, or returned it in a damaged condition. *Falls v. Goforth*, 501.

Evidence that at the time plaintiff loaned his mule to defendant, the mule was in good condition, that defendant hitched plaintiff's mule, which was a willing worker, to a mowing machine with defendant's mule, which was a slow worker and failed to pull his share of the load, that defendant worked the mules without rest on a very hot day until plaintiff's mule fell in harness and died of heat exhaustion, *is held* sufficient to be submitted to the jury in plaintiff's action to recover the value of the mule, and the granting of defendant's motion for judgment of nonsuit was error. *Ibid.*

BANKS AND BANKING.

§ 8c. Accepting Checks and Advancing Proceeds to Payee or Holder.

Where a check payable to a corporation is endorsed by its duly authorized agent "pay to any bank, banker or trust company," the corporation's local bank may accept the check and pay the amount thereof to the corporate officer or employee who has the authority, either express or implied, to present it. *Warehouse Co. v. Bank*, 246.

Evidence *held* sufficient for jury on question of implied authority of corporate agent to present check for payment. *Ibid.*

Notice to a bank by its corporate depositor to honor all checks, drafts, etc., for the withdrawal of the funds of the corporation only when made, drawn, accepted or endorsed by at least two of its officers, by its terms embraces only the withdrawal of funds deposited in the bank and does not apply to the advancement of money by the bank on checks payable to the corporation and drawn on another bank, pending presentment to and payment by the payee bank. *Ibid.*

§ 9b. Pledges.

Language of pledge *held* to cover every liability of the borrower to the bank arising out of ordinary conduct of business. *Edwards v. Buena Vista Annex, Inc.*, 706.

BARBERS.

§ 3. Prosecutions and Enforcement of Licensing Statute.

The indictment charged defendant with practicing barbering "without first obtaining a certificate of registration." The evidence tended to show that defendant practiced barbering after his license had been revoked. *Held:* There is a fatal variance between the indictment and proof, proof of lack of a license not being proof of lack of a certificate of registration. *S. v. Hardie*, 346.

BASTARDS.

§ 1. Nature, Validity and Construction of Statutes Providing Remedy or Prosecution for Failure to Support.

Defendant pleaded guilty to an indictment charging him with the willful neglect and refusal to support his illegitimate child, and judgment was pronounced. Thereafter defendant moved in arrest of judgment on the ground that the power of the court to enter the judgment was taken away by chapter 432, Public Laws of 1937, which repealed sec. 6, ch. 228, Public Laws of 1933. *Held:* Defendant's plea established his guilt of the offense charged and supported the judgment regardless of whether the whole of sec. 6, ch. 228, Public Laws of 1933, was repealed by the later act or not, and therefore no fatal defect appears upon the face of the record and the motion in arrest of judgment was properly denied. *S. v. Black*, 448.

BILLS AND NOTES.

§ 7a. Endorsement and Negotiation in General.

A note payable to bearer is negotiated by delivery, a note payable to order is negotiated by endorsement of the holder and completed by delivery, C. S., 3010, and a note with special endorsement requires the endorsement of the person specified therein to further negotiation of the instrument, C. S., 3015, and endorsements may be either in blank or special, which may also be either restricted or qualified or conditional, C. S., 3014, and for convenience endorsements may be divided into endorsements in blank, which are unqualified, and endorsements not in blank, which are qualified. *Warehouse Co. v. Bank*, 246.

Where the original endorsement is authorized, subsequent diversion of the funds will not make it a forgery. *Ibid.*

§ 7b. Qualified Endorsement.

The designation of a particular class is sufficient to render an endorsement special, and therefore an endorsement to "any bank, banker or trust company" is a special endorsement precluding the further negotiation of the instrument without the endorsement of one of the class specified. *Warehouse Co. v. Bank*, 246.

When corporation endorses check "pay to any bank, banker or trust company" the corporation's bank of deposit may accept same and advance the amount thereof in cash to the corporate officer or agent having authority to present it, and evidence of corporate agent's implied authority *held* sufficient for jury in this case. *Ibid.*

§ 8. Possession and Presumptions from Possession.

Mere possession of notes which have not been endorsed by the payee does not raise any presumption of ownership in the holder. *Metcalf v. Ratcliff*, 216.

BOUNDARIES—*Continued.*

the location of the true dividing line, C. S., 363, and therefore injunctive relief will not lie at the instance of one party to enjoin the other from retaining possession of the disputed strip, pending the final determination of the proceeding, even in the Superior Court on appeal, since the restraint sought is not germane to the subject of the action. *Jackson v. Jernigan*, 401.

§ 10. Issues and Burden of Proof.

In a processioning proceeding to establish the true dividing line between the lands of the parties, it is error for the court to instruct the jury that the burden is on defendants to establish the line as claimed by them, since the burden of proof never shifts to defendants. The submission of a single issue as to the location of the true dividing line, rather than the submission of separate issues as to the location of the dividing line as contended by the respective parties, approved. *Greer v. Hayes*, 396.

§ 11. Instructions in Processioning Proceedings.

Instruction *held* for error in failing to charge jury under what circumstances plaintiff would be entitled to have variations in magnetic pole computed as of date of former deed. *Greer v. Hayes*, 396.

§ 12. Verdict and Judgment.

Verdict in this case *held* ambiguous so that boundaries could not be ascertained therefrom or judgment rendered thereon, and motion to set aside should have been granted. *Cody v. England*, 604.

BURGLARY.

§ 1a. Burglary in the First Degree.

A person who burglariously breaks and enters a dwelling at nighttime while the same is occupied is guilty of burglary in the first degree, and the fact that the value of goods stolen from the dwelling is less than $20.00 is no defense to the capital charge, the provision of C. S., 4251, dividing larceny into two degrees, by its terms having no application to burglary. *S. v. Richardson*, 304.

§ 2. "Breaking."

Evidence that defendants encountered the owner of a dwelling house immediately outside of the house at nighttime, and marched him into the house at the point of firearms and stole money which was hidden in the house, is sufficient to be submitted to the jury on the charge of second degree burglary, the method of entry being a constructive "breaking." C. S., 4232. *S. v. Rodgers*, 572.

CARRIERS.

§ 5b. Sale and Transfer of Franchise.

Option to sell franchise within stipulated time requires notice but not payment of purchase price nor approval of commissions within that time. *Lennon v. Habit*, 141.

Tender is not required of plaintiffs when on defendant's statements it would be futile. *Ibid.*

In a suit to compel specific performance of a contract of sale of a franchise as a common carrier, made subject to the approval of the Interstate Commerce Commission and the State commissions having jurisdiction, defendant sellers' demurrer on the ground that it failed to appear from the complaint that the

CARRIERS—*Continued.*

commissions would approve the transfer, is untenable, it being incumbent upon defendants under the terms of their contract to join in a proper application to the commission for such transfer. *Ibid.*

The jurisdiction of the Interstate Commerce Commission does not preclude our courts from entertaining a suit to compel defendant sellers to join in making a proper application to the proper commissions for a transfer of their franchise to plaintiffs in accordance with their contract for the sale of such franchise. *Ibid.*

§ 21a. Degree of Care Required of Carrier.

The duty of a common carrier is to go as far as human care and foresight permits in providing safe conveyance for its passengers. *Horton v. Coach Co.*, 567.

§ 21b. Injuries to Passengers in Transit.

Evidence that plaintiff passenger in going to her seat in the bus had turned around to take her seat when the bus jerked and threw her on her right side causing injury to her hip *is held* sufficient to take the case to the jury on authority of *Riggs v. R. R.*, 188 N. C., 366. *Smith v. Bus Co.*, 22.

§ 21f. Discharge and Ejection of Passengers.

Plaintiff's evidence tending to show that she was caused to alight from defendants' bus with a small child and baggage in a lonely place before the bus had reached the destination for which she had purchased a ticket, and that before she had time to collect her wits the bus was driven away, and that the bus driver was rude in his manner, tends to establish willful injury or gross negligence entitling plaintiff to the submission of issues relating to punitive, as well as compensatory, damages. *Horton v. Coach Co.*, 567.

CLERKS OF COURT.

§ 3. Jurisdiction as Court in General.

The jurisdiction of the court of the clerk of the Superior Court is limited to that conferred by statute, and unless otherwise expressly provided the clerk may not enter any judgment except on Monday. Ch. 92, sec. 10, Public Laws of 1921, as amended by ch. 68, Public Laws of 1923. Michie's Code, 597 (b). *Beaufort County v. Bishop*, 211.

Clerk is without jurisdiction to enter order confirming commissioner's sale of land under foreclosure of tax lien and to order deed made to purchaser except on a Monday. *Ibid.*

§ 18. Receipt of Money Under Color of Office.

Clerks of the Superior Court are insurers and guarantors of funds coming into their hands by virtue or color of their offices. *Thacker v. Deposit Co.*, 135.

Failure of a clerk of the Superior Court to account for funds received by virtue or color of his office upon demand raises the presumption that the money was misappropriated and converted upon receipt, and places the burden upon the clerk or his surety to show the contrary. *Ibid.*

CONSPIRACY.

§ 3. Nature and Elements of the Crime.

A criminal conspiracy is an agreement between two or more persons to do an unlawful act or to do a lawful thing in an unlawful way or by unlawful

CONSPIRACY—*Continued.*

means, and the illegal agreement being the crime, the failure of one of the conspirators to participate personally in the overt act is immaterial upon the question of his guilt of conspiracy. *S. v. Andrews*, 574.

§ 6. Sufficiency of Evidence and Nonsuit.

A criminal conspiracy need not be proven by direct testimony but may be established by proof of facts and circumstances from which it may be legitimately inferred. *S. v. Andrews*, 574.

Evidence *held* sufficient for jury in this prosecution for conspiracy to commit larceny. *Ibid.*

CONSTITUTIONAL LAW.

II. Construction
- 3a. General Rules of Construction. Lilly & Co. v. Saunders, 163; S. v. Harris, 746.
- 3b. Grant and Reservation of Powers. Best & Co. v. Maxwell, 115.
- 3c. Waiver of Constitutional Provisions. Cameron v. McDonald, 712.

III. Governmental Branches and Powers
- 4. Legislative Powers.
  - a. In General. Lilly & Co. v. Saunders, 163; S. v. Harris, 746.
  - b. Taxing Power. Henderson County v. Smyth, 421.
  - c. Delegation of Legislative Power. Lilly & Co. v. Saunders, 163; Baxter v. Arthur Co., 276; S. v. Harris, 746.
- 6. Judicial Powers.
  - a. In General. Henderson County v. Smyth, 421; Helms v. Emergency Crop & Seed Loan Office, 581.
  - b. Power and Duty to Determine Constitutionality of Statutes. Leonard v. Maxwell, 89; Lilly & Co. v. Saunders, 163; S. v. Harris, 746.

IV. Police Power of the State
- 7. Scope of Police Power in General. S. v. Allen, 621.
- 8. Regulation of Trades and Professions. S. v. Harris, 746.

V. Personal, Civil, and Political Rights and Privileges.
- 12. Monopolies and Exclusive Emoluments. Lilly & Co. v. Saunders, 163; S. v. Harris, 746.
- 13. Equal Protection, Application and Enforcement of Laws and Discrimination. Reaves v. Mill Co., 462; S. v. Harris, 746.
- 14a. Searches and Seizures. S. v. Shermer, 719.

VI. Due Process of Law: Law of the Land
- 17. Right to Jury Trial in Civil Cases. Peele v. Peele, 298.
- 18. Property Rights within Protection of Due Process Clause. Lilly & Co. v. Saunders, 163; Ins. Co. v. Carolina Beach, 778.

XI. Constitutional Guarantees in Trial of Persons Accused of Crime
- 27. Right to Trial by Duly Constituted Jury. S. v. Henderson, 99.

§ 3a. General Rules of Construction of Constitution.

The Constitution must be construed as stating fundamental concepts in broad and comprehensive terms, anticipating implementation by statute or liberal construction by the courts to meet changing conditions. *Lilly & Co. v. Saunders*, 163.

The Constitution must be construed in the light of its history, Art. I, sec. 29, and must be liberally construed in aid of progress, but a liberal construction is especially required in interpreting those provisions safeguarding individual liberty. *S. v. Harris*, 746.

§ 3b. Grant and Reservation of Powers.

The Federal Constitution is a grant of powers, and powers not therein granted nor prohibited by it to the States are reserved to the States or to the people. Tenth Amendment of the Federal Constitution. *Best & Co. v. Maxwell, Comr. of Revenue*, 115.

§ 3c. Waiver of Constitutional Provisions.

Subject to certain exceptions, a defendant may waive a constitutional as well as a statutory provision made for his benefit, and such waiver may be made by express consent, by failure to assert it in apt time, or by conduct inconsistent with a purpose to insist upon it. *Cameron v. McDonald*, 712.

CONSTITUTIONAL LAW—*Continued.*

§ 4a. Legislative Powers in General.

The question of public policy is exclusively for the determination of the Legislature. *Lilly & Co. v. Saunders*, 163.

Expediency of legislation within constitutional limitations is a matter for the General Assembly; whether statute is within those limitations is for the courts. *S. v. Harris*, 746.

§ 4b. Taxing Power of General Assembly.

The Constitution vests the power to levy taxes exclusively in the General Assembly, and the courts have no jurisdiction of an action the purpose of which is to discover, to list and assess for taxation personal property alleged to have escaped taxation. *Henderson County v. Smyth*, 421.

§ 4c. Delegation of Power.

North Carolina Fair Trade Act *held* not unconstitutional as delegation of legislative authority. *Lilly & Co. v. Saunders*, 163.

Provision of Compensation Act authorizing award for bodily disfigurement *held* not a delegation of legislative power in violation of Art. I, sec. 8. *Baxter v. Arthur Co.*, 276.

Chapter 30, Public Laws of 1937, as amended by chapter 337, Public Laws of 1939, providing for the licensing of those engaged in the business of dry cleaning by the commission set up in the act, *is held* an unconstitutional delegation of legislative authority, in that the act fails to set up the standards or provide reasonable limitations to guide the administrative board in admitting or excluding persons from the business, but leaves such power in the unlimited discretion of the administrative board. *S. v. Harris*, 746.

§ 6a. Judicial Power in General.

The jurisdiction of a court depends upon the authority granted to it by the Constitution and laws of the sovereignty. *Henderson County v. Smyth*, 421.

The propriety of permitting suits against a Federal agency whose activities result in numerous contractual relationships with citizens of the State is a question for the lawmaking body, and the courts must grant it sovereign immunity against suit in the State courts except in accordance with acts of Congress. *Helms v. Emergency Crop and Seed Loan Office*, 581.

§ 6b. Power and Duty of Courts to Determine Constitutionality of Statutes.

The courts will not declare a statute unconstitutional if it can be upheld on any reasonable ground. *Leonard v. Maxwell, Comr.*, 89.

A party may not invoke the power of the courts to declare an act unconstitutional unless he shows injury resulting to him from the statute. *Ibid.*

A party may not attack the constitutionality of a statute on the ground that the Legislature at which it was enacted was not properly constituted because no reapportionment had been made as required by the Constitution, reapportionment being a political and not a judicial question. *Ibid.*

In determining the validity of a statute permitting the establishment of minimum retail sale prices on trade-marked goods, the courts are concerned solely with the legislative power to enact such statute, the question of public policy upon the conflicting economic theories being for the Legislature to determine. *Lilly & Co. v. Saunders*, 163.

While the courts will not declare an act of the Legislature unconstitutional unless it is clearly so, when it clearly appears upon the facts presented that an act of the Legislature clearly violates the restrictions placed upon it by the fundamental law, it is the solemn duty of the court to uphold the Constitution and declare the statute void. *S. v. Harris*, 746.

CONSTITUTIONAL LAW—*Continued.*

Expediency of legislation within constitutional limitations is a matter for the General Assembly; whether statute is within those limitations is for the courts. *Ibid.*

§ 7. Scope of State Police Power.

The regulation of the sale of securities for the protection of the public is within the police power of the State. *S. v. Allen*, 621.

§ 8. Regulation of Trades or Professions.

Extent of police power in regulating businesses and occupations defined. *S. v. Harris*, 746.

Whether a particular business or occupation should be regulated is not merely a question of public policy within the exclusive province of the Legislature which is not reviewable by the courts, but it is for the courts to determine whether a particular business or occupation bears such substantial relationship to the public peace, health, or welfare as to bring its regulation within the State police power, and the Legislature may not preclude judicial review by a fact-finding declaration that the regulation sought to be imposed is necessary in the public interest. *Ibid.*

The power of the Legislature to impose restrictions preventing persons from engaging in particular businesses or occupations is much more limited than its power to impose purely regulative restrictions on those engaged therein. *Ibid.*

The business of operating cleaning and pressing plants does not afford any peculiar opportunities for fraud, require scientific or technical training, or involve any exceptional dangers to those engaged therein or to the public, and therefore it is not a business or occupation having such substantial relationship to public peace, health, or welfare as to bring it within the police power of the Legislature to impose prohibitive regulations upon those desiring to engage therein. *Ibid.*

Historically and fundamentally the constitutional guaranties of individual liberty protect the individual in the selection and pursuit of the ordinary occupations against the unwarranted invocation of the police power. *Ibid.*

§ 12. Monopolies and Exclusive Emoluments.

North Carolina Fair Trade Act *held* not to create or tend to create monopoly in violation of Art. I, sec. 31. *Lilly & Co. v. Saunders*, 163.

Since the Legislature is without authority in the exercise of the police power to regulate those engaged in the business of operating cleaning and pressing plants, the provision of chapter 30, Public Laws of 1937, as amended by chapter 337, Public Laws of 1939, delegating power to the commission set up by the act to impose regulations upon those desiring to engaged in the business is unconstitutional as creating a monopoly. Constitution of North Carolina, Art. I, sec. 31. *S. v. Harris*, 746.

§ 13. Equal Protection, Application and Enforcement of Laws and Discrimination.

The provision of the North Carolina Compensation Act excluding from its coverage nonresident employees involves no unconstitutional discrimination, the inadvisability of attempting to give the act extra-territorial effect being a sufficient basis for the provision. *Reaves v. Mill Co.*, 462.

Act providing for licensing of dry cleaners, being applicable to those oper-

CONSTITUTIONAL LAW—*Continued.*

ating in certain counties of the State but not to those operating in other counties exempted from the act, *held* unconstitutional as being discriminatory. *S. v. Harris*, 746.

§ 14a. Searches and Seizures.

It is not required the officer using a search warrant make the affidavit, and even conceding that the warrant was irregular, the evidence of possession of illegal gaming paraphernalia obtained by the search was nevertheless competent. *S. v. Shermer*, 719.

§ 17. Right to Trial by Jury in Civil Cases.

Provisions of C. S., 1667, empowering court, without intervention of jury, to grant subsistence *pendente lite* to plaintiff in her action for alimony without divorce *held* constitutional. *Peele v. Peele*, 298.

§ 18. Property Rights Within Protection of Due Process Clause.

The North Carolina Fair Trade Act, permitting the establishment of minimum retail prices on trade-marked goods by agreement, does not deprive a retailer not a party to a contract with the manufacturer or distributor of any property right in preventing such retailer from selling the trade-marked article at a price less than that stipulated by contract, since such retailer acquires title with knowledge and subject to the stipulations relative to the minimum retail price permitted by the law in protecting the property right of the manufacturer or distributor in his trade-mark and good will, which property right subsists while the goods bear his trade-mark, even after he has parted with title to the commodity itself. Art. I, sec. 17, of the State Constitution. *Lilly & Co. v. Saunders*, 163.

Granting of municipal charter cannot have effect of defeating rights of individual purchasers to easements in streets shown by plat. *Ins. Co. v. Carolina Beach*, 778.

§ 27. Right to Trial by Duly Constituted Jury in Criminal Prosecutions.

Defendant, a Negro, filed a plea in abatement on the ground that members of his race were excluded from the jury box. *Held:* The plea was properly denied upon the court's finding, upon supporting evidence, that names of qualified Negroes had been placed in the jury box and that the jurors had been properly selected therefrom. *S. v. Henderson*, 99.

CONTRACTS.

§ 1. Nature and Essentials in General.

In order to make a valid contract, the parties must agree to each of its terms at the same time and in the same sense, and each of its terms must be certain or capable of being made certain by proof. *Sides v. Tidwell*, 480.

§ 7d. Gaming Contracts.

C. S., 2144, amended by ch. 236, Public Laws of 1931, does not render void a contract for the purchase and sale of stocks on margin when actual delivery of the stocks is made to the purchaser or to his agent, and the stocks are paid for in whole or in part. *Cody v. Hovey*, 391.

§ 8. General Rules of Construction.

Pertinent public statutes enter into and form a part of a contract as if they were expressly referred to or incorporated in its terms, or at least contracts will be deemed to have been made in contemplation of the law. *Rostan v. Huggins*, 386.

CONTRACTS—*Continued.*

§ 9. Entire and Divisible Contracts.

Plaintiff's evidence that plaintiff was to furnish at an agreed price all building materials, except brick and cement, necessary to the construction of a church in accordance with a blueprint, is sufficient to be submitted to the jury on the question of whether the contract was entire and indivisible, and the fact that plaintiff was not called upon to deliver all of such material does not alter the result. *Sides v. Tidwell*, 480.

§ 10. Time and Place of Performance.

Option to sell franchise within stipulated time requires notice but not payment of purchase price nor approval of commissions within that time. *Lennon v. Habit*, 141.

§ 20. Necessity of Performance or Tender.

Tender is not required of plaintiffs when on defendants' statements it would be futile. *Lennon v. Habit*, 141.

§ 21. Pleadings.

Complaint *held* to allege the contract, its breach, and consequent damages, and defendant's demurrer thereto should have been overruled. *Williams v. Bruton*, 582.

§ 25. Measure and Assessment of Damages.

Damages recoverable for breach of contract are those which are the natural consequences of such breach and which are reasonably certain and not speculative, and special damages are recoverable only when the special circumstances out of which they arise are communicated or known to the party sought to be charged. *Chesson v. Container Co.*, 337.

A new trial is awarded in this action for damages for breach of contract to purchase pulpwood for error in the instructions on the issue of damages under which the jury might have twice awarded the difference between the price defendant agreed to pay for the wood delivered and the price plaintiff agreed to pay for the timber plus his expenses in cutting and removing same. *Chesson v. Container Co.*, 337.

CONTROVERSY WITHOUT ACTION.

§ 2. Statement of Facts Agreed.

In the submission of a controversy without action the statement of facts agreed should include only pertinent facts upon which the parties are in agreement, and evidence from which other facts may be found has no place therein, and since the procedure is statutory, compliance with the provisions of the statute is necessary and the statute must be strictly construed, C. S., 626. *Realty Corp. v. Koon*, 295.

§ 4. Hearings and Judgment.

In hearing a case submitted under a statement of facts agreed, the court is restricted to the facts therein presented and it may not hear evidence and find additional facts, although if the facts agreed are insufficient the court has discretionary power to permit amendments concurred in by the parties. *Realty Corp. v. Koon*, 295.

Where persons having an interest in the subject matter of a controversy without action are not parties thereto, they may be afforded opportunity to come in by consent and join in the submission upon the facts agreed, or upon

CONTROVERSY WITHOUT ACTION—*Continued.*

a new statement of facts, or upon additional facts agreed to by all the parties, in order that the entire controversy may be finally adjudicated, but additional parties cannot be compelled to come in against their will. *Ibid.*

CONVERSION.

§ 1. Nature and Elements.

The compromise of a caveat proceeding by a consent judgment allotting one-half the lands to testator's widow, his sole devisee, under the will, and the other one-half to testator's heirs at law, subject to the debts and costs of administration, does not affect a conversion of the real estate, and the agreement of all the parties is not necessary to the exoneration of the widow's lands from the obligations of the estate upon her payment of one-half the debts and costs of administration, such exoneration not being a reconversion. *Raymer v. McLelland*, 443.

CORPORATIONS.

§ 8. Rights, Powers and Liabilities of Stockholders in General.

Ordinarily, the control of a corporation is held by the individual or group of individuals having the voting rights of a majority of the stock. *Unemployment Compensation Com. v. Coal Co.*, 6.

§ 13a. Sale of Stock by Individuals and Transfer of Ownership.

Complaint *held* insufficient to allege conversion of stock, since upon the facts alleged there could not have been a valid transfer of ownership on the books of the corporation under the general laws of the state in which the cause of action arose. *Suskin v. Hodges*, 333.

§ 13b. Capital Issues Law and Licensing of Stock Salesmen.

The regulation of the sale of securities for the protection of the public is within the police power of the State. *S. v. Allen*, 621.

The penal provision of the Capital Issues Law, chapter 149, Public Laws of 1927, making the sale of securities in violation thereof a felony, must be strictly construed and the terms of the statute cannot be extended beyond the plain implication of the words used. *Ibid.*

In a prosecution for violation of the Capital Issues Law the fact that the property sold is of little value is irrelevant to the question of whether the property is a security as defined by the statute. *Ibid.*

An oil lease amounting to sale of mineral rights *held* not a security as defined by Capital Issues Law. *Ibid.*

§ 16. Dividends.

Right to accrued preferred dividends may not be defeated by charter amendment. *Patterson v. Henrietta Mills*, 728.

§ 20. Representation of Corporation by Officers and Agents.

The secretary-treasurer of a corporation has the authority to present to the corporation's local depository, either for deposit or for payment in cash, checks received by the corporation and drawn on out-of-town banks. *Warehouse Co. v. Bank*, 246.

COSTS.

§ 2a. Successful Party.

Costs follow the final judgment, and when a municipality is entitled to the relief sought in its action to foreclose a paving assessment lien, it is error to tax any part of the costs against it. *Zebulon v. Dawson*, 520.

§ 6. Items and Amount of Costs.

Attorneys' fees are not a part of the costs and may not be recovered by the successful litigant. *Patrick v. Trust Co.*, 525.

COURTS.

§ 1a. Jurisdiction of Superior Courts in General.

The power to levy taxes is the exclusive province of the legislative branch of the government, N. C. Constitution, Art. V, and the Superior Court has no jurisdiction of an action the nature and purpose of which is to discover, to list and assess for taxation, property which has escaped taxation. *Henderson County v. Smyth*, 421.

The general rule is that the fact that a court of general jurisdiction has acted in the matter raises a *prima facie* presumption of rightful jurisdiction, but when the court's authority to act is limited, the converse will be presumed, and it must affirmatively appear that the court's acts are within the limited authority. *Beck v. Bottling Co.*, 579.

§ 1d. Objections to Jurisdiction and Dismissal.

An action should be dismissed on defendant's motion even before complaint is filed, when it appears upon the face of the proceedings had after issuance of summons that the court has no jurisdiction of the action. *Henderson County v. Smyth*, 421.

When defendant demurs *ore tenus* on the ground that the court is without jurisdiction, and this defect does not appear upon the face of the complaint, the court may consider the facts alleged in the answer and the evidence heard by it upon defendant's motion to dismiss. *Thompson v. R. R.*, 554.

§ 2a. Appeals from County and Municipal Courts.

An appeal from a county court to the Superior Court vests jurisdiction in the Superior Court, and subsequent proceedings in the county court pending the appeal are void. *S. v. Cox*, 424.

The Superior Court, on appeal, may remand a cause back to the county court by consent upon satisfactory cause shown, and the remand reinstates the cause on the county court docket and gives it jurisdiction. *Ibid.*

Proper remand to county court ends Superior Court's jurisdiction and it may review subsequent proceedings only upon proper appeal. *Ibid.*

The jurisdiction of the Superior Court on an appeal from a general county court is an appellate jurisdiction limited to matters of law only which are properly presented by errors assigned, and the Superior Court may either affirm or modify the judgment of the general county court or remand the cause for a new trial. *Robinson v. McAlhaney*, 674.

An appeal is properly taken to the Superior Court of Guilford County from an order of the municipal court of the county granting defendant's motion to remove to the county of its residence, ch. 699, sec. 5 (j), Public-Local Laws of 1927. *Lewis v. Sanger*, 724.

§ 2c. Appeals from Clerks of Court.

Where the clerk of the Superior Court erroneously hears a proceeding over which he does not have jurisdiction, an appeal to the Superior Court confers

COURTS—*Continued.*

jurisdiction upon it to hear and determine the whole matter. Michie's N. C. Code, 637. *Bradshaw v. Warren*, 354.

§ 3. Jurisdiction After Orders or Judgments of Another Superior Court Judge.

When it is determined by provision of prior judgment that land should be sold to satisfy materialman's lien free of homestead, another Superior Court judge has no jurisdiction to hear proceedings to restrain execution, since no appeal will lie from one Superior Court judge to another. *Cameron v. McDonald*, 712.

§ 9. Jurisdiction of State and Federal Courts in General.

The admiralty and maritime jurisdiction of the United States (Art. III, sec. 2, of the Federal Constitution) does not preclude the application of a state law when the occurrence upon which the state law is invoked has no direct relation to navigation or commerce and the application of the state law does not interfere with the harmony and uniformity of the general maritime law. *Johnson v. Lumber Co.*, 123.

§ 12. Transitory Causes and What Law Governs.

This action to recover for alleged tortious conversion of corporate stock and dividends thereon by a nonresident was instituted after the death of the nonresident against his personal representative in this State. *Held:* Upon the allegations, the cause of action arose in the state in which deceased resided and the laws of that state control the cause of action. *Suskin v. Hodges*, 333.

CRIMINAL LAW.

(Particular Crimes see particular titles of crimes.)

II. Capacity to Commit and Responsibility for Crime
5. Mental Capacity.
c. Burden of Proving Insanity. S. v. Murray, 681.

III. Parties and Offenses
8b. Aiders and Abettors. S. v. Hobbs, 14; S. v. Williams, 446; S. v. Kelly, 627.

IV. Jurisdiction and Venue
14. Venue. S. v. Godwin, 49.
15. Jurisdiction upon Appeals from County and Municipal Courts. S. v. Cox, 424.

VII. Evidence in Criminal Cases
29. Facts in Issue and Relevant to Issues.
b. Evidence of Guilt of Other Offenses. S. v. Kelly, 627; S. v. Godwin, 49.
e. Evidence of Motive and Malice. S. v. Lefevers, 494.
31. Expert and Opinion Evidence.
a. Subjects of Expert and Opinion Evidence. S. v. Holland, 610.
33. Confessions. S. v. Godwin, 49; S. v. Fain, 157; S. v. Richardson, 304; S. v. Gibson, 535; S. v. Kelly, 627; S. v. Murray, 683; S. v. Rogers, 731.
34. Admissions and Declarations.
a. In General. S. v. Murray, 681.
b. Flight as Implied Admission. S. v. Godwin, 49.
35. Acts and Declarations of Conspirators. S. v. Williams, 446.
38. Demonstrative Evidence.
a. Photographs and Drawings. S. v. Holland, 610
41. Examination and Credibility of Witnesses.
b. Cross-Examination. S. v. Lefevers, 494; S. v. Spaulding, 538; S. v. Hargrove, 570.
d. Impeaching Character of Defendant. S. v. Kelly, 627.
f. Credibility of Defendant. S. v. Holland, 610.
i. Credibility of Interested Witnesses. S. v. Hammonds, 67.
j. Credibility of Witnesses Generally. S. v. Buchanan, 34.
43. Evidence Obtained by Unlawful Means. S. v. Shermer, 719.

VIII. Trial
44. Time of Trial and Continuance. S. v. Hobbs, 14; S. v. Godwin, 49; S. v. Henderson, 99.
48. Reception of Evidence.
c. Admission of Evidence after Argument Begun. S. v. Hobbs, 14.
50. Course and Conduct of Trial.
a. Expression of Opinion by Court During Trial. S. v. Buchanan, 34; S. v. Fain, 157.
51. Argument and Conduct of Counsel. S. v. Kelly, 627; S. v. Murray, 681; S. v. Buchanan, 709.
52. Taking Case from Jury.
a. Questions of Law and of Fact. S. v. Buchanan, 34; S. v. Hammonds, 67; S. v. Rodgers, 572; S. v. Andrews, 574.
b. Nonsuit. S. v. Hammonds, 67; S. v. Lefevers, 494; S. v. Rodgers,

§ 5c. Burden of Proving Defense of Insanity.

A defendant has the burden of proving to the satisfaction of the jury his defense of insanity. *S. v. Murray*, 681.

§ 8b. Aiders and Abettors.

An instruction upon supporting evidence that if defendant was present aiding and encouraging another who intentionally threw a brick at the prosecuting witness and broke the windshield of the truck he was driving, defendant would be guilty of an assault with a deadly weapon *is held* without error. *S. v. Hobbs*, 14.

Where two or more persons aid and abet each other in the commission of a crime, all being present, all are principals and equally guilty. *S. v. Williams*, 446; *S. v. Kelly*, 627.

§ 14. Venue.

Motion for change of venue on ground of prejudice is addressed to discretion of trial court. *S. v. Godwin*, 49.

§ 15. Jurisdiction Upon Appeals from County and Municipal Courts to Superior Court.

Upon appeal to the Superior Court from a county court, the Superior Court has power by consent upon satisfactory cause shown to remand the cause, but such remand terminates Superior Court's jurisdiction and reinstates cause in county court, and Superior Court cannot again acquire jurisdiction except by proper appeal, and provision in its order of remand that State might appeal is void. *S. v. Cox*, 424.

CRIMINAL LAW—*Continued.*

§ 29b. Evidence of Guilt of Other Offenses.

Evidence of defendant's guilt of other offenses is competent for the purpose of showing intent, design or guilty knowledge constituting an element of the offense charged. *S. v. Kelly*, 627.

Evidence of the defendant's commission of other crimes *held* competent to show intent and motive. *S. v. Godwin*, 49.

§ 29e. Evidence of Motive and Malice.

Evidence tending to show ill will between the prosecuting witness and the defendant, arising from the destruction of certain whiskey stills by officers of the law is competent for the purpose of showing motive. *S. v. Lefevers*, 494.

§ 31a. Subjects of Expert and Opinion Evidence.

The person embalming the body of the deceased testified that pressure had been applied on the neck below the Adam's apple requiring incisions in the neck before the tongue could be placed in proper position. The court expressly excluded the testimony by the witness as to what produced the pressure. *Held:* Defendant's objection to the admission of the testimony is untenable. *S. v. Holland*, 610.

§ 33. Confessions.

The competency of alleged confessions is for the determination of the court upon the preliminary hearing, and it is incumbent upon defendant to introduce evidence at that time if he desires to contend that the confessions were involuntary. *S. v. Godwin*, 49.

Evidence *held* to support the findings of the trial court that confessions admitted were voluntary. *Ibid.*

The competency of a confession is a preliminary question for the trial court, and its ruling thereon will not be disturbed if supported by competent evidence. *S. v. Fain*, 157.

A confession is to be regarded as *prima facie* voluntary and admissible and it is incumbent upon defendant to ask that its voluntariness be determined before its introduction, but failure of defendant to challenge its competency will not be held fatal to his objection if its involuntariness appears from the State's evidence. *S. v. Richardson*, 304.

A confession is not rendered involuntary and incompetent by the mere fact that, at the time of making it, defendant is in prison or under arrest. *Ibid.*

Held: Subsequent confession should have been excluded under presumption that it was induced by same influence vitiating prior confession. *S. v. Gibson*, 535.

Where it appears from record that confession admitted was incompetent, absence of motion to strike does not preclude appellate court from considering exception. *Ibid.*

The whole of a confession should be taken together and admitted in evidence in its entirety. *S. v. Kelly*, 627.

Prior to making the confessions admitted in evidence, defendants were warned of their rights and told by the witness what the matter was about and that it was very serious. *Held:* An exception on the ground that the warning was not sufficient is untenable. *S. v. Murray*, 683.

Ordinarily, confessions are to be taken as *prima facie* voluntary and admissible unless the contrary is made to appear, the burden being upon the party against whom the confession is offered to so show. *Ibid.*

The fact that a confession is made after arrest to an officer of the law does not in itself render the confession incompetent. *Ibid.*

CRIMINAL LAW—*Continued.*

A voluntary confession is presumed to flow from the strongest sense of guilt, and is deserving of the highest credit, but an involuntary confession is inadmissible and merits no consideration. *S. v. Rogers*, 731.

The competency of a confession is a preliminary question for the trial court, and its ruling thereon will not be disturbed when supported by any competent evidence, and an objection to the admission of a confession in evidence cannot be sustained when there is nothing on the face of the record to show that it is incompetent and no reason is assigned for the objection. *Ibid.*

§ 34a. Admissions and Declarations in General.

The court permitted the solicitor to read the entire signed statements made by each of the defendants. Defendants objected thereto on the ground that each statement involved the defendant other than the one making the statement. *Held:* It appearing that the entire of each of the statements related to the defendant making it, and that the court instructed the jury that each of the statements was competent only against the defendant making it, the objection is untenable. *S. v. Murray*, 681.

Declaration of conspirator made after termination of conspiracy, in presence of co-conspirator and impliedly assented to by him, is competent against both. *Ibid.*

§ 34b. Flight as Implied Admission of Guilt.

Flight is a circumstance to be considered by the jury with the other evidence in the case in determining defendant's guilt. *S. v. Godwin*, 49.

§ 35. Acts and Declarations of Conspirators. (Declarations of conspirator after termination of conspiracy see Criminal Law § 34a.)

When the evidence establishes a conspiracy or establishes facts from which a conspiracy can be inferred, the acts and declarations of each conspirator, done or uttered in furtherance of the common, illegal design, are competent and admissible in evidence against all of the conspirators. *S. v. Williams*, 446.

§ 38a. Photographs and Drawings.

The trial court has discretionary power to admit in evidence drawings and photographs of the scene of the crime for the purpose of illustrating the testimony of the witnesses, and its action in admitting properly identified drawings and photographs for this purpose and excluding them as substantive evidence is not error. *S. v. Holland*, 610.

§ 41b. Cross-Examination of Witnesses.

When testimony elicited from defendant's witness on cross-examination is confined by the court to the question of the witness' credibility, defendant's exception thereto cannot be sustained. *S. v. Lefevers*, 494.

Testimony of witness on cross-examination by State *held* to connect witness with, and show interest of witness toward defendant, and therefore State was entitled to contradict the testimony. *S. v. Spaulding*, 538.

The State may cross-examine defendant's character witnesses to show the extent of their knowledge of defendant and to show that his general reputation was not good in some respects. *S. v. Hargrove*, 570.

§ 41d. Impeaching Character of Defendant.

Objection to evidence tending to impeach the character of a defendant, entered on the ground that defendant had not put his character in evidence or testified in his own behalf, is untenable when the evidence constitutes a part of defendant's confession, and is competent to show *scienter* and intent. *S. v. Kelly*, 627.

CRIMINAL LAW—*Continued.*

Defendants may not object to evidence impeaching the character of a participant in the commission of the crime who was dead and not a defendant. *Ibid.*

§ 41f. Credibility of Defendant. (Instruction as to, see Criminal Law § 53a.)

An instruction to the effect that the law looks with suspicion on the testimony of the defendant in his own behalf, that the jury should scrutinize such testimony and take it with a degree of allowance, but that the rule which regards it with suspicion does not reject it, and that if the jury under all the facts and circumstances believes the witness has sworn to the truth that they should give his testimony as full credibility as that of any other witness, *is held* without error. *S. v. Holland*, 610.

§ 41i. Credibility of Interested Witnesses. (Instruction as to credibility see Criminal Law § 53a.)

An instruction that if the jury should believe from the facts and circumstances that interested witnesses had told the truth, their testimony should be given the same credit as that of disinterested witnesses is without error. *S. v. Hammonds*, 67.

§ 41j. Credibility of Witnesses Generally.

A charge that a person of good character is more apt to tell the truth than a person of bad character *is held* erroneous, the credibility of a witness being a matter for the jury. *S. v. Buchanan*, 34.

§ 43. Evidence Obtained by Unlawful Means.

Held: Even if it be conceded that it was not permissible to issue the search warrant authorizing an officer to search defendant's premises for gaming devices and paraphernalia, evidence discovered by the search is nevertheless competent. *S. v. Shermer*, 719.

§ 44. Time of Trial and Continuance.

A motion for a continuance made after the court has permitted additional evidence to be submitted after argument begun is addressed to the discretion of the court and its ruling thereon is not reviewable in the absence of abuse of discretion. *S. v. Hobbs*, 14.

A motion for a continuance is addressed to the discretion of the trial judge to be determined by him upon the facts in the exercise of his duty to administer right and justice without sale, denial, or delay. Constitution of North Carolina, Art. I, sec. 35. *S. v. Godwin*, 49.

A motion for continuance is addressed to the discretion of the trial court, and where it appears that counsel appointed were given the names of the State's witnesses, that defendant confessed the commission of the crime, and that he presented numerous witnesses who testified in support of the matter asserted by him as a defense, defendant's exception to the refusal of the court to grant a continuance cannot be sustained, there being no indication of any abuse of discretion. *S. v. Henderson*, 99.

§ 48c. Admission of Evidence After Argument Begun.

The court has the discretionary power *ex mero motu* to permit additional evidence to be procured and introduced after argument begun, upon such evidence being brought to the attention of the court. *S. v. Hobbs*, 14.

§ 50a. Expression of Opinion by Court During Trial.

A statement by the court during the cross-examination of defendant that defendant "swore both ways" in regard to the matter under inquiry, *is held*

prejudicial error, the effect of the observation being to disparage or discredit defendant's testimony in the eyes of the jury. *S. v. Buchanan*, 34.

The comment of the trial court upon the admission of defendant's confession in evidence that the court had held the confession competent because it appeared that it was taken without hope of reward or without extortion or fear, after defendant had been duly warned of his rights, amounts to no more than stating that the confession had been admitted in evidence and the reasons for admitting it, and will not be held for error as an expression of opinion by the court prohibited by C. S., 564. *S. v. Fain*, 157.

§ 51. Argument and Conduct of Counsel.

An objection to the remarks of the solicitor in his argument to the jury to the effect that certain of the State's evidence was uncontradicted cannot be sustained when it appears that on each occasion the court warned the jury not to consider such statements. *S. v. Kelly*, 627.

The action of the trial court in permitting the solicitor to read to the jury written statements made by defendants that had been properly admitted in evidence cannot be held for error when it appears that the court cautioned the jury that each statement was competent only as to the defendant making it. *S. v. Murray*, 681.

Permitting solicitor to read decision on former appeal which was not germane and tended to discredit defendant *held* reversible error. *S. v. Buchanan*, 709.

§ 52a. Questions of Law and of Fact.

The competency of a witness is a question of law for the determination of the court; the credibility of a witness is a matter of fact for the determination of the jury. *S. v. Buchanan*, 34.

The competency, admissibility, and sufficiency of the evidence is for the court; its weight and credibility is for the jury. *S. v. Hammonds*, 67.

The credibility of a witness is a question for the jury. *S. v. Rodgers*, 572.

The credibility of the evidence and the inferences properly to be drawn from the facts in evidence is for the jury. *S. v. Andrews*, 574.

§ 52b. Nonsuit. (Sufficiency of evidence in particular prosecutions see particular titles of crimes.)

Upon a motion to nonsuit, only the evidence favorable to the State should be considered. *S. v. Hammonds*, 67.

Upon a motion to nonsuit, the evidence should be considered in the light most favorable to the State and it is entitled to every reasonable intendment thereon and every reasonable inference therefrom. C. S., 4643. *Ibid.*

Case must be submitted to the jury if evidence considered in light favorable to State is sufficient to sustain verdict of guilty. *S. v. Lefevers*, 494.

Defendants' contention that their motion to nonsuit should have been allowed because the only evidence tending to identify them as the perpetrators of the crime charged was the testimony of a witness of little education, slight intelligence and uncertain memory, is properly denied, and credibility of the State's witness being a question for the jury. *S. v. Rodgers*, 572.

Upon motion to nonsuit, the evidence must be considered in the light most favorable to the State, and if there is any substantial evidence to support the charge contained in the bill of indictment the motion is properly denied. *S. v. Andrews*, 574.

Motion to nonsuit must be renewed at close of all the evidence. *S. v. Holland*, 610.

CRIMINAL LAW—*Continued.*

§ 53a. Form and Sufficiency in General.

In this prosecution for murder in attempt to commit robbery, failure of court to define "robbery" *held* not error in absence of request. *S. v. Godwin*, 49.

Court need not charge that failure of defendant to testify should not be considered against him in absence of request. *S. v. Jordan*, 356; *S. v. Kelly*, 627.

The failure of the court to charge the jury as to the credibility to be given the testimony of an accomplice, corroborated in every respect by other evidence, will not be held for error in the absence of a special request, C. S., 564, whether such charge should be given being in the sound discretion of the trial court. *S. v. Kelly*, 627.

Where jury requests additional instructions on particular points, the court need not repeat therein instructions on defendants' defense. *S. v. Murray*, 681.

§ 53c. Instructions on Burden of Proof and Presumption.

A charge to the effect that the defendants are presumed innocent until their guilt has been established, and that the burden is upon the State to satisfy the jury of defendants' guilt from all the evidence beyond a reasonable doubt, and that reasonable doubt does not mean a conjectural or fictitious doubt, but a doubt founded on some substantial reason growing out of the evidence, *is held* sufficiently full upon the presumption of innocence and the burden of proof in the absence of a request for more particular elaboration. *S. v. Kelly*, 627.

The instruction of the court when read contextually as a whole *held* not to place the burden on each defendant of proving that both defendants were insane at the time the crime was committed, but to properly place the burden on each defendant, respectively, to prove his plea of insanity. *S. v. Murray*, 681.

§ 53d. Instructions on Less Degree of Crime.

Where the uncontradicted evidence for the State tends to show that the assault was committed with a missile large enough and thrown with sufficient force to knock a large hole in the windshield of the truck driven by the prosecuting witness, and defendant relies solely upon an alibi, there is no evidence of simple assault, and the failure of the court to submit to the jury the question of defendant's guilt of this degree of the crime is not error. C. S., 4640. *S. v. Hobbs*, 14.

Court need not submit question of manslaughter when there is no evidence of defendant's guilt of this degree of crime. *S. v. Godwin*, 49; *S. v. Kelly*, 627.

§ 53e. Expression of Opinion in Charge.

Defendant's exception to the charge on the ground that the court expressed an opinion on the weight and credibility of the evidence by undue emphasis in the charge *held* untenable. *S. v. Godwin*, 49.

A charge to the effect that the trial of the cause involved heavy expense to the county and that it was the duty of the jury to continue their deliberations and decide the issue, will not be held for error when the court, immediately following such instruction, charges the jury that it was its duty to try to come to some agreement and that the court was not attempting to force it to agree. *S. v. Lefevers*, 494.

Charge as to consideration jury should give testimony of defendant *held* without error. *S. v. Holland*, 610.

CRIMINAL LAW—*Continued.*

§ 53f. Requests for Instructions.

The refusal of the trial court to give part of the instructions requested by defendant *held* not error, the court having given in substance the applicable instructions requested by him. *S. v. Godwin*, 49.

Defendant must request instruction that his failure to testify should not be taken to his prejudice. *S. v. Jordan*, 356.

§ 53g. Misstatement of Evidence and Contentions and Objections Thereto.

Objections to the charge on the ground of misstatement of evidence and contentions of the parties must be brought to the court's attention in time to afford opportunity for corrections in order for assignments of error based thereon to be considered on appeal. *S. v. Hobbs*, 14.

An incorrect statement of the contentions of the defendant must be brought to the court's attention in time to afford opportunity for correction. *S. v. Godwin*, 49.

§ 53h. Construction of Instructions.

The charge of the court will be construed contextually as a whole. *S. v. Hobbs*, 14; *S. v. Jordan*, 356.

§ 56. Motions in Arrest of Judgment.

The use of the word "feloniously" in a warrant charging an assault with a deadly weapon is surplusage and defendant's motion in arrest of judgment in the Supreme Court (Rule of Practice in the Supreme Court, No. 21) for insufficiency of the warrant is denied. *S. v. Hobbs*, 14.

Statute *held* not to impose tax on business of employing peddlers, and motion in arrest on warrant charging that offense is allowed. *S. v. Freeman*, 161.

Motion in arrest of judgment is proper when, and only when, some fatal defect appears on the face of the record. *S. v. Black*, 448.

A motion in arrest of judgment is one made after verdict and to prevent entry of judgment, and is based upon the insufficiency of the indictment or some other fatal defect appearing on the face of the record, and the granting of defendant's petition that he be relieved of further payments required of him by prior order as a special condition of probation, is not equivalent to arrest of judgment. *S. v. McCollum*, 737.

§ 61d. Mental Capacity of Defendant to Receive Sentence.

Whether the court should order inquiry as to defendant's mental capacity to receive sentence rests in sound discretion. *S. v. Godwin*, 49.

§ 62. Conditional and Alternative Judgments.

Ordinarily, the terms upon which a sentence is suspended must be sufficiently definitive to permit enforcement ministerially by its inherent directions, and a judgment which imposes propositions in the alternative is void. *S. v. Wilson*, 130.

Condition upon which execution was suspended *held* not void as being alternative. *Ibid.*

§ 63. Suspended Judgments and Executions.

Where record shows no breach of the condition upon which execution was suspended, execution on the judgment is error. *S. v. Perryman*, 30.

The Superior Court has the power to suspend execution of a sentence in a criminal prosecution for a period of five years, ch. 132 (4), Public Laws of 1937, notwithstanding that the maximum imprisonment authorized for the

offense of which defendant is convicted is two years. C. S., 4173. *S. v. Wilson*, 130.

Terms upon which execution was suspended *held* to require payment of fine and that defendant remain law-abiding. *Ibid.*

A defendant who is present and remains silent is presumed to accept the conditions upon which execution of his sentence is suspended. *Ibid.*

§ 68a. Right of State to Appeal.

The right of the State to appeal is statutory, which right may not be enlarged by order of court. *S. v. Cox*, 424.

The State may appeal only upon a judgment upon a special verdict, upon a demurrer, upon a motion to quash, or upon arrest of judgment. C. S., 4649. *S. v. McCollum*, 737.

State may not appeal from adjudication that the duty to make payments required as special condition of probation had terminated. *S. v. McCollum*, 737.

§ 76. Certiorari.

Defendant's application for *certiorari* denied on authority of *S. v. Moore*, 210 N. C., 686, and *held further*, the solicitor having refused to grant an extension of time to defendant to file his statement of case on appeal, and the time allowed therefor by the Court having expired, *certiorari* could not help defendant. *S. v. Moore*, 543.

§ 77c. Matters Not Appearing of Record Presumed Without Error.

Where the charge of the court is not in the record, it will be presumed that the court fairly and correctly charged every phase of the law applicable to the evidence. *S. v. Henderson*, 99; *S. v. Hargrove*, 570.

Where the record fails to show that the officer issuing the search warrant did so without first requiring the complainant or other person to sign an affidavit under oath, or that he failed to examine such person in regard thereto, the warrant not being in the record, it will be presumed that it was in all respects regular. *S. v. Shermer*, 719.

§ 78c. Motions to Strike Out Incompetent Evidence.

Where part of the answer of a witness is not responsive to the question propounded, defendant, if he deems it prejudicial, should request the court to strike it from the record and to instruct the jury not to consider it. *S. v. Lefevers*, 494.

Where incompetency of confession appears on face of record, absence of motion to strike does not preclude appellate court from considering exception. *S. v. Gibson*, 535.

If later testimony discloses that prior evidence was incompetent as not relating to conditions existing at time of commission of crime, defendant should move to strike out prior evidence, and his failure to do so waives his objection. *S. v. Holland*, 610.

§ 78d. Motions to Nonsuit.

A motion to nonsuit must be renewed at the close of all the evidence in order to present on appeal the question of the sufficiency of the evidence. *S. v. Holland*, 610.

§ 78e. Parties Injured and Entitled to Except.

An objection to the admission of impeaching evidence on the ground that the defendants had not testified or put their character in issue, is not avail-

able to defendants when it appears that the impeaching evidence related solely to the character of a participant in the crime who was not on trial, but who was killed in the gun fight ensuing when he and defendants were surprised by officers of the law. *S. v. Kelly*, 627.

§ 79. Briefs.

While exceptions not brought forth in defendants' brief are deemed abandoned, nevertheless they may be considered when defendants have been convicted of a capital felony. *S. v. Murray*, 681.

§ 80. Prosecution of Appeal and Dismissal.

When defendant fails to make out and serve his statement of case on appeal within the time allowed, no agreement for extension of time having been made, the motion of the Attorney-General to docket and dismiss will be allowed, Rule of Practice in the Supreme Court, No. 17, but when defendant stands convicted of a capital crime this will be done only when no error is apparent on the face of the record. *S. v. Mayes*, 542; *S. v. Moore*, 543; *S. v. Mitchell*, 544; *S. v. Young*, 626; *S. v. Williams*, 740.

§ 81a. Matters Reviewable.

A motion for a continuance made after the court has permitted additional evidence to be submitted after argument begun is addressed to the discretion of the court and its ruling thereon is not reviewable in the absence of abuse of discretion. *S. v. Hobbs*, 14.

The trial court's refusal of defendant's motion for a continuance is not reviewable on appeal in the absence of palpable or gross abuse, and under the facts of this case there is no evidence of abuse of discretion. *S. v. Godwin*, 49.

Under the facts of this case there was no evidence of abuse of discretion on the part of the trial court in the refusal of defendant's motion for a change of venue or for a special venire. *Ibid.*

The trial court overruled defendant's plea in abatement on the ground that Negroes had been excluded from the jury box, the court finding that names of qualified Negroes had been placed in the jury box and the jurors selected therefrom in accordance with law. *Held:* The findings of the trial court are conclusive upon appeal and the ruling of the court will not be disturbed, there being no evidence of any abuse of discretion. *S. v. Henderson*, 99.

A motion for a continuance is addressed to the discretion of the trial court, and its ruling thereon is not reviewable in the absence of abuse. *Ibid.*

§ 81b. Presumptions and Burden of Showing Error.

When record discloses that defendant had violated terms of suspended execution it will be presumed that court considered facts in ordering execution to be put into effect. *S. v. Wilson*, 130.

§ 81c. Prejudicial and Harmless Error.

When defendant is charged with two separate capital offenses, and there is plenary evidence to support the jury's verdict of guilty on each count, defendant's exception to the court's failure to submit the question of his guilt of a lesser degree of one of the crimes charged is immaterial, since it does not affect the validity of the verdict of guilty as to the other crime. *S. v. Fain*, 157.

Exceptions to the charge of the court will not be sustained when the charge is free from prejudicial error when read contextually as a whole. *S. v. Lefevers*, 494.

DEDICATION—*Continued.*

When the owner of lands, located within or without a town or city, subdivides and plats same into lots and streets, and sells and conveys any of the lots with reference to the plat, nothing else appearing, he thereby dedicates the streets, and all of them, to the use of the purchasers, and those claiming under them, and of the public. *Ins. Co. v. Carolina Beach*, 778.

§ 3. Acceptance.

Where a street is dedicated by sale of lots with reference to a plat showing it as being 99 feet wide, a resolution of a municipality in which the land is situate limiting the width of the street to 80 feet does not affect the rights of those purchasing lots with reference to the original plat to have the land remain so that the street may be open for its full width as occasion may require, since the easement of the original purchasers is not dependent upon acceptance of the dedication by the municipality, and a subsequent resolution rescinding the prior resolution and declaring the street to be 99 feet in width constitutes an acceptance of the street for the full width as shown by the original plat. *Ins. Co. v. Carolina Beach*, 778.

§ 4. Title and Rights Acquired.

Purchasers' easements in streets shown by plat may not be defeated by revision of plat by owner of subdivision. *Ins. Co. v. Carolina Beach*, 778.

Granting of municipal charter cannot have effect of defeating rights of individual purchasers to easements in streets shown by plat. *Ibid.*

§ 5. Revocation of Dedication.

Use and maintenance of street by municipality is acceptance of dedication precluding revocation of dedication as to any part of street. *Ins. Co. v. Carolina Beach*, 778.

DEEDS.

§ 9. Priorities.

C. S., 3309, provides, for reasons of public policy, that the rights of successive grantees of the same property shall be determined by registration, and that even actual knowledge on the part of the grantee in a registered instrument of the execution of a prior unregistered deed will not defeat his title as purchaser for a valuable consideration in the absence of fraud or matters creating an estoppel. *Patterson v. Bryant*, 550.

§ 10a. Rights of Original Parties Under Unregistered Instruments.

An unregistered deed is good as between the parties and the fact that it is not registered does not affect the equities between the parties, the sole purpose of the statute being to determine and make certain the question of title. *Patterson v. Bryant*, 550.

The registration laws are not for the protection of the grantor, and therefore laches on the part of his first grantee in failing to promptly record his deed is not available as an equitable defense in such grantee's action for damages for failure of title by reason of the execution by the grantor of a second deed to the same property which is first recorded. *Ibid.*

§ 13a. Estates and Interests Created by Construction of the Instrument.

When the life tenant executes deed with full covenants, and thereafter the life tenant and the remainderman execute deed to the same grantee with like covenants, the second deed conveys only the remainder, even though it purports to convey the life estate also. *Thompson v. Avery County*, 405.

DIVORCE—*Continued.*

amount to be allowed under this section is that which appears to the court just and proper, having regard to the circumstances and the parties. *Ibid.*

§ 13. Alimony Without Divorce.

In action for alimony without divorce denial of abandonment and failure to support plaintiff raises issues for determination of jury. *Masten v. Masten*, 24.

In making an allowance either for alimony without divorce or for alimony *pendente lite* the court is not limited to one-third of the net annual income of the husband's estate, C. S., 1666, 1667, it being only in the allowance of alimony following a decree of divorce *a mensa et thoro* that such limitation is provided by statute, C. S., 1665. *Wright v. Wright*, 693.

In the wife's action for alimony without divorce, the amount to be allowed her as alimony and for the support of the children of the marriage is within the sound discretion of the trial court, and its order will not be disturbed except where such discretion has been grossly abused. *Ibid.*

An allowance to the plaintiff of $40.00 per month, out of her husband's earnings of $20.00 per week, for support of the two minor children of the marriage of school age, and the allotment to her of the use of the home place owned by them by the entirety, with further provision that the wife should pay the monthly mortgage installments of $17.45 on the house, *is held* reasonable, and negatives any abuse of discretion. *Ibid.*

Objection to provision that wife and children should occupy homeplace owned by husband and wife by entireties on the ground that it was an allotment of the *corpus* of the husband's estate *held* untenable, the husband not being prejudiced thereby. *Ibid.*

§ 14. Enforcing Payment of Alimony or Subsistence.

Where defendant makes general appearance in action for subsistence without divorce, service of notice of subsequent petition for recovery of past due installments gives court jurisdiction. *Barber v. Barber*, 232.

§ 15. Review and Change of Award of Alimony.

Court may reopen and amend prior orders awarding subsistence to wife and children. *Wright v. Wright*, 693.

DOWER.

§ 2b. Conveyance of Dower.

Where a wife joins in the execution of a mortgage or deed of trust she conveys her dower interest as security for the debt, and upon foreclosure after her husband's death she may not assert her dower in the land as against the purchaser at the foreclosure sale, although, her position being analogous to that of a surety, she is entitled to assert a claim against her husband's estate to the amount of the value of her dower. *Realty Corp. v. Hall*, 237.

EASEMENTS.

§ 3. Acquisition of Easements by Prescription.

An allegation of permissive user by the public of a path across private land within the corporate limits is insufficient to show title of the way as against the owner by adverse user. *Whitacre v. Charlotte*, 687.

EJECTMENT.

§ 3. Termination of Tenancy.

In this action in summary ejectment, a peremptory instruction that defendant lessee had exercised the right of renewal under the terms of his lease *held* error upon conflicting evidence. *Realty Co. v. Logan*, 26.

Held: In this action in summary ejectment, summons did not leave the control of the justice of the peace for the purpose of service until the second day after the termination of defendant's lease, and therefore defendant's motion to dismiss on the ground that the action was instituted prior to the termination of his term and the accrual of the cause of action was properly denied. *Cherry v. Whitehurst*, 340.

§ 15. Instructions and Burden of Proof.

In an action in ejectment the burden of proof on issue as to plaintiff's title and right to possession of the property remains on plaintiff throughout the trial, and an instruction correctly placing the burden upon plaintiff but subsequently charging the jury that the burden was upon defendant to satisfy the jury upon the issue by clear, strong, and cogent proof is error entitling defendants to a new trial, the burden of proof being a substantial right. *Semble:* Defendant's contention that the *locus in quo* was included in the deed of trust under which plaintiff's claimed, by fraud or mutual mistake should have been submitted under a separate issue. *Fisher v. Jackson*, 302.

ELECTIONS.

§ 19. Actions for Possession of Office.

In an action to recover possession of a public office, the complaint alleging the election of relator, the issuance of a certificate of election to him by the county board of elections, relator's qualification as provided by statute, and the refusal of defendant to surrender the office, states a cause of action and defendant's demurrer *ore tenus* to the complaint is properly overruled. *Cohoon v. Swain*, 317.

The statutory certificate of election is *prima facie* proof that the person therein designated is entitled to the office specified upon his qualification, and is conclusive until reversed or adjudged to be void in a proper proceeding by a court of competent jurisdiction, and such certificate and evidence of qualification is sufficient to overrule defendant's motion to nonsuit in relator's action for possession of the office. *Ibid.*

Mere denial by defendant of issuance of certificate of election to relator does not entitle defendant to attack legality of election. *Ibid.*

ELECTRICITY.

§ 6. Degree of Care Required in Handling Electricity.

In constructing and maintaining high voltage transmission lines a power company is required to exercise the utmost care and prudence consistent with the practical operation of its business, such care being only commensurate with the highly and inherently dangerous character of the instrumentality. *Calhoun v. Light Co.*, 256.

In the distribution of electric current a power company *is held* to that high degree of care and foresight which is commensurate with the inherent danger of the instrumentality. *Kiser v. Power Co.*, 698.

ELECTRICITY—*Continued.*

§ 7. Maintenance and Inspection of Wires, Poles and Equipment.

Evidence *held* for jury on issue of negligence of power company in maintaining high voltage wires too near ground and in employing inexperienced workman to clear underbrush from beneath the wires. *Calhoun v. Light Co.*, 256.

Whether power company was negligent in failing to inspect premises during seven days elapsing between discontinuance of service after storm and death of intestate, killed when he came in contact with armor of BX cable energized by improper repairs made by electrical contractor, *held* for jury. *Kiser v. Power Co.*, 698.

§ 10. Contributory Negligence of Persons Injured.

Intestate contracted to clear small trees and underbrush from underneath defendant's transmission lines and was killed when he felled a tree which came into contact with high voltage wires. *Held:* The question of intestate's contributory negligence was a matter for the jury under appropriate instructions. *Calhoun v. Light Co.*, 256.

§ 11. Intervening Negligence.

Act of employee of electrical contractor in improperly repairing wiring system of house *held* not intervening negligence insulating negligence of power company in failing to make proper inspection. *Kiser v. Power Co.*, 698.

EQUITY.

§ 2. Laches.

Registration laws are not for protection of grantor, and therefore he may not maintain that grantee in secondly recorded deed was guilty of laches in failing to promptly record the instrument as a defense in the grantee's action for failure of title by reason of the grantor's action in twice conveying the same property. *Patterson v. Bryant*, 550.

§ 3. Nature of Equitable Jurisdiction in General.

Equity is the complement of law for the purpose of rendering justice between litigants where the law, by reason of its inflexibility, is deficient, and equity never overrides or sets at naught a positive statutory provision, but, as an instrument of remedial justice, follows the law. *Zebulon v. Dawson*, 520.

ESTATES.

§ 9d. Taxes and Assessments and Rights and Liabilities of Life Tenant and Remaindermen.

When the life tenant forfeits her life estate by permitting the land to be sold for taxes, C. S., 7982, the lands pass to the remainderman unencumbered by the lien for taxes, and they are damaged in the amount of the lien and are entitled to offset the amount against a consent judgment against the estate in favor of the life tenant, the remaindermen being also the residuary beneficiaries of the estate. *Meadows v. Meadows*, 413.

§ 9h. Sale of Lands and Ascertainment of Respective Shares of Life Tenant and Remainderman. (Breach of covenant against encumbrances see Deeds § 17a.)

When a life tenant and the remainderman sell the lands, the life tenant is entitled to the present cash value of her life estate in the purchase price, computed according to her life expectancy at the date of the execution of the

ESTATES—*Continued.*

deed, C. S., 1790, 1791, as amended by Public Laws of 1927, ch. 215, and the remainderman is entitled to the balance of the purchase price. *Thompson v. Avery County*, 405.

ESTOPPEL.

§ 2. Estoppel by Deed to Assert After Acquired Title.

Cestui held estopped by quitclaim deed releasing land from lien of deed of trust from claiming interest therein by reason of subsequent purchase of note secured by deed of trust from stranger, an express warranty not being necessary to support an estoppel, and the language of the quitclaim deed that the grantors should be forever barred from asserting any claim against the land being sufficient to bar after acquired title based upon the deed of trust. *Ins. Co. v. Sandridge*, 766.

§ 4. Estoppel by Record.

Admission of record precludes contention at variance therewith. *Rose v. Franklin*, 289.

§ 6g. Acceptance of Benefits.

Evidence of heir's acceptance of lands as his share of parents' estates *held* sufficient for jury on question of his estoppel from claiming interest in other lands. *Coward v. Coward*, 506.

§ 6h. Knowledge as Preventing Assertion of Estoppel.

Under facts of this case, knowledge of attorney *held* not such as to preclude plaintiff from asserting estoppel. *Ins. Co. v. Sandridge*, 766.

§ 10. Persons Estopped.

When a child would be estopped, if living, from asserting any interest in lands of which his mother died intestate by reason of his prior acceptance of deed to other lands as his full share in his parents' lands under an agreement by them to pool their lands for division among all their children, such child's children, as his sole heirs at law, are bound by the estoppel. *Coward v. Coward*, 506.

EVIDENCE.

§ 3. Judicial Notice of Legislative Acts of Other States and of Federal Government.

The courts of this State will take judicial notice of pertinent public laws of other states and of the Federal Government, but not of private acts. *Suskin v. Hodges*, 333.

§ 6. Burden of Proof in General.

The burden of proof is a substantial right. *Fisher v. Jackson*, 302.

§ 17. Party May Not Impeach Own Witness.

A party may not directly impeach his own witness. *Bunn v. Harris*, 366.

§ 22. Cross-Examination.

The right to cross-examine a witness with respect to the subject matter of his examination-in-chief is absolute and not a mere privilege, and when a witness refuses to answer questions on cross-examination the adverse party is entitled to have his entire examination-in-chief stricken from the record. *Bank v. Motor Co.*, 432.

EVIDENCE—*Continued.*

§ 29. Evidence at Former Trial or Proceeding.

Original record of prior proceeding in the cause is competent without certification when properly identified. *Blalock v. Whisnant*, 417.

The record of a witness' testimony in a criminal prosecution is incompetent in a subsequent civil action, since it is required not only that the question being investigated be the same, but also that the party against whom the evidence is admitted should have had an opportunity to cross-examine the witness. *Bank v. Motor Co.*, 432.

§ 32. Transactions or Communications With Decedent.

Widower has no interest in division of wife's lands among their children, precluding his testimony as to agreement with her for distribution of lands among them. *Coward v. Coward*, 506.

§ 33. Res Inter Alios Acta.

Defendant insurer's liability depended on whether the second installment of the first annual premium had been paid. *Held:* Testimony of an insured under another policy as to the premium receipts received by him from insurer is properly excluded as being *inter alios*. *Smith v. Ins. Co.*, 152.

In an action to set aside certain deeds as being fraudulent as to creditors, evidence of the tax valuation of the lands in question is incompetent, since the valuation is fixed by assessors and therefore is *res inter alios acta*. *Bunn v. Harris*, 366.

§ 34. Public Papers, Documents and Records.

Original record properly identified is competent without certification. *Blalock v. Whisnant*, 417.

§ 37. Best and Secondary Evidence in General.

Whether sufficient foundation has been laid for the admission of secondary evidence is for the determination of the court. *Smith v. Ins. Co.*, 152.

Evidence that insurance premium had been burned *held* sufficient to permit secondary evidence of its contents. *Ibid.*

Plaintiffs tendered parol evidence of the execution and delivery of a deed to defendants and upon defendants' objection to the evidence, demanded that defendants produce the deed. Defendants remained silent and did not deny possession nor assert their inability to produce the instrument. *Held:* Defendants' objection to the testimony on the ground that they were given insufficient notice to produce the deed is untenable. *Metcalf v. Ratcliff*, 216.

§ 39. Parol or Extrinsic Evidence Affecting Writings.

The policy in suit provided that premiums were payable at the home office, or to the insurer's local agent in exchange for the insurer's official receipt. *Held:* Testimony of insurer that its local agent was without authority to collect the premiums in question is incompetent as tending to contradict the written terms of the policy contract. *Smith v. Ins. Co.*, 152.

EXECUTION.

§ 10. Staying, Quashing or Restraining Execution.

When a judgment providing that lands should be sold free of homestead to satisfy materialman's lien, and no appeal is taken therefrom, the judgment is *res judicata*, and the judgment debtor may not maintain subsequent proceedings to restrain the sale of the land free of homestead. *Cameron v. McDonald*, 712.

EXECUTIONS—*Continued.*

§ 29. Proceedings and Relief in Actions to Subject Lands to Payment of Judgment.

In this action to subject lands to the satisfaction of plaintiffs' judgment, plaintiffs alleged that defendant judgment debtor was the real owner of lands although record title thereto was in another, plaintiffs claiming that the record owner held title as trustee for the benefit of the judgment debtor. *Held:* Evidence that the record owner was in possession and claimed some interest in the lands is sufficient to overrule his motion for judgment as of nonsuit. *Metcalf v. Ratcliff*, 216.

Judgment decreeing that owner of record title held land as trustee for judgment debtor, and that land should be sold for satisfaction of judgment, *held* without error. *Ibid.*

EXECUTORS AND ADMINISTRATORS.

§ 12b. Sale of Assets of Estate Without Court Order.

The provision of a will that testatrix' executor should pay off mortgage indebtedness on a particular tract of land out of the "further assets constituting my estate" does not empower the executor to sell other lands of testatrix, even though the personalty is insufficient to pay off the encumbrances, and the executor may not sell such other lands except by court order upon his petition to make assets in compliance with the statute. *Clarke v. Wineke*, 238.

§ 13a. Nature and Grounds of Remedy to Sell Lands to Make Assets to Pay Debts.

In proceedings to sell lands to make assets and for partition, devisee may be permitted to pay pro rata part of debts and take lands relieved from obligations of the estate. *Raymer v. McLelland*, 443.

The rights of creditors are not adversely affected by an order exonerating lands devised to a devisee from liability for debts of the estate upon payment by the devisee of her pro rata part of the debts when it is admitted that if the other lands of the estate do not bring an amount sufficient to pay all debts the lands of such devisee should then be liable for the balance. *Ibid.*

When an administrator buys realty at a foreclosure sale in order to protect mortgage notes belonging to the estate, such lands must be treated as personalty in settling the estate and must be first sold to make assets for the payment of debts before other lands of the estate are sold for this purpose. *Ibid.*

§ 13b. Application and Order for Sale of Lands to Make Assets to Pay Debts.

In a proceeding to sell lands to make assets to pay debts of the estate, C. S., 74, an averment that insufficient personalty remained in the hands of the petitioner to pay debts and legacies is insufficient and the petition is demurrable, since the statute, C. S., 79, prescribes that the petition should set forth the value of the personal estate and the application thereof, and it is necessary that the requirement of the statute should be observed. *Watson v. Peterson*, 343.

§ 15e. Claims Arising from Payment of Obligations of Deceased or Estate.

When a wife signs a mortgage and notes for money borrowed by her husband, she conveys her dower as security for the debt, and upon foreclosure after his death she is entitled to assert a claim against his estate for the value of her dower, her position being analogous to that of a surety. *Realty Corp. v. Hall*, 237.

EXECUTORS AND ADMINISTRATORS—*Continued.*

§ 15g. Widow's Allowance.

Return of personalty belonging to estate *held* not condition precedent to widow's right to enforce judgment for year's allowance. *Meadows v. Meadows*, 413.

§ 21. Offsets Against Amount Due Beneficiaries of Estate.

The life tenant forfeited her estate by failing to pay taxes and the lands passed to the remaindermen named in the will. The life tenant, who was testator's widow, obtained a consent judgment against the estate for her share therein. *Held:* The remaindermen were damaged by the amount of the lien for taxes, and they being also the residuary beneficiaries of the estate, the amount of the taxes was properly allowed as an offset against the widow's consent judgment. *Meadows v. Meadows*, 413.

§ 24. Distribution of Estate by Agreement.

The compromise of a caveat proceeding by a consent judgment allotting one-half the lands to testator's widow, his sole devisee, under the will, and the other one-half to testator's heirs at law, subject to the debts and costs of administration, does not affect a conversion of the real estate, and the agreement of all the parties is not necessary to the exoneration of the widow's lands from the obligations of the estate upon her payment of one-half the debts and costs of administration. *Raymer v. Thompson*, 443.

§ 30c. Actions for Wrongful Dissipation of Assets.

Beneficiaries may maintain action for wrongful dissipation of assets against administrator and those profiting by alleged collusion. *Johnson v. Hardy*, 558

In an action by the beneficiaries to recover assets of the estate alleged to have been wrongfully dissipated by defendant administrator to the profit of the other defendants alleged to have been in collusion with him, the fact that the administrator had been discharged will not preclude plaintiff's right to maintain the action for want of a personal representative to administer any recovery that might be had, since the court has power by proper action to safeguard the rights of all parties. C. S., 135. *Ibid.*

FOOD.

§ 15. Competency of Evidence and Proof of Negligence.

While the doctrine of *res ipsa loquitur* does not apply to the finding of a foreign, deleterious substance in a bottled drink, direct evidence of actionable negligence is not required, but such negligence may be inferred from relevant facts and circumstances, such as the finding of like substances in other bottles manufactured by defendant under similar conditions at about the same time. *Tickle v. Hobgood*, 221.

§ 16. Sufficiency of Evidence and Nonsuit.

Plaintiff instituted this action for damages upon allegation and evidence that he was injured as a result of drinking a bottled drink containing a foreign, deleterious substance, which was prepared by defendant. The retailer from whom plaintiff purchased the bottle testified that he saw a greasy substance in the lower corner of another bottle, prepared by defendant at about the same time, which was on the inside because it could not be rubbed off, but that he did not open the bottle. *Held:* The testimony that there was a greasy substance on the inside of the bottle was a mere conclusion of the witness, both as to the nature of the substance and that it was on the inside

HOMICIDE.

§ 2. Parties and Offenses.

Where several persons aid and abet each other in the perpetration or attempt to perpetrate a robbery and while so engaged one of them shoots and kills an officer of the law, all being present, each is guilty of murder in the first degree. *S. v. Kelly*, 627.

§ 4c. Premeditation and Deliberation.

Premeditation and deliberation imply thought prior to the execution of the fixed design, but the length of time elapsing between the formation of the fixed intent and the execution is immaterial. *S. v. Hammonds*, 67.

Instruction to the jury to the effect that defendant could not be convicted of the capital crime if at the time of committing the act he was incapable of premeditation or deliberation, but that if defendant formed a fixed intent to kill prior to getting drunk and executed such intent while intoxicated, the killing would constitute murder in the first degree, is without error. *Ibid.*

§ 4d. Murder in Perpetration or Attempt to Perpetrate Robbery.

A homicide committed in the perpetration or an attempt to perpetrate a robbery is murder in the first degree, notwithstanding the absence of any fixed intent to kill or any previous purpose, design or plan. *S. v. Kelly*, 627.

§ 10. Drunkenness as a Defense.

Drunkenness to such an extent as to preclude premeditation and deliberation is a defense to a charge of first degree murder. *S. v. Hammonds*, 67; *S. v. Kelly*, 627. But is not a defense to the charge of murder in second degree. *S. v. Kelly*, 627.

§ 16. Presumptions and Burden of Proof.

A defendant asserting the defense of drunkenness to the charge of murder in the first degree has the burden of proving the defense to the satisfaction of the jury. *S. v. Hammonds*, 67; *S. v. Kelly*, 627.

§ 18a. Dying Declarations.

Dying declarations relating to the *res gestæ* are competent when, at the time, declarant is in actual danger of death, has full apprehension of such danger, and death ensues, and when declarant, if living, would be a competent witness to testify as to the matter. *S. v. Jordan*, 357.

The competency of dying declarations is a question of law for the court. *Ibid.*

Upon an exception to the admission of testimony of a dying declaration the ruling of the trial court will be reviewed solely to determine whether there is evidence tending to show facts necessary to support the ruling. *Ibid.*

Evidence *held* to show that declarant was in actual danger of death and had full apprehension of such danger. *Ibid.*

When declarations are made under an apprehension of impending dissolution it is not necessary that death immediately ensue; in this case declarant died about three days after making the declarations, and testimony of the declarations *is held* competent. *Ibid.*

§ 20. Evidence of Motive and Malice.

Defendant was charged with murder in attempting to obtain deceased's automobile to complete his escape from jail. *Held:* Evidence of the actions of defendant and his companion in the escape from the time of the escape until the commission of the murder, including the commission of other crimes in attempting to escape is competent to show motive and intent. *S. v. Godwin*, 49.

§ 21. Evidence of Premeditation and Deliberation.

The surrounding circumstances and lack of provocation or sudden passion may be properly considered by the jury upon the question of premeditation and deliberation. *S. v. Hammonds*, 67.

§ 23. Demonstrative Evidence.

Admission of drawings and photographs of scene of the crime, properly identified, *held* within trial court's discretion. *S. v. Holland*, 610.

Deceased was found floating on surface of mill pond. Admission of evidence of experiments with boards to show flow of stream *held* within trial court's discretion. *Ibid.*

§ 25. Sufficiency of Evidence and Nonsuit.

It is not necessary for the State to prove motive in order to make out a case of murder in the first degree. *S. v. Hammonds*, 67.

Evidence *held* sufficient to be submitted to the jury on the question of defendant's guilt of murder in the first degree. *S. v. Hammonds*, 67; *S. v. Holland*, 610.

Evidence that defendants entered into a conspiracy to rob deceased, and that in effecting their purpose one of them hit deceased with an axe, inflicting fatal injury, the other appealing defendant being present and aiding and abetting, *is held* amply sufficient to be submitted to the jury and to sustain their verdict of guilty of murder in the first degree as to each of the appealing defendants. *S. v. Williams*, 446.

Evidence *held* sufficient to be submitted to the jury and sustain verdict of guilty of second degree murder. *S. v. Hargrove*, 570.

Evidence tending to show that defendants conspired and agreed to rob a farmer of the proceeds of tobacco sold by him, that in the perpetration of the robbery one of them struck the fatal blow, the other being present aiding and abetting, *is held* sufficient to be submitted to the jury on the question of the guilt of each defendant of murder in the first degree. *S. v. Murray*, 681.

§ 27a. Form and Sufficiency of Instructions in General.

Defendant was charged with murder in the attempt to perpetrate a robbery. Defendant excepted to the charge for the court's failure to define "robbery." *Held:* The exception is untenable, it being incumbent upon defendant to request special instructions if he desired a more detailed charge on this aspect of the case. *S. v. Godwin*, 49.

HOMICIDE—*Continued.*

The failure of the court to define "feloniously" and "willfully" will not be held for error when its definition and explanation of the law of murder includes the meaning of these terms, certainly in the absence of a request for instructions by defendant. *S. v. Holland*, 610.

§ 27c. Instructions on Question of Murder in First Degree.

Instruction upon defendant's defense of intoxication precluding premeditation and deliberation *held* without error. *S. v. Hammonds*, 67.

Instruction that intentional killing in preparation or attempt to perpetrate robbery is murder in first degree regardless of lack of any previous purpose, design or plan *held* without error. *S. v. Kelly*, 627.

§ 27f. Instructions on Right of Self-Defense.

A charge on the question of self-defense that if defendant was assaulted while on his own premises, defendant was not required to retreat to avoid a combat *held* not error for failure to add at that particular point that under such circumstances defendant would have the right to kill if necessary or apparently necessary in his self-defense, when in other portions of the charge the right to kill in self-defense is correctly set forth, since the enunciation of the principle of the right to kill in self-defense applied to the statement of defendant's right to stand his ground, and therefore the charge is without error when construed contextually as a whole. *S. v. Jordan*, 356.

When all the evidence discloses that defendant was on his own premises at the time of the fatal encounter, an instruction that under the circumstances defendant was not required to retreat *held not* error for failing to charge on the principle of the right to stand one's ground in the face of a sudden, felonious assault affording no opportunity for retreat, since the jury was instructed that under the circumstances defendant had the right to stand his ground in the face of any kind of assault. *Ibid.*

§ 27g. Instructions on Question of Parties and Offenses.

Instruction that defendants aiding and abetting perpetration of robbery in which one of them intentionally killed an officer of the law, all being present, would be guilty of murder in first degree *held* without error. *S. v. Kelly*, 627.

§ 27h. Instructions on Less Degree of the Crime.

Court need not submit question of manslaughter when there is no evidence of defendant's guilt of this degree of crime. *S. v. Godwin*, 49; *S. v. Kelly*, 627.

§ 30. Appeal and Review.

The jury's verdict of guilty of murder in the first degree and the judgment thereon must be upheld when the evidence is properly submitted to the jury under a charge free from error and none of defendant's exceptions to the admission of evidence can be sustained and nothing appears on the record to justify a disturbance of the verdict and judgment. *S. v. Maxwell*, 739.

HUSBAND AND WIFE.

§ 4b. Contracts Between Husband and Wife Affecting Corpus of Estate.

An agreement by a husband and wife to pool their respective lands for division among their children is *not* an agreement under which any interest in his wife's lands moves to the husband, and it is not required that such agreement be executed in accord with C. S., 2515. *Coward v. Coward*, 506.

§ 12. Nature and Incidents of Estates by Entireties.

The husband is entitled to possession during his lifetime of property held by entireties and such property constitutes a part of the *corpus* of his estate. *Wright v. Wright*, 693.

INDICTMENT AND WARRANT.

§ 9. Charge of Crime.

Use of word "feloniously" in warrant charging assault with deadly weapon is surplusage. *S. v. Hobbs*, 14.

§ 20. Variance Between Charge of Crime and Proof.

Evidence that defendant committed the assault with a "brick or a rock or what" *held* not a fatal variance with a warrant charging that the assault was committed with a brick, C. S., 4623, the evidence being sufficient to justify the jury in inferring that the assault was committed with a brick as charged, and there being no element of surprise in the evidence, especially since defendant's defense was that of an alibi. *S. v. Hobbs*, 14.

The indictment charged defendant with practicing barbering "without first obtaining a certificate of registration." The evidence tended to show that defendant practiced barbering after his license had been revoked. *Held:* There is a fatal variance between the indictment and proof, proof of lack of a license not being proof of lack of a certificate of registration. *S. v. Hardie*, 346.

Defendant was tried upon a warrant charging that she permitted persons in her employ to practice as apprentices without certificate of registration as registered apprentices or registered cosmetologists. The jury returned a special verdict to the effect that defendant permitted unlicensed students to work in her school. *Held:* There is a fatal variance between the warrant and the special verdict and a failure of proof, and the adjudication that defendant was not guilty is affirmed. *S. v. McIver*, 734.

INJUNCTION.

§ 1. Nature and Grounds of Remedy in General.

Injunction will not lie to redress a consummated wrong, or to establish a cause of action. *Jackson v. Jernigan*, 401.

When it does not appear from the facts alleged whether the proposed lease of a municipal auditorium reserved reasonable use of the building for the public, the restraining order is properly dissolved as premature. *Latta v. Durham*, 722.

§ 6a. Injunctions Relating to Use or Occupation of Land.

When title is not put in issue in processioning proceeding, injunction will not lie as ancillary remedy pending final judgment, nor would injunction lie in an independent suit, since possession under the clerk's judgment in the processioning proceeding is more like an ouster than a continuing trespass. *Jackson v. Jernigan*, 401.

Injunction will not lie to prevent damage by trespass when it appears that the damage has already been done. *Ibid.*

INSANE PERSONS.

§ 4. Proceedings to Declare Person Committed No Longer Insane.

A proceeding to have declared sane and competent a person theretofore declared incompetent is a summary proceeding not requiring service of notice on the guardian nor service of summons on the incompetent under C. S., 483 (3), it being necessary only that the incompetent be given notice. *In re Dry*, 427.

A guardian of an incompetent may not appeal from the finding of the jury or the order of the clerk entered thereon declaring such person sane and

competent in proceedings under C. S., 2287, the guardian having no interest adverse to such declaration and there being no right of appeal given him by statute. *Ibid.*

§ 9b. Support of Dependents of Incompetent Out of His Estate.

In proper instances, clerk, with approval of judge, may order guardian to purchase home for use of dependent sister of incompetent and to make proper advances for her support; whether the sister was a "dependent" within the meaning of the Veterans' Guardianship Act *held* not necessary to be determined. *Patrick v. Trust Co.*, 525.

Allowance of attorney's fee out of estate to attorney successfully prosecuting claim against estate *held* improper. *Ibid.*

INSURANCE.

§ 13. Construction and Operation of Insurance Contracts in General.

Insurer's liability is limited by the policy provisions. *Webb v. Ins Co.*, 10.

§ 15. Reformation.

In an action to reform policy for fraud, plaintiff must show that agent had the authority to make the contract as claimed. *Jones v. Ins. Co.*, 300.

§ 18. Effective Date of Policy.

Policy provision that it should be effective from delivery *held* controlling notwithstanding parol representation of soliciting agent that it would be effective from date of application and payment of first premium. *Jones v. Ins. Co.*, 300.

§ 26. Insurable Interest in Life of Another.

The ties of blood alone are sufficient to give brothers an insurable interest in the life of each other, the relationship being sufficient to give each a natural desire for the continued life of the other, and therefore it is not against public policy for one brother to take out and pay for a policy on the life of the other and have himself named beneficiary therein, and such contract is valid in the absence of fraud. *Webb v. Ins. Co.*, 10.

§ 30a. Forfeiture of Policy for Nonpayment of Premiums in General.

The nonpayment of a premium when due, or within the period of grace thereafter, in the absence of some extension or waiver, automatically avoids a policy of insurance. *Rees v. Ins. Co.*, 428.

§ 30c. Evidence and Proof of Payment of Premiums.

Held: Proper predicate was laid for admission of secondary evidence relating to receipt for insurance premium. *Smith v. Ins. Co.*, 152.

Conflicting evidence *held* to raise issue of fact as to whether premium had been paid. *Ibid.*

The policy in suit provided that premiums were payable at the home office, or to the insurer's local agent in exchange for the insurer's official receipt. *Held:* Testimony of insurer that its local agent was without authority to collect the premiums in question is incompetent as tending to contradict the written terms of the policy contract. *Ibid.*

Defendant insurer's liability depended on whether the second installment of the first annual premium had been paid. *Held:* Testimony of an insured under another policy as to the premium receipts received by him from insurer is properly excluded as being *inter alios*. *Ibid.*

INSURANCE—*Continued.*

§ 30d. Waiver of Payment of Premiums.

Plaintiff must show disability existing for six or more consecutive months and proof of disability during lifetime of insured as required by disabilty clause for waiver of premiums in order to claim waiver under the disability clause. *Rees v. Ins. Co.*, 428.

§ 34b. Notice and Proof of Disability and Waiver of Proof.

Insured's evidence that he became disabled prior to the due date of a certain premium and failed to pay same or any subsequent premium, but that he failed to give notice of such disability until more than two years thereafter because he thought his disability temporary and not permanent, fails to disclose proof of disability during the life of the policy as required by the disability clause, or sufficient excuse for failure to give such notice, and insured's action on the disability clause was properly nonsuited. *Whitman v. Ins. Co.*, 742.

§ 34c. Occurrence of Disability Within Age Limits Prescribed.

Evidence that insured worked continuously as a bookkeeper at a salary of $1,800 per year until he was over sixty-seven years of age, though enfeebled by physical infirmities and lessening eyesight, *is held* sufficient to sustain insurer's motion to nonsuit in an action on a clause in a life policy providing for benefits if insured should become disabled prior to his sixty-fifth birthday. *Mertens v. Ins. Co.*, 741.

§ 39. Provisions in Accident and Health Policies Limiting Liability or Constituting Conditions Precedent Thereto.

The policy in suit provided that it should not cover injury or death suffered by insured while having "in his body, physically present, intoxicating liquor." *Held:* An instruction to the effect that insurer would be entitled to avoid the policy under this exception if insurer satisfied the jury by the greater weight of the evidence that at the time of the fatal accident insured had in his body intoxicating liquor to an extent sufficient to appreciably affect his mental or bodily faculties to any degree, however slight, is error, insurer being entitled to avoid the policy under its specific terms if insured had physically present in his body at the time any intoxicating liquor, regardless to whether he was intoxicated or not. *Webb v. Ins. Co.*, 10.

§ 58. Construction of Theft Policy as to Risks Covered.

Evidence tending to show that the nephew of insured's president was staying at the president's residence and took the car from the garage at the residence for a personal trip and wrecked the car in returning *held* not to show any theft or larceny of the car, and insurer's motion to nonsuit insured's action on the policy should have been allowed. *Funeral Home v. Ins. Co.*, 562.

JAILS.

§ 1. Office of Jailer.

The duties of a jailer are those prescribed by statute and those recognized by common law, and he has no authority by virtue of his office to serve processes or make arrests except, perhaps, in preventing an escape. *Gowens v. Alamance County*, 107.

When deputy sheriff is appointed jailer his position as deputy sheriff and jailer are separate and distinct. *Ibid.*

JUDGMENTS.

JUDGMENTS—*Continued.*

§ 40. Actions of Foreign Judgments.

Allegations *held* insufficient to show that contract upon which judgment of another state was based was an illegal gaming contract. *Cody v. Hovey*, 391.

Allegation that the judgment of another state upon which action is instituted in this State was obtained through false testimony is an allegation that the judgment was obtained by extrinsic fraud, which does not constitute a basis for attacking the validity of the judgment in plaintiff's action thereon. *Ibid.*

JURY.

§ 8. Jury Boxes.

Defendant's plea in abatement on ground that Negroes had been unlawfully excluded from jury box *held* properly denied upon finding, supported by evidence, that names of qualified Negroes had been placed in the box and that jurors were properly selected therefrom. *S. v. Henderson*, 99.

§ 9. Special Venire.

Motion for special venire on ground of prejudice is addressed to discretion of trial court. *S. v. Godwin*, 49.

LABORERS' AND MATERIALMEN'S LIENS.

§ 8. Date of Attachment of Lien and Priorities.

Evidence that plaintiff agreed to furnish certain material for a building by entire and indivisible contract and that he began to furnish material thereunder prior to the registration of a deed of trust on the property, *is held* sufficient to be submitted to the jury on the question of the priority of plaintiff's lien for materials furnished over the lien of the deed of trust. *Sides v. Tidwell*, 480.

The right of homestead is superior to the lien of a material furnisher. *Cameron v. McDonald*, 712.

LANDLORD AND TENANT.

§ 5. Tenancies from Year to Year.

Where a tenant holds over and the landlord continues to recognize the relationship after the expiration of the tenant's lease for a year or longer, the tenant becomes a tenant from year to year, in the absence of qualifying facts or circumstances, which tenancy continues under the same terms and stipulations as contained in the original lease as far as they may apply. *Cherry v. Whitehurst*, 340.

§ 15c. Renewal and Extensions.

The lease in question provided for the right of renewal by lessee or his assigns at a figure satisfactory to lessor in preference to third persons. *Held:* In an action in summary ejectment, after the expiration of the original period, a peremptory instruction in favor of the assignees of the lessee is error when the lessor offers evidence that he leased the premises at competitive bidding, that defendants were advised and entered a bid that the premises were leased to a third person entering a higher bid, and that defendant did not renew or increase his bid, even though defendants offered evidence in contradiction thereof upon their contention that they were given no opportunity to obtain preference over third persons. *Realty Co. v. Logan*, 26.

LANDLORD AND TENANT—*Continued.*

§ 19. Notice of Intent to Terminate Tenancy.

C. S., 2354, requiring one month's notice before the expiration of the term to terminate a tenancy from year to year does not preclude the parties from making a different agreement between themselves, and where a tenant in an action in ejectment contends that the parties agreed that notice of intention to terminate the lease should be given six and one-half months prior to the expiration of the term, and that the landlord did not give notice as required by the agreement, the exclusion of the tenant's evidence of such agreement is error. *Cherry v. Whitehurst*, 340.

LARCENY.

§ 1. Elements of the Crime.

In order to constitute larceny it is necessary that the personalty be taken under circumstances amounting to a technical trespass and that there be some asportation, and that both the taking and the carrying away be with felonious intent to steal. *Funeral Home v. Ins. Co.*, 562.

LIMITATION OF ACTIONS.

§ 2a. Actions Barred in Ten Years.

Execution of power of sale is barred after expiration of ten years, but when it appears that some of notes were due less than ten years prior to foreclosure and execution of foreclosure deed, contention that at time of sale the power of sale was barred, is untenable. *Mfg. Co. v. Jefferson*, 230.

§ 2c. Actions Barred in Six Years.

Action on official bond of clerk of Superior Court is barred in six years. *Thacker v. Deposit Co.*, 135.

§ 2e. Actions Barred in Three Years.

It appeared that plaintiff's cause of action based upon the alleged wrongful and unlawful act of defendant in swearing out a warrant against plaintiff charging plaintiff with larceny, accrued within three years prior to the issuance of summons in this suit. *Held:* Plaintiff's cause of action was not barred by the statute of limitations, C. S., 441 (5). *Jackson v. Parks*, 329.

§ 2g. Actions Barred in One Year.

It appeared that plaintiff's cause of action based upon the alleged wrongful act of defendant in causing plaintiff's detention in an insane asylum was instituted less than one year from the date plaintiff was discharged as sane. *Held:* Plaintiff's cause of action was not barred by the statute of limitation, C. S., 443 (3). *Jackson v. Parks*, 329.

§ 3f. Accrual of Right of Action on Official Bonds.

The statute of limitations on the bond of a clerk of the Superior Court begins to run at the time of default, which, upon failure of the clerk upon demand to account for funds received by virtue or color of his office, presumptively occurs the date the funds were received, or, upon failure of demand, default occurs upon failure of the clerk to account either to the *cestui que trust* or to the successor clerk at the expiration of the term during which the funds were received, even though the clerk succeeds himself, C. S., 439, and therefore the statute begins to run, at the latest, at the expiration of the term during which the default in fact occurs. *Thacker v. Deposit Co.*, 135.

LIMITATION OF ACTIONS—*Continued.*

Actions against sureties on clerk's bonds for terms expiring more than six years prior to institution of action *held* barred. *Ibid.*

C. S., 441 (9), *held* not applicable in this action against sureties on clerk's bonds. *Ibid.*

§ 4. Fraud and Ignorance of Cause of Action.

Ordinarily, the statute of limitations on the bond of a clerk of the Superior Court begins to run upon default and not upon discovery, C. S., 439, and when funds are paid into the clerk's office to the use of a person who is *sui juris* and knows that the funds are subject to his demand, and the clerk invests such funds in good faith, the provisions of C. S., 441 (9), have no application in an action against successive sureties on the clerk's bonds to recover the loss sustained through such investment. *Thacker v. Deposit Co.*, 135.

In an action grounded on fraud, the statute of limitations begins to run from the discovery of the fraud or from the time it should have been discovered in the exercise of reasonable diligence. C. S., 441 (9). *Wimberly v. Furniture Stores*, 732.

Evidence *held* to sustain finding that action was instituted within the time allowed from discovery of fraud or time fraud should have been discovered. *Ibid.*

§ 7. Disabilities.

Plaintiff's cause of action was based upon the alleged wrongful act of defendant in causing plaintiff's detention in an insane asylum. *Held:* Defendant will not be allowed to take advantage of his own wrong, and as to defendant, plaintiff was *non sui juris* for the period during which plaintiff was detained, and the statute of limitations did not run against plaintiff's cause of action during that period, C. S., 407. *Jackson v. Parks*, 329.

MALICIOUS PROSECUTION.

§ 1. Nature and Essentials of Right of Action in General.

The essential elements of a cause of action for malicious prosecution are the institution or the procurement of the institution of a criminal prosecution by defendant against plaintiff, without probable cause, with malice, and the termination of the prosecution in favor of plaintiff. *Mooney v. Mull*, 410.

§ 8a. Competency of Evidence on Question of Malice.

Facts and circumstances within the knowledge of defendant at the time of instituting the prosecution, to the exclusion of facts later coming within his knowledge tending to show plaintiff's guilt of the crime for which she was prosecuted, are competent upon the question of malice. *Mooney v. Mull*, 410.

§ 8b. Competency of Evidence on Question of Probable Cause.

When defendant in an action for malicious prosecution elects to challenge plaintiff's allegation of want of probable cause in fact, all evidence tending to show plaintiff's guilt of the crime for which she was prosecuted, whether within the knowledge of defendant at the time of instituting the prosecution or not, is competent on the question of probable cause. *Mooney v. Mull*, 410.

When plaintiff's innocence is conceded or not challenged, evidence of innocence is not competent to show want of probable cause, since in such case the question of probable cause depends upon the facts and circumstances within the knowledge of defendant at the time of instituting the action. *Ibid.*

§ 11. Damages.

Compensatory damages recoverable in an action for malicious prosecution are those proven by plaintiff, and a charge correctly stating the rule for the

MALICIOUS PROSECUTION—*Continued.*

admeasurement of damages, followed by an instruction that the amount thereof rested largely in the discretion of the jury because of the difficulty of ascertaining the pecuniary equivalent of mental suffering and humiliation, is error. *Mooney v. Mull*, 410.

MANDAMUS.

§ 1. Nature and Grounds of Writ in General.

Mandamus confers no new authority, but lies only at the instance of a party having a clear legal right to demand it, against a person under clear legal obligation to perform the act sought to be enforced, and therefore *mandamus* should be denied upon application of a party seeking issuance of a building permit for a filling station which it admits will be in direct violation of an ordinance of defendant municipality. *Distributing Co. v. Burlington*, 32.

Mandamus will lie against a municipal corporation or a public official only when the defendant is under a clear legal obligation to perform the act sought to be required, and only at the instance of those having a clear legal right to demand its performance, and further, the writ will lie only when there is no other legal remedy. *Harris v. Board of Education*, 147.

Mandamus will not lie when plaintiff must establish his right thereto by competent proof, since his right to the relief is in doubt. *Ibid.*

§ 2b. Discretionary Powers.

Mandamus will not lie to control the exercise of a discretionary power nor to compel a board to reverse its action theretofore taken in determining a matter in its discretion, and an allegation that defendant acted "wrongfully, unlawfully, unjustly, arbitrarily and without just cause or reason" in determining a discretionary matter is not sufficient to support an application for a writ of *mandamus*. *Harris v. Board of Education*, 147.

§ 3. Parties Entitled to Maintain Suit for Mandamus.

Private citizens of a school district have no legal right in connection with the election and approval of a principal for such district, and therefore may not maintain a suit to compel the county board of education to approve the election of a principal by the district school committee. *Harris v. Board of Education*, 147.

The members of a district school committee may not maintain an action to compel the county board of education to approve their election of a principal, since their statutory duty in regard to the matter requires only that they elect a principal and, if the election is disapproved, that they elect another. *Ibid.*

MASTER AND SERVANT.

I. The Relation

7a. Discharge and Termination of Employment. May v. Power Co., 439.

7c. Actions for Breach of Contract of Employment. Colyer v. Hotel Co., 228; May v. Power Co., 439; Robinson v. McAlhaney, 674.

IV. Liability for Injury to Third Persons

21b. Course of Employment. Parrott v. Kantor, 584.

VII. Workmen's Compensation Act

36. Validity of Compensation Act. Baxter v. Arthur Co., 277.

38. Scope of Compensation Act and Industries and Concerns Subject to the act. Johnson v. Lumber Co., 123; Clark v. Sheffield, 375.

39a. Employees Covered by the Act in General. Burnett v. Paint Co., 204.

39c. Residence in This State. Reaves v. Mill Co., 462.

39d. Dual Employment. Gowers v. Alamance County, 107; Burnett v. Paint Co., 204.

40. Injuries Compensable.

b. Occupational Disease. Tindall v. Furniture Co., 306.

e. Whether Accident Arises "Out of Employment." McNeill v. Construction Co., 744.

f. Whether Accident Arises "In Course of Employment." Smith v. Gastonia, 517.

41a. Amount of Compensation for Injuries. Baxter v. Arthur Co., 276.

44. Right of Action Against Third Person Tort-Feasor. Thompson v. R. R., 554.

MASTER AND SERVANT—*Continued.*

§ 7a. Discharge and Termination of Employment.

When a contract of employment does not stipulate any term of employment or period of payment, the contract is terminable at the will of either party. *May v. Power Co.*, 439.

§ 7c. Actions for Breach of Contract of Employment.

In this action by an employee to recover damages for breach of contract of employment for definite period, the evidence of the authority of the employer's agent to execute the contract for it *held* sufficient for jury. *Colyer v. Hotel Co.*, 228.

Mere discharge of employee in public place does not give employee cause of action in tort for wrongful discharge. *May v. Power Co.*, 439.

Mere allegations that plaintiff employee was illegally and wrongfully discharged cannot be held to state a cause of action for breach of contract of employment in the absence of allegations showing the execution and terms of the contract of employment and the breach of such terms by the employer. *Ibid.*

In employee's suit for breach of contract, damages should be limited to those accrued on date of institution of action. *Robinson v. McAlhaney*, 674.

§ 21b. Course of Employment. (Of agent see Principal and Agent § 10a.)

A servant is acting within the course of his employment so as to render his master liable for his torts under the doctrine of *respondeat superior* if, at the time, the servant is engaged in the performance of duties he is employed to perform and is acting in furtherance of his master's business, and while every deviation from the strict execution of his duty will not relieve the master of liability, the master cannot be held liable for torts committed by the servant while acting without authority and not in the performance of his duties, but wholly in pursuit of his private and personal ends. *Parrott v. Kantor*, 584.

Master is not liable for tort committed by servant while returning to employment after complete departure therefrom. *Ibid.*

§ 36. Validity of Compensation Act.

Provision authorizing award for bodily disfigurement *held* sufficiently definite and not an unconstitutional delegation of legislative power. *Baxter v. Arthur Co.*, 277.

§ 38. Scope of Compensation Act and Industries and Concerns Subject to the Act.

Workmen's Compensation Act *held* applicable to injury to barge worker received while on land, since the application of the State act does not inter-

fere with the harmony and uniformity of general maritime law, and the accident causing injury does not directly affect commerce. *Johnson v. Lumber Co.*, 123.

Intestate was killed while serving a warrant under authority of his appointment as deputy sheriff. The fatal injury was inflicted prior to the enactment of ch. 277, Public Laws of 1939. *Held:* Intestate was not an employee of the sheriff, and the sheriff cannot be held liable for the payment of the award rendered in favor of the deputy's dependents, the act of 1939 having no retroactive effect, but under facts of this case intestate was an employee of defendant civic association, and it was liable for award. *Clark v. Sheffield*, 375.

§ 39a. Employees Covered by the Workmen's Compensation Act in General.

The North Carolina Workmen's Compensation Act excludes persons whose employment is casual and not in the course of the trade, business, profession or occupation of the employer, sec. 8081 (a), (b), and specifically excepts from its provisions casual employees, farm laborers and domestic servants. *Burnett v. Paint Co.*, 204.

§ 39c. Residence in This State.

The injured employee was a nonresident, but the contract of employment was made in this State and the employer maintained its place of business here. The injury occurred in another state, and the parties agreed upon a settlement accordant with the provisions of the North Carolina Compensation Act, which agreement was approved by the State Commission. The employee instituted this proceeding to enforce the terms of the agreement. *Held:* The Industrial Commission did not have jurisdiction over the original claim, and the parties may not confer jurisdiction by consent or agreement. *Reaves v. Mill Co.*, 462.

§ 39d. Dual Employment.

The evidence tended to show that the deceased employee had been appointed by the sheriff as a deputy and had been employed by the county as jailer, that while in the jail he was advised that a man in the vicinity of the jail had shot his wife, that he left the jail and was killed while attempting to arrest the man as he was preparing to flee. *Held:* In attempting to make the arrest the employee was acting in his capacity as deputy sheriff, such act being outside the scope of his employment as jailer, and the evidence is insufficient to support a finding by the Industrial Commission that he was fatally injured in an accident arising out of and in the course of his employment as jailer. *Gowens v. Alamance County*, 107.

Employee *held* not covered while performing duties at employer's residence unconnected with duties at place of business. *Burnett v. Paint Co.*, 204.

§ 40b. Occupational Diseases.

Conflicting expert testimony on the question of whether the deceased employee died as the result of an occupational disease, caused by exposure to benzol poisoning, arising out of and in the course of his employment, *is held* sufficient to sustain the Commission's award of compensation to the employee's dependent. *Tindall v. Furniture Co.*, 306.

§ 40e. Whether Accident Arises "Out of Employment."

Evidence tending to show that a night watchman employed to watch over one section of a highway under construction came over to a night watchman employed to watch over another section thereof, and engaged in an altercation

relating to matters foreign to the employment, and that one of them killed the other as a result thereof, *is held* sufficient to support the finding of the Industrial Commission that the deceased's death was not the result of an accident arising out of and in the course of the employment. *McNeill v. Construction Co.*, 744.

§ 40f. Whether Accident Arises "in Course of Employment."

While ordinarily an employer is not liable under the Workmen's Compensation Act for an injury suffered by an employee while going to or returning from work, the employer may be held liable when he furnishes the means of transportation as an incident to the contract of employment. *Smith v. Gastonia*, 517.

Injury to policeman inflicted while he was returning home, after regular hours, on motorcycle under his exclusive control, *held* compensable. *Ibid.*

§ 41a. Amount of Compensation for Injuries.

Injured employee may be awarded compensation for bodily disfigurement and for partial loss of use of member. *Baxter v. Arthur Co.*, 276.

§ 44. Right of Action Against Third Person Tort-Feasor.

Where it appears that an injured employee's action against the third person tort-feasor is instituted prior to the institution of an action by the compensation insurance carrier against the tort-feasor, chapter 449, Public Laws 1935, Michie's Code, sec. 8081 (r), defendant's plea in abatement in the employee's action on the ground of the pendency of a prior action cannot be sustained. *Thompson v. R. R.*, 554.

Employee may maintain action in his own name against third person tort-feasor when no award of compensation has been made to employee, and time of filing claim has expired so that no right of action by the employer or insurance carrier could thereafter arise by subrogation, and fact that award of medical expenses on petition of doctor had been made does not alter this result. *Thompson v. R. R.*, 554.

§ 45b. Employees and Risks Covered.

Conversations between insured and insurer's auditor as to the coverage of the policy cannot vary the terms of the compensation insurance policy theretofore executed and delivered to, and accepted by insured. *Burnett v. Paint Co.*, 204.

When a compensation insurance policy provides coverage solely in connection with the employee's business having a definite location, the policy does not cover injury to an employee sustained while mowing the lawn at the employer's residence. *Ibid.*

§ 46a. Nature, Functions and Jurisdiction of Industrial Commission.

The Industrial Commission is primarily an administrative agency of the State, but in hearing and determining the facts upon which the rights and liabilities of employers and employees depend, it has certain judicial functions which it must exercise accordant with orderly procedure essential to the due administration of justice according to the law. *Tindall v. Furniture Co.*, 306.

The North Carolina Industrial Commission is an administrative board with *quasi*-judicial functions, and its jurisdiction is limited to that prescribed by the statute. *Reaves v. Mill Co.*, 462.

Jurisdiction may not be conferred on the Industrial Commission by consent or agreement of the parties. *Ibid.*

MASTER AND SERVANT—*Continued.*

§ 55g. Determination and Disposition of Appeal.

While plaintiff's motion to dismiss defendant's appeal from an award of the Industrial Commission to the Superior Court should be determined by the Superior Court prior to the consideration of the cause on its merits, where the award in favor of plaintiff is affirmed, plaintiff is not prejudiced by the order in which the matters were considered by the Superior Court and may not complain thereof in the Supreme Court. *Johnson v. Lumber Co.*, 123.

Whether the Superior Court, on appeal from an award of the Industrial Commission, should remand the proceedings to the Commission on the ground of newly discovered evidence rests in its sound discretion. *Tindall v. Furniture Co.*, 306.

§ 56. Validity, Nature and Construction of Unemployment Compensation Insurance Act in General.

The General Assembly has the power to determine the scope of the Unemployment Compensation Act, and the definitions and tests therein prescribed will be applied by the courts in accordance with the legislative intent. *Unemployment Compensation Com. v. Coal Co.*, 6.

§ 57. Employers Within Meaning of Unemployment Compensation Act.

The agreed statement of facts disclosed that the three defendant corporations have common officers and directors and substantially identical stockholders, and that they maintain a central business office where each keeps its records and handles all clerical matters. *Held:* The three corporations are owned and controlled directly or indirectly by the same interests within the meaning of section 19 (f) (4) of the North Carolina Unemployment Compensation Act (chapter 1, Public Laws of 1936), and constitute but a single employing unit within the meaning of the act. *Unemployment Compensation Com. v. Coal Co.*, 6.

The words in the provision of the North Carolina Compensation Act that enterprises "controlled" by the same "interests" shall be considered but a single employing unit will be given their distinct, definite, and commonly understood meaning. *Ibid.*

MINES AND MINERALS.

§ 6. Leases and Contracts.

A lease of oil lands for a period of five years and as long thereafter as oil or gas in paying quantities is produced from the land by the lessee, conveys real property. *S. v. Allen*, 621.

MONEY RECEIVED.

§ 1. Nature and Essentials of Right of Action.

Allegations of defendant's acceptance of a corporate check in payment of individual obligation of its president does not entitle plaintiff to judgment on the pleadings, fraud being denied. *LaVecchia v. Land Bank*, 28.

Person making improvements in reliance upon parol agreement for easement may recover amount the value of land is enhanced by the improvements. *Ebert v. Disher*, 36.

MONOPOLIES.

§ 1. Definition of Monopolies and Construction of Statutes Relating Thereto in General.

Monopoly is ownership or control of so large a part of the market supply or output of a given commodity as to stifle competition, restrict freedom of commerce and give control of the price; and while restraint of trade may be an instrument of monopoly, it does not, in itself, constitute monopoly or necessarily lead thereto, nor does the common law definition of monopoly import to that term as used in the Constitution prohibition against all price fixing agreements, since the common law recognized exceptions for the protection of good will, and while public policy condemned conspiracies and agreements to raise prices to the public detriment, it did not seek to obtain the lowest possible price to the consumer on every commodity. *Lilley & Co. v. Saunders*, 163.

N. C. Fair Trade Act does not create or tend to create monopoly. *Ibid.*

MORTGAGES.

§ 10. Property Mortgaged and Parties Liable.

When a wife joins in the execution of a mortgage and the notes secured thereby she conveys her dower right as security for the debt, but, her position being analogous to that of a surety, she is entitled to assert a claim against her husband's estate for the value of her dower. *Realty Corp. v. Hall*, 237.

§ 17. Estates, Rights and Liabilities of Mortgagees and Cestuis Que Trustent.

A mortgagee is entitled to possession upon default, but he must account to the mortgagor for rents, profits and waste, the mortgagor being entitled to credit therefor on the mortgage debt. *Mills v. Building & Loan Assn.*, 664.

§ 18. Rights, Duties and Liabilities of Trustee.

A trustee in a deed of trust is agent for both the trustor and *cestui que trust*, and upon default he is not only under duty to make due advertisement, conduct the sale and execute the deed to the purchaser, but is also under duty to apprise both parties of his intention to sell, to exercise good faith, act impartially, and to exercise due diligence to procure an advantageous sale for the protection of both parties. *Mills v. Building & Loan Assn.*, 664.

§ 30g. Parties Who May Enjoin Foreclosure.

The purchaser of land from one tenant in common after the land had been allotted to the tenant in a special proceeding for partition may maintain a suit to restrain foreclosure of a mortgage executed by the other tenant in common prior to partition when the mortgagee advertises and seeks to sell a one-half interest in the entire tract, since such foreclosure would constitute a cloud on the purchaser's title. Michie's N. C. Code, 1743. *Rostan v. Huggins*, 386.

§ 32a. Execution of Power of Sale in General.

The presumption is in favor of the regularity of the execution of the power of sale. *Mfg. Co. v. Jefferson*, 230.

The exercise of the power of sale in a mortgage or deed of trust will be scrutinized by courts of equity for the protection of the mortgagor, and the power must be exercised under well recognized restrictions. *Mills v. Building & Loan Assn.*, 664.

A declaration in a deed of trust of the trustee's right to take possession upon default does not require that the trustee take possession as a condition

MORTGAGES—*Continued.*

precedent to foreclosure under the power of sale contained in the instrument. *Ibid.*

§ 32e. Limitation on Execution of Power of Sale.

When the mortgagors admit the execution of the notes secured by the instrument, and it appears that the due date of some of the notes was within ten years prior to the date of foreclosure and the execution of the foreclosure deed, the mortgagors' contention that at the time of foreclosure the power of sale was barred is untenable, and a peremptory instruction on the issue is proper. *Mfg. Co. v. Jefferson*, 230.

§ 35a. Right of Mortgagee or Cestui to Bid in Property.

When a mortgagee purchases at his own sale, the sale is voidable at the election of the mortgagor, and the trust relationship continues regardless of good faith and absence of fraud, the rule being founded upon the opportunity of oppression arising out of the relationship. *Mills v. Building & Loan Assn.*, 664.

Right of *cestui* to bid in property is predicated upon duty of trustee to act impartially and protect rights of both parties, and the evidence in this case *held* for jury upon question of whether trustee was also representing *cestui* so as to make the instrument in effect a mortgage within the rule precluding the mortgagee from bidding in the property. *Ibid.*

§ 36. Deficiency and Personal Liability.

Complaint alleging deficiency after foreclosure *held* to state cause of action and not demurrable, notwithstanding defendants' plea of ch. 275, Public Laws of 1933. *Mortgage Corp. v. Holding*, 503.

§ 39e. Actions for Damages for Wrongful or Voidable Foreclosure.

Where a mortgagee purchases the property at his own foreclosure sale and thereafter sells to an innocent purchaser, the mortgagor may elect to disavow the foreclosure sale and recover damages for the wrongful conversion of his equity of redemption. *Mills v. Building & Loan Assn.*, 664.

Evidence that trustee acted as agent of *cestui* in bidding in property for *cestui* so that in effect the instrument was a mortgage *held* for jury in trustor's action for damages for the wrongful conversion of his equity of redemption, the property having been sold to an innocent purchaser by the *cestui*. *Ibid.*

§ 39g. Innocent Purchasers for Value.

The trustee's deed establishes *prima facie* right in the purchaser at the foreclosure sale, and therefore in the absence of evidence of notice to the purchaser of any irregularity in the foreclosure or any invalidity in the power of sale or evidence of absence of good faith in acquiring the title, the purchaser is an innocent purchaser for value without notice. *Mfg. Co. v. Jefferson*, 230.

Defendant mortgagors contended that at the time of the foreclosure sale the mortgage notes had been paid. *Held:* The burden was on defendants upon the issue of payment, and upon failure of proof of payment to the holders of the notes alleged to have been in default at the time of foreclosure or to their duly authorized agent, a peremptory instruction in favor of the purchaser at the foreclosure sale is without error. *Ibid.*

A widow may not assert her dower rights as against the purchaser at the foreclosure sale under a mortgage executed by her husband and herself prior

MORTGAGES—*Continued.*

to his death, and evidence tending to show transactions between herself and her late husband and those through whom the original loan was obtained, is properly excluded as against the purchaser at the sale. *Realty Corp. v. Hall*, 237.

MUNICIPAL CORPORATIONS.

§ 5. Powers of Municipal Corporations and Legislative Control and Supervision.

A municipal corporation has only those powers expressly granted in its charter and by the general law, construing the acts together, and those powers reasonably implied in or incident to the granted powers which are necessary to effect the fair intent and purpose of its creation, and it may exercise a sound discretion as to the means by which the purposes of its creation may be accomplished. *Riddle v. Ledbetter*, 491; *Mortgage Co. v. Winston-Salem*, 726.

Where there is a conflict between a municipal ordinance and the general law of the State regulating the same matter, the ordinance must yield to the State law. *Eldridge v. Mangum*, 532.

§ 11a. Officers and Employees and Appointment.

The city of Charlotte, which has the form of government as set forth in plan "D" of the general act as modified by its charter, *is held* to have the power to create the office of commissioner of police or public safety and to provide compensation for the incumbent under the provisions of its charter and the general law, C. S., 2622 (7), 2898, 2899; ch. 366, Public-Local Laws of 1939. *Riddle v. Ledbetter*, 491.

§ 12. Exercise of Governmental and Corporate Powers in General.

The negligent failure of a city to maintain in a reasonably safe condition for public travel a bridge built by it over private lands within the city limits for the use of the public comes within the exception to the general rule, and the municipality may not escape liability on the ground that its negligence was in the exercise of a governmental function. *Whitacre v. Charlotte*, 687.

§ 13b. Defense of Ultra Vires as Defense to Action in Tort.

A municipality may not escape liability for its negligence in failing to maintain in a reasonably safe condition a bridge constructed by it over private

MUNICIPAL CORPORATIONS—*Continued.*

lands for the use of the public on the ground that its construction of the bridge was *ultra vires*, since the construction of the bridge is within its general corporate powers and it may be held liable for acts done therein though done at an unauthorized place or in an unauthorized manner. *Whitacre v. Charlotte*, 687.

§ 14. Defects or Obstructions in Streets or Sidewalks.

The duty of a municipality to maintain its streets in proper repair and reasonably safe condition applies as well to bridges under its control used by the public for the purpose of travel. *Whitacre v. Charlotte*, 687.

Fact that bridge is constructed on private lands does not relieve municipality of liability when it exercises control thereover and by acts invites public to use the bridge as a public way. *Ibid.*

§ 24. Sale or Lease of Land by Municipality.

As incidental to the power of a municipal corporation to sell at public auction parcels of land acquired by it by foreclosure of tax and street assessment liens, C. S., 2688, 2787 (2), ch. 232, Private Laws of 1927, the municipality has the authority in the exercise of its discretion in determining the means for accomplishing this purpose, to employ a real estate agent upon commission, to obtain a responsible bidder at the sale to bid a sum sufficient to protect the municipality's interest. *Mortgage Co. v. Winston-Salem*, 726.

Plaintiff instituted this action to enjoin defendant municipality from leasing the municipal auditorium to a private firm on the ground that the city was without authority to lease the building to the entire exclusion of the public so as to preclude necessary or expedient public meetings. The terms of the proposed lease and the extent to which the public might be permitted to use the building after its execution were not made to appear. *Held:* Upon the facts established, the reasonableness of the proposed lease cannot be determined, and the restraining order was properly dissolved as premature. *Latta v. Durham*, 722.

§ 30. Power to Make Improvements and Levy Assessments.

It is required that property assessed for street and sidewalk improvements abut the improvements, and when the municipality buys a lot for street and sidewalk purposes and uses only a portion thereof for these purposes, leaving a strip of the lot unused and owned in fee by the municipality lying between the improvements and lands of defendant, assessments against the lands of defendant are void. *Winston-Salem v. Smith*, 1.

§ 33. Validity, Objections to, and Appeals from Assessments.

Where a municipality levies assessments for public improvements without statutory jurisdiction therefor, the owner of the land against which the levy is made may resist the enforcement of the assessments at any time, and is not precluded therefrom by his failure to follow the statutory remedy for making objection thereto. *Winston-Salem v. Smith*, 1.

§ 34. Nature of Lien, Priorities and Enforcement.

The interest rate on street assessments is fixed by statute, C. S., 2716, 2717, Public Laws of 1929, ch. 331 (1), and the courts are without authority at law or in equity to prescribe a smaller interest rate. *Zebulon v. Dawson*, 520.

Assessments for public improvements are not subject to set-off or counterclaim by municipal bond. *Ibid.*

In ordering the foreclosure of a lien for paving assessments, the court may grant defendant reasonable time in which to pay in order to give defendant

MUNICIPAL CORPORATIONS—*Continued.*

The city manager of a municipal corporation is its "managing or local agent" and is authorized to verify the municipality's answer in an action instituted against it. C. S., 531, 483. *Ibid.*

NEGLIGENCE.

§ 1. Acts and Omissions Constituting Negligence in General.

In order to establish actionable negligence plaintiff must show a failure to exercise proper care in the performance of some legal duty which defendant owed plaintiff under the circumstances in which they were placed, and that such negligent breach of duty was the proximate cause of the injury. *Gold v. Kiker*, 511.

§ 5. Proximate Cause in General.

The proximate cause of an injury is that cause which produces 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. *Gold v. Kiker*, 511.

§ 6. Concurring Negligence.

Each person whose negligence is a proximate cause, or one of the proximate causes of injury may be held liable. *Gold v. Kiker*, 511.

§ 7. Intervening Negligence.

Intervening act cannot insulate primary negligence if such intervening act was foreseeable. *Gold v. Kiker*, 511.

§ 16. Pleadings in Actions for Negligence.

Defendant in a negligent injury action may enter a general denial of the allegations of negligence, and also allege that the negligence of a third person was the sole proximate cause of the accident, and that if defendant was negligent such negligence concurred with the negligence of the third person, and move to have such third person joined as a defendant. *Freeman v. Thompson*, 484.

§ 19d. Nonsuit for Intervening Negligence or Negligence of Codefendant.

A nonsuit may be granted for intervening negligence only when the injury is independently and proximately produced by the wrongful act, neglect or default of an outside agency or responsible third person, and an intervening act will not break the sequence or insulate the primary negligence if the intervening act is foreseeable under the circumstances in the exercise of ordinary prudence. *Gold v. Kiker*, 511.

§ 20. Instructions in Negligent Injury Actions.

An instruction which correctly defines and explains negligence and proximate cause in abstract terms but fails to apply the law to the facts adduced by the evidence fails to meet the requirements of C. S., 564, and a new trial will be awarded on appellant's exception. *Smith v. Bus Co.*, 22.

It is reversible error for the court to fail to charge on element of proximate cause. *Templeton v. Kelley*, 487.

PARTIES.

§ 1. Parties Who May or Must Sue.

Beneficiaries may maintain action for wrongful dissipation of assets of estate against administrator and those profiting by alleged collusion in sale

PHYSICIANS AND SURGEONS.

§ 15e. Sufficiency of Evidence of Malpractice.

Expert testimony that defendant physician failed to use accepted methods in treating simple fracture of leg, resulting in gangrene and permanent injury, *held* to take case to jury. *Butler v. Lupton*, 653.

PLEADINGS.

§ 3a. Form and Contents of Complaint in General.

A complaint should state in a plain and concise manner the material and essential facts constituting plaintiff's cause of action, C. S., 506 (2), so as to disclose the issuable facts determinative of plaintiff's right to relief, and should not contain collateral, irrelevant, redundant or evidential matter. *Barron v. Cain*, 282.

Where there are conditions precedent to plaintiff's right to recovery, he should allege performance or facts excusing nonperformance. *Ibid.*

Where plaintiff relies upon an implied contract, he should state the circumstances giving rise to the implied agreement. *Ibid.*

§ 3c. Pleading of Public and Private Laws.

In an action on a transitory cause arising in another state it is not necessary that plaintiff plead the pertinent public laws of such other state, since our courts will take judicial notice thereof, but its private laws must be pleaded. *Suskin v. Hodges*, 333.

§ 6. Defenses in General.

A defendant may plead as many defenses as he has and it is not required that the defenses be consistent with each other. *Freeman v. Thompson*, 484.

§ 7. Matters in Traverse or Denial.

Allegation that plaintiff is a holder in due course of the bonds sued on may be denied upon information and belief, the matter not relating to a personal transaction between the parties. *Grimes v. Lexington*, 735.

§ 8. Matters in Confession and Avoidance.

A plea by denial simply controverts the material allegations of the complaint and puts plaintiff to proof; while a plea in confession and avoidance sets up new matter, which is matter not appearing in the complaint, constituting an

PLEADINGS—*Continued.*

affirmative defense, C. S., 519, and such new matter must be properly alleged in order to give notice that it will be used. *Cohoon v. Swain*, 317.

§ 12. Office and Scope of Reply.

A reply should be limited to a denial of any new matter set up in the answer. *Hildebrand v. Tel. Co.*, 235.

§ 14. Demurrer for Want of Jurisdiction. (Motion to dismiss for want of jurisdiction see Courts § 1d.)

When defendant demurs *ore tenus* on the ground that the court is without jurisdiction, and this defect does not appear upon the face of the complaint, the court may consider the facts alleged in the answer and the evidence heard by it upon defendant's motion to dismiss. *Thompson v. R. R.*, 554.

§ 15. Demurrer for Failure of Complaint to State Cause of Action or for Failure of Answer to State Defense.

When the allegations of the answer are insufficient to constitute an affirmative defense the trial court should sustain plaintiff's demurrer to such defense with leave to defendant to move to amend. C. S., 515. *Cody v. Hovey*, 391.

When complaint is sufficient to state cause of action in any aspect, demurrer should be overruled. *Mortgage Corp. v. Holding*, 503.

§ 16. Demurrer for Misjoinder of Parties and Causes.

Demurrer for misjoinder of parties and causes *held* properly denied when all causes of action arose out of same automobile accident. *Powell v. Smith*, 242.

§ 17. Statement of Grounds, Form and Requisites.

A demurrer to the complaint on the ground that it does not state facts sufficient to constitute a cause of action challenges its sufficiency to state any cause of action, admitting the truth of the facts alleged, and it is not required that the demurrer point out defects and deficiencies more specifically or definitely. *Sanders v. R. R.*, 312.

§ 18. Defects Appearing on Face of Pleading and "Speaking" Demurrer.

The citation of the law upon which defendant relies as a basis of his demurrer does not constitute the demurrer a speaking demurrer, since such citation is not a statement of fact, and plaintiff's exception is particularly untenable when the same statute is cited in the amended complaint. *Sanders v. R. R.*, 312.

§ 19. Time of Filing Demurrer and Waiver of Right to Demur.

All grounds for demurrer other than want of jurisdiction and failure of the complaint to state a cause of action are waived by failure to file formal demurrer, but defendant may demur on these grounds at any time, even in the Supreme Court. *Watson v. Peterson*, 343.

§ 20. Office and Effect of Demurrer.

A demurrer tests the sufficiency of a pleading, admitting for the purpose the allegations of fact and relevant inferences of fact deducible therefrom, but it does not admit inferences or conclusions of law. *Leonard v. Maxwell, Comr.*, 89; *Cody v. Hovey*, 391.

A demurrer tests the sufficiency of the complaint to state a cause of action, admitting for the purpose the truth of the facts alleged and relevant inferences of fact arising thereon. *Price v. Honeycutt*, 270.

PLEADINGS—*Continued.*

A demurrer not only admits the specific facts alleged in the complaint but also relevant inferences of fact necessarily deducible therefrom. *Whitacre v. Charlotte*, 687.

Upon demurrer, the complaint will be liberally construed in favor of plaintiff. *Williams v. Bruton*, 582; *Whitacre v. Charlotte*, 687.

A demurrer will not lie to a bill of particulars, the remedy, if the bill of particulars is insufficient, being an application to the judge to make it more definite. *Williams v. Bruton*, 582.

§ 23. Amendment After Decision on Appeal.

Where it is determined on appeal that defendants' demurrer in plaintiffs' suit for *mandamus* should have been sustained but that plaintiffs, upon the facts alleged, may be entitled to a mandatory injunction, the action need not be dismissed, but the court below may permit the filing of additional or amended pleadings and order the cause transferred to the civil issue docket of the county in which the cause of action arose in order to save time and costs. *Harris v. Board of Education*, 147.

Where it is held on appeal that petitioner's demurrer to the interplea was properly sustained, the interpleader may be permitted to recast his petition. *Clarke v. Wineke*, 238.

In this processioning proceeding, Michie's N. C. Code, 361-364, the Supreme Court granted a new trial for error of law, and upon the subsequent hearing the trial court allowed petitioner to amend to allege mutual mistake in entering one of the calls in the deeds of the parties. *Held:* The amendment does not substantially change the cause of action, and the ruling of the court upon the petition to be allowed to amend is not reviewable in the absence of abuse of discretion. *Bradshaw v. Warren*, 354.

When plaintiff's demurrer to defendant's counterclaim is properly sustained, plaintiff's exception to the order of the court permitting defendant to amend is untenable. C. S., 515. *Cody v. Hovey*, 391.

The trial court has discretionary power to permit the amendment of a bill of particulars after the granting of a new trial by the Supreme Court, and ordinarily no appeal will lie from the exercise of such discretionary power, the amendment of the bill of particulars being governed by the general rules relating to the amendment of pleadings. *Beck v. Bottling Co.*, 579.

The Superior Court has authority to hear motions in civil actions at criminal terms only after due notice to the adverse party, C. S., 1443, 1444, and therefore when it does not affirmatively appear that due notice was given of plaintiff's motion to be allowed to amend, the granting of the motion at a term of court for criminal cases only will be held for error as being presumptively outside the authority of the court. *Ibid.*

§ 28. Motion for Judgment on Pleadings. (Appeals from decision on motions for judgment on pleadings see Appeal and Error § 2.)

In action for alimony without divorce, defendant husband's answer denying abandonment and failure to support plaintiff *held* to raise issue of fact for determination of jury, and granting of plaintiff's motion for judgment on the pleadings was error. *Masten v. Masten*, 24.

Allegation that defendant accepted corporate check in payment of individual obligation of its president *held* not to entitle plaintiff receiver to judgment on the pleadings when fraud is denied, fraudulent use of the check in which defendant participated being necessary to bring the action within ch. 85, sec. 5, Public Laws of 1923 (Code, 1864 [i]), and the issue of fraud being raised for the determination of the jury. *La Vecchia v. Land Bank*, 28.

PLEADINGS—*Continued.*

When material allegation does not relate to personal transaction between the parties and is denied upon information and belief, the denial is sufficient and the granting of a motion for judgment on the pleadings is error. *Grimes v. Lexington*, 735.

§ 29. Motions to Strike Out.

Upon motion to strike, the court will not attempt to plot the course of the trial, and allegations in answer setting up affirmative defenses which may become material on the trial are improperly stricken out on plaintiff's motion. *Hildebrand v. Tel. Co.*, 235.

A reply should be limited to a denial of any new matter set up in the answer, and defendant's motion to strike out matter beyond the scope of such denial should be allowed. *Ibid.*

In this action to recover on a contract under which plaintiff agreed to care for defendant during defendant's lifetime, allegations *held* proper as excusing want of complete performance by plaintiff and as being matter in mitigation of damages, and motion to strike was properly denied. *Barron v. Cain*, 282.

The fact that allegations might be put in more orderly sequence and might be more concisely stated is insufficient to support defendant's motion to strike such allegations from the complaint. *Ibid.*

A motion to strike certain allegations from a pleading is made as a matter of right if made in apt time, and at other times it is addressed to the discretion of the court, but in both instances it is subject to review, since the power of the court must be exercised in accordance with legal principles and established procedure. *Fayetteville v. Distributing Co.*, 596.

PRINCIPAL AND AGENT.

§ 7. Evidence and Proof of Agency.

The course of dealing between the parties in similar transactions is competent upon the question of agency. *Colyer v. Hotel Co.*, 228.

Evidence *held* for jury on question of agent's implied authority to employ plaintiff for definite period of time. *Ibid.*

Evidence *held* for jury on question of corporate agent's implied authority to present check payable to corporation to bank for payment. *Warehouse Co. v. Bank*, 246.

§ 8a. Power of Agent to Bind Principal.

A principal is bound by the acts of his agent within the apparent scope of the agent's authority, which includes authority to do all those things usual and necessary to accomplish the main act authorized, and a third person having no knowledge of limitations on the agent's authority is not bound thereby. *Colyer v. Hotel Co.*, 228.

A principal is bound by the acts of his agent which are within the agent's express or implied authority, and a person who, in the exercise of reasonable prudence and good faith, relies upon the agent's apparent authority is not chargeable with secret limitations upon that authority. *Warehouse Co. v. Bank*, 246.

§ 10a. Wrongful Act of Agent. (Wrongful acts of servant see Master and Servant § 21b.)

Where one of two innocent parties must suffer by the wrongful act of an agent, he who selects the agent and places it in the agent's power to do the wrong must suffer the loss. *Warehouse Co. v. Bank*, 246.

PRINCIPAL AND AGENT—*Continued.*

Evidence *held* to disclose that assault by store employee on customer was personal and not in course of employment. *Robinson v. Sears, Roebuck & Co.*, 322.

§ 5a. Bonds of Public Officers and Agents in General. (Limitation of actions on, see Limitation of Actions § 3f.)

Failure of a clerk of the Superior Court to account for funds received by virtue or color of his office upon demand raises the presumption that the money was misappropriated and converted upon receipt, and places the burden upon the clerk or his surety to show the contrary. *Thacker v. Deposit Co.*, 135.

The provisions of public laws in effect at the time of the execution of an official bond become a part of the contract, since the surety will be presumed to have executed the agreement with knowledge thereof. *Price v. Honeycutt*, 270.

A sheriff, in his official capacity, and his surety are liable for wrongful arrest or for excessive force used in making arrest under color of office. *Ibid.*

§ 5b. Renewals and Subsequent Bonds.

An official bond of a clerk of the Superior Court is liable only for default occurring during the term for which the bond was given and cannot be held liable for default occurring during a prior or a subsequent term, even though the principal and surety on the bonds for the other terms of office be the same. *Thacker v. Deposit Co.*, 135.

PROCESS.

§ 5. Service on Nonresidents by Publication and Attachment.

Where it appears that the cause of action alleged had theretofore been finally determined against plaintiff in a prior suit, such cause of action will not support service of process by publication and attachment. *Stevens v. Cecil*, 350.

An action to cancel a judgment of *retraxit* will not support the service of process by publication and attachment, since it is not one to recover a sum of money only nor damages for one or more of the causes of action enumerated in the statute, C. S., 798. *Ibid.*

§ 8. Service on Nonresident Automobile Owners.

In this action for alleged negligent operation of automobile, service of process on nonresident through Commissioner of Revenue *held* valid. *Wynn v. Robinson*, 347.

§ 16. Abuse of Process.

Evidence of malice on the part of defendant against plaintiff, and that defendant gave alleged false information to a third person who procured plaintiff's detention in an insane asylum *is held* sufficient to connect defendant with the alleged wrongful detention of plaintiff. *Jackson v. Parks*, 329.

QUASI-CONTRACTS.

§ 1. Elements and Essentials of Cause of Action.

While care of a person during his lifetime is a prerequisite to a recovery on an alleged agreement to pay plaintiff for such care, when the person for whom the services are rendered breaches the contract by making performance

QUASI-CONTRACTS—*Continued.*

impossible, plaintiff is discharged from further performance and may sue for breach of the agreement and recover the reasonable value of the services rendered prior to defendant's breach. *Barron v. Cain*, 282.

The law will imply a promise to pay the reasonable value of personal services rendered by one person to or for another which are knowingly and voluntarily received by him, in the absence of some express or implied gratuity. *Ray v. Robinson*, 430.

§ 2. Actions.

Where plaintiff relies upon an implied contract, he should state the circumstances giving rise to the implied agreement, and matter in aggravation of damages. *Barron v. Cain*, 282.

Evidence that plaintiff went to the home of defendant principally to perform services for defendant's mother with expectation of pay, and that plaintiff did perform such services until the death of defendant's mother, *is held* sufficient to be submitted to the jury in plaintiff's action to recover the reasonable value of the services rendered. *Ray v. Robinson*, 430.

QUIETING TITLE.

§ 1. Nature and Grounds of Remedy.

The purchaser of land from one tenant in common after the land had been allotted to the tenant in a special proceeding for partition may maintain a suit to restrain foreclosure of a mortgage executed by the other tenant in common prior to partition when the mortgagee advertises and seeks to sell a one-half interest in the entire tract, since such foreclosure would constitute a cloud on the purchaser's title. Michie's N. C. Code, 1743. *Rostan v. Huggins*, 386.

The statute relating to actions to quiet title is a remedial statute and must be liberally construed. *Maynard v. Holder*, 524.

An action to quiet title may be maintained to determine conflicting claims of title to a strip of land lying between the lands of the parties, C. S., 1743. *Ibid.*

RAILROADS.

§ 7. Maintenance of Crossings.

A railroad company cannot be held liable by the owners of property along a street for its action in closing the street at the public grade crossing pursuant to a valid ordinance enacted by the municipality in the exercise of its governmental powers in the interest of public safety. *Sanders v. R. R.*, 312.

§ 9. Accidents at Crossings.

Evidence *held* sufficient to be submitted to the jury in this action to recover for death of intestate resulting from a crossing accident. *White v. R. R.*, 79.

The violation of a municipal ordinance regulating the speed of trains within its limits is negligence *per se*, and ordinarily whether such negligence is a proximate cause of the injury in suit is for the determination of the jury. *Ibid.*

An engineer is charged with the duty of giving some signal of the approach of the train to a public crossing. *Ibid.*

The failure of a motorist to come to a full stop before entering upon a railroad crossing as required by statute is not contributory negligence *per se*, but such failure is a circumstance to be considered by the jury with the other

RAILROADS—*Continued.*

evidence in the case upon the question. Michie's North Carolina Code, 2621 (47) (48). *Ibid.*

Evidence *held* not to disclose contributory negligence as matter of law on part of plaintiff in entering upon tracks at crossing. *Coltrain v. R. R.*, 263.

REFERENCE.

§ 3. Pleas in Bar.

The plea of title by adverse possession is not such a plea in bar as will prevent a compulsory reference until after the determination of the plea when it appears that the very plea of adverse possession of lappage is based upon a complicated question of boundary within the meaning of C. S., 573 (3). *Fibre Co. v. Lee*, 244.

§ 12. Modification of Report by Court.

When there is evidence supporting the court's modification of a finding of the referee, the modification is not subject to review. *Meadows v. Meadows*, 413.

REMOVAL OF CAUSES.

§ 1. Nature of Right, Statutory Provisions and Procedure in General.

While issues of fact raised by a petition for removal of a cause must be determined in the Federal Court, whether the right of removal has been established, admitting the facts alleged in the petition to be true, is a question of law which the State courts have jurisdiction to determine. *Hosiery Mills v. R. R.*, 474.

Where answer to petition raises no issue of fact but only question of law, it is properly considered in determining petition for removal. *Ibid.*

§ 3. Diverse Citizenship.

Purchaser of South and Western Railroad Company *held* a domestic corporation in operation of the properties and not entitled to removal. *Hosiery Mills v. R. R.*, 474.

SCHOOLS.

§ 22. Election, Appointment and Tenure of Teachers and Principals.

Private citizens of a school district have no legal right in connection with the election and approval of a teacher or principal for such district, and therefore may not maintain an action to compel the county board of education to approve the election of a principal. *Harris v. Board of Education*, 147.

The members of a district school committee may not maintain an action to compel the county board of education to approve their election of a principal, since their statutory duty in regard to the matter requires only that they elect a principal and, if the election is disapproved, that they elect another. *Ibid.*

A person elected principal of a school by the district school committee is not entitled to *mandamus* to compel the county board of education to approve his election upon his allegation that the county board of education acted wrongfully, arbitrarily and without just cause and reason in disapproving his election, since his right to the relief remains in doubt until he establishes by competent proof that the action of the county board of education in disapproving his election was void for want of good faith. *Ibid.*

County board of education has discretionary power to approve or disapprove election of teachers by local school authorities. *Ibid.*

SCHOOLS—*Continued.*

While a person elected principal by the district school committee is not entitled to *mandamus* to compel the county board of education to approve his election upon his allegation that the county board disapproved his election unlawfully and arbitrarily, he may be entitled to a mandatory injunction, upon proper pleadings and proof that the county board acted in bad faith, to compel the county board to act upon his election and to grant or withhold its approval in good faith in the proper exercise of its discretionary power. *Ibid.*

The county board of education is not authorized to elect a principal of a school unless it appears that the local school authorities are in disagreement as to such election, and therefore, in a suit to compel the county board to approve an election made by the local school authorities, a plea in abatement on the ground that the county board had already elected another to the position is properly overruled in the absence of a showing of disagreement by the local school authorities. *Ibid.*

SHERIFFS.

§ 2. Deputies Sheriff. (Coverage by Compensation Act see Master and Servant § 39d.)

While the office of sheriff is provided for by Art. IV, sec. 24, of the State Constitution, the right of the sheriff to appoint deputies is a common law right and deputies appointed by the sheriff are public officers, but their duties and authority relate only to ministerial duties imposed by law upon the sheriff, in the performance of which they act for the sheriff in his name or right. *Gowens v. Alamance County*, 107.

When deputy sheriff is appointed jailer his positions as deputy sheriff and jailer are separate and distinct. *Ibid.*

§ 6a. Official Liability of Sheriff for Wrongful Acts.

A sheriff, in his official capacity, and his surety are liable for wrongful arrest or for excessive force used in making arrest under color of office. *Price v. Honeycutt*, 270.

§ 6d. Personal Liability of Sheriff for Wrongful Acts.

Injury inflicted by escaped prisoner *held* not foreseeable, and sheriff and deputy were not individually liable therefor. *Moss v. Bowers*, 546.

SPECIFIC PERFORMANCE.

§ 3. Waiver and Defenses.

Tender is not required when on defendant's statement it would be futile. *Lennon v. Habit*, 141.

In a suit to compel specific performance of a contract of sale of a franchise as a common carrier, made subject to the approval of the Interstate Commerce Commission and the State commissions having jurisdiction, defendant sellers' demurrer on the ground that it failed to appear from the complaint that the commissions would approve the transfer, is untenable, it being incumbent upon defendants under the terms of their contract to join in a proper application to the commission for such transfer. *Ibid.*

The jurisdiction of the Interstate Commerce Commission does not preclude our courts from entertaining a suit to compel defendant sellers to join in making a proper application to the proper commissions for a transfer of their franchise to plaintiffs in accordance with their contract for the sale of such franchise. *Ibid.*

STATUTES.

§ 2. Constitutional Inhibition Against Passage of Special Act.

The Legislature has the power to regulate trade by general statute, the inhibition of Art. II, sec. 29, applying solely to such regulation by private, special, or local law; and a law regulating trade will be held general and not inhibited by this section of the Constitution if its application is limited to classifications based on reasonable distinctions and is not arbitrary or capricious and applies equally to all persons or things coming within the classifications regulated, which classifications may be made either directly or by provision of the act exempting from its operation classifications based upon reasonable distinctions and consonant with the general purpose of the act. *Lilly & Co. v. Saunders*, 163.

The North Carolina Fair Trade Act in limiting its application to commodities bearing a trade-mark and in exempting from its operation such commodities when sold to particular classes of persons, sets up reasonable classifications and applies uniformly to all persons or things coming therein, and therefore is a general act regulating trade and does not contravene Art. II, sec. 29, of the State Constitution. *Ibid.*

§ 3. Form and Contents: Vague and Contradictory Statutes.

Provision of Workmen's Compensation Act authorizing award for bodily disfigurement *held* sufficiently certain and to prescribe the standard for the computation of an award thereunder with sufficient definiteness. *Baxter v. Arthur Co.*, 276.

§ 5b. Construction in Regard to Constitutionality. (Duty and power of courts to determine constitutionality of statutes see Constitutional Law § 6b.)

The presumption is in favor of the constitutionality of an act of the Legislature, and the courts will not declare a statute unconstitutional if it can be upheld on any reasonable ground. *Leonard v. Maxwell, Comr.*, 89; *S. v. Harris*, 746.

A statute providing for the licensing of those engaged in a particular business or profession must be construed *in pari materia* with a later statute exempting designated counties from the act, in determining whether the statute is unconstitutional as being discriminatory. *S. v. Harris*, 746.

§ 5d. Construction of Remedial Statutes.

Remedial statutes must be liberally construed. *Maynard v. Holder*, 524.

§ 8. Construction of Criminal Statutes.

Penal statutes must be strictly construed. *S. v. Hardie*, 346; *S. v. Allen*, 621.

TAXATION.

§ 1. Uniform Rule and Discrimination.

Act imposing license fee on cleaners and pressers in addition to regular license prescribed in Revenue Act, if considered a State tax, *is held* unconstitutional as discriminatory, since the fee is imposed on those operating in some of the counties and not those operating in other counties of the State without reasonable basis of classification. *S. v. Harris*, 746.

§ 2a. Classification of Trades and Professions for License Taxes.

The Legislature may levy a sales tax or a tax on the business of selling tangible personal property, levied as a license or privilege tax, and classify trades, callings, and occupations for the imposition of the tax, and classify

articles sold as the basis for computing the tax, exempting certain classes of articles and providing a graduated tax as to other classes of articles, or differentiate in the method of collecting the tax as to some of the classes, provided the levy applies equally and uniformly to all who fall within each particular classification, and provided the classifications are reasonable and based upon some real distinction. *Leonard v. Maxwell, Comr.*, 89.

The provision of Art. V, Schedule E, of the Revenue Act of 1937, making a distinction between wholesale and retail merchants, and exempting sales of ice, medicines on a prescription, fish and farm products when sold in the original or unmanufactured state, commercial fertilizer, agricultural lime and plaster, public school books, sale of used or repossessed articles, and sales to the Government or governmental agencies, etc., constitute classifications based upon reasonable and real distinctions, and an allegation that the act is void as imposing arbitrary discriminations in making such classifications is untenable. *Ibid.*

Art. V, Schedule E, of the Revenue Act of 1937, providing that a proportion of the six cents per gallon gasoline tax should be deemed in satisfaction of the privilege sales tax levied by the act, is valid. *Ibid.*

The fact that a privilege sales tax is levied upon all retail merchants as a single category with exemptions relating to certain classes of articles sold, amounts in effect to classifications for the purpose of taxation, and are valid if the classifications are reasonable, the method by which the classifications are made being immaterial. *Ibid.*

§ 7. State Tax as Burden on Interstate Commerce.

Tax on display of samples in hotel room or temporarily occupied house *held* not void as burden on interstate commerce. *Best & Co. v. Maxwell, Comr.*, 114.

§ 23. Construction and Operation of Revenue Statutes.

Even conceding that ch. 127, Public Laws of 1937, renders persons employing peddlers liable for the peddlers' tax therein imposed on their employees, defendants' motion in arrest of judgment on a warrant charging that they "engaged in the business of employing peddlers without obtaining licenses to do so" fails to charge a crime, since the statute does not require a license to "engage in the business of employing peddlers," and defendants' motion in arrest of judgment for uncertainty and failure to charge them with the commission of a crime is allowed. *S. v. Freeman*, 161.

§ 25. Listing, Levy and Assessment of Personalty.

The power to levy taxes is the exclusive province of the legislative branch of the government, N. C. Constitution, Art. V, and the Superior Court has no jurisdiction of an action the nature and purpose of which is to discover, to list and assess for taxation, property which has escaped taxation. *Henderson County v. Smyth*, 421.

§ 29. Levy and Assessment of Income Taxes.

Plaintiff, owning stock in a foreign investment corporation, received as a dividend on such stock, stock of another foreign corporation. *Held:* The stock received as a dividend was taken from the surplus of the investment corporation and was equivalent to a cash dividend, and was taxable as income from stock in a foreign corporation under the provision of 311½ Revenue Act of 1935. *Maxwell v. Tull*, 500.

§ 38c. Recovery of Tax Paid Under Protest.

Party seeking to recover tax paid under protest on ground that statute under which tax was levied was unconstitutional, may not attack the con-

TAXATION—*Continued.*

stitutionality of the statute by attack of provisions not applying to him and therefore resulting in no injury to him. *Leonard v. Maxwell, Comr.*, 89.

§ 40c. Foreclosure of Tax Liens.

In this suit to foreclose the lien for taxes, C. S., 7990, the clerk entered an order confirming the commissioner's sale and directing the commissioner to execute deeds and upon the commissioner's filing a supplementary report later the same month the clerk entered another order of confirmation, both of which orders of confirmation were entered on a day other than Monday. *Held:* The clerk was without jurisdiction to enter the orders of confirmation on a day other than Monday and therefore the orders are void and the deed of the commissioner purporting to be executed thereunder is also void, and confirmation being essential, the tax sale was incomplete and the last and highest bidder remained but a proposed purchaser. *Beaufort County v. Bishop*, 211.

§ 41. Redemption from Tax Sales.

The owners are entitled to redeem lands from the foreclosure of the tax lien under C. S., 7990, at any time before valid confirmation. *Beaufort County v. Bishop*, 211.

TORTS.

§ 6. Right to Contribution and Joinder of Tort-Feasors.

Defendant in negligent injury action is entitled to joinder of third person upon allegations that such person was joint tort-feasor. *Freeman v. Thompson*, 484.

TRADE-MARKS.

§ 4. Retail Price Protection of Trade-Marked Goods.

The provision of the North Carolina Fair Trade Act making its violation actionable at the suit of any person damaged thereby authorizes a suit by a manufacturer or distributor protected by the act against a non-contracting retailer to permanently enjoin such retailer from selling trade-marked commodities of the manufacturer or distributor in violation of the act upon allegations of accrued and prospective irreparable damages. *Lilly & Co. v. Saunders*, 163.

The fact that a manufacturer or distributor of trade-marked commodities permits the sale of such commodities to a non-contracting retailer does not preclude the manufacturer or distributor from maintaining a suit against such retailer under the North Carolina Fair Trade Act, since the manufacturer or distributor has the option to obtain a contract or rely upon the statute, and since the sale to the non-contracting retailer does not confer upon him the right to violate the statute with reference to which he is deemed to have contracted in making the purchase. *Ibid.*

The fact that a retailer makes a reasonable profit upon trade-marked articles is no defense in a suit against such retailer for selling such articles at a price below that allowed by the North Carolina Fair Trade Act, since the standard of the statute is one of retail price and not of reasonable profit. *Ibid.*

The fact that the prices of the restricted number of manufacturers manufacturing a product pursuant to patent licensing agreements are practically the same is no defense in an action by one of such manufacturers against a retailer for selling the product manufactured by him in violation of the North

TRADE-MARKS—*Continued.*

Carolina Fair Trade Act, since the substantial identity of price as fixed by the several competing distributors is not unlawful in the absence of an agreement between them to so fix the price. *Ibid.*

TRESPASS.

§ 3. Use of Land Beyond Scope of Easements Granted.

Plaintiff instituted this action for trespass against defendant telephone company upon the ground that an additional burden had been imposed on plaintiff's land abutting a highway by the erection of defendant's poles and wires. *Held:* The allegations of defendant's answer setting up as defenses the provision of C. S., 1695, and regulations of the State Highway Commission were improperly stricken upon plaintiff's motion, since the defenses may or may not become material at the trial, and since the court will not attempt to plot the course of the trial upon a motion to strike, but will ordinarily leave the matter for determination by rulings upon the evidence. *Hildebrand v. Tel. Co.*, 235.

TRESPASS TO TRY TITLE.

§ 3. Actions.

In this action to recover damages for alleged trespass the verdict *is held* ambiguous so that boundary could not be determined, and motion to set aside verdict should have been allowed. *Cody v. England*, 604.

TRIAL.

§ 22b. Consideration of Evidence on Motion to Nonsuit.

Upon motion to nonsuit, the evidence tending to support plaintiff's cause of action is to be considered in the light most favorable to plaintiff, and she is entitled to every reasonable intendment upon the evidence and every reasonable inference therefrom. *White v. R. R.*, 79; *Coltrain v. R. R.*, 263; *Funeral Home v. Ins. Co.*, 562.

Upon a motion to nonsuit, the evidence is to be considered in the light most favorable for plaintiff. *Calhoun v. Light Co.*, 256; *Harris v. Smith*, 352; *Blalock v. Whisnant*, 417; *Sides v. Tidwell*, 480.

Upon a motion to nonsuit, the evidence will be considered in the light most favorable to plaintiff, and only the evidence favorable to plaintiff will be considered. *Jackson v. Parks*, 329.

While ordinarily defendant's evidence should not be considered in passing upon his motion to dismiss as of nonsuit, unless it is favorable to plaintiff, it is properly considered when it is not in conflict with plaintiff's evidence, but is in explanation and clarification thereof. *Funeral Home v. Ins. Co.*, 562.

§ 24. Sufficiency of Evidence to Overrule Nonsuit. (In particular actions see particular titles of actions.)

If there is any substantial evidence supporting plaintiff's cause of action, defendant's motion for nonsuit is properly overruled, *Calhoun v. Light Co.*, 256, even though the damages shown be slight or only nominal. *Harris v. Smith*, 352.

If there is more than a scintilla of evidence supporting plaintiff's cause of action, defendant's motion to nonsuit should be overruled and the cause submitted to the jury. *Coltrain v. R. R.*, 263.

TRIAL—*Continued.*

§ 27a. Directed Verdict and Peremptory Instructions.

When defendant's evidence, if believed by the jury, would constitute a defense, a peremptory instruction for plaintiff is error. *Andrews v. Parks*, 616.

§ 29b. Statement of Evidence and Explanation of Law Arising Thereon.

An instruction which correctly defines and explains negligence and proximate cause in abstract terms but fails to apply the law to the facts adduced by the evidence fails to meet the requirements of C. S., 564, and a new trial will be awarded on appellant's exception. *Smith v. Bus Co.*, 22.

§ 37. Form and Sufficiency of Issues and Verdict.

A verdict must be certain and responsive to the issues, and should establish facts sufficient to enable the court to proceed to judgment, and when its terms construed with reference to the pleadings, evidence and charge of the court remain ambiguous and uncertain, a new trial should be granted. *Cody v. England*, 604.

§ 39. Tender of Issues.

Refusal to submit issue of fraud in the treaty *held* not error when such issue is not determinative of rights of parties, the rights of the parties depending upon the issue submitted relating to fraud in the *factum*. *Finance Co. v. Rinehardt*, 380.

§ 49. Motions to Set Aside Verdict and for New Trial on Ground That Verdict Is Contrary to Weight of Evidence.

Motions to set aside the verdict as being against the weight of the evidence and motions for a new trial on the ground that the verdict is against the weight of the evidence are addressed to the discretion of the trial court and are not reviewable. *In re Escoffery*, 19.

§ 54. Findings of Fact by Court and Judgment.

Where cause is heard by the court by consent, its written judgment granting defendant's motion as of nonsuit is equivalent to a finding that all the evidence, considered in the light most favorable to plaintiffs, is insufficient to show facts entitling plaintiffs to recover on any issue raised by the pleadings, and is a sufficient finding of facts by the court as required by C. S., 569. *Ins. Co. v. Carolina Beach*, 778.

§ 50b. Motions for New Trial for Defective Verdict.

Held: Plaintiffs' motion to set aside verdict because of its ambiguity should have been granted. *Cody v. England*, 604.

TRUSTS.

§ 12. Compensation of Trustee and Attorneys' Fees.

There is no statutory or equitable authority for allowance of attorney's fee out of estate for his successful prosecution of claim against the estate. *Patrick v. Trust Co.*, 525.

UNITED STATES.

§ 4. Suits Against Federal Agencies.

The Emergency Crop and Seed Loan Office, a branch of the Farm Credit Administration, is an agency of the United States Government, and enjoys

VENDOR AND PURCHASER—*Continued.*

introduce evidence that they had informed the purchaser or his attorney of the prior conveyance and that it was made upon condition that the grantee should sell the land and divide the proceeds of sale after payment of the tax liens, it is error for the court to exclude the vendors' testimony that they had received nothing for the prior conveyance, since such evidence is consistent with their contention as to the character of their deed and tends to relieve them from the imputation of unfair dealing. *Ibid.*

VENUE.

§ 1a. Residence of Parties.

Where, at the time of hearing a motion for removal, the only parties to the suit are the nonresident plaintiffs and a resident corporate defendant, defendant's motion to remove to the county of its residence is properly allowed. C. S., 466, 469, 470. *Lewis v. Sanger*, 724.

§ 1d. Actions by Nonresidents.

When both parties are nonresidents and no other rule governing venue is germane, plaintiff may maintain action in any county of the State. *Clement v. Clement*, 240.

§ 2a. Actions Involving Realty.

An action by creditors to enjoin foreclosure of a deed of trust on the debtor's land and for the appointment of a receiver is properly removed to the county in which the land is situate upon defendants' motion. *Ballard v. Metcalf*, 240.

WILLS.

II. Contracts to Devise or Bequeath
- 5. Actions on Contract to Devise or Bequeath. Barron v. Cain, 282.
- 6. Damages. Barron v. Cain, 282.

VI. Revocation of Wills
- 14. Revocation by Subsequent Marriage. In re Will of Coffield, 285.
- 15. Republication and Revival. In re Will of Coffield, 285.

VIII. Caveat Proceedings
- 17. Nature of Caveat Proceedings. In re Will of Redding, 497.
- 20. Grounds of Attack.
  - a. Validity of Execution. In re Will of Redding, 497.
- 22. Presumptions and Burden of Proof. In re Will of Redding, 497.
- 24. Sufficiency of Evidence, Nonsuit and Directed Verdict. In re Will of Coffield, 285; In re Will of Redding, 497.
- 27. Verdict and Judgment. In re Will of Coffield, 285.
- 28. Costs and Attorneys' Fees. In re Will of Coffield, 285.

IX. Construction and Operation of Wills
- 33. Estates and Interests Created.
  - a. In General. Williams v. McPherson, 565.
  - d. Estates in Trust or in Fee. Williams v. Thompson, 292.
  - f. Devises with Power of Disposition. Buncombe County v. Wood, 224; Heefner v. Thornton, 702.
- 35. Conditions and Restrictions.
  - a. Restraint on Alienation. Williams v. McPherson, 565.
  - b. Conditions Subsequent and Estates upon Special Limitation. Williams v. Thompson, 292.
- 46. Nature of Title of Devisees and Right to Convey. Lee v. Lee, 349.

§ 5. Actions on Contracts to Devise or Bequeath. (Actions on contracts to pay for personal services rendered third person, see Quasi-Contracts.)

In this action on a contract under which defendant agreed to pay plaintiff for caring for defendant during his lifetime, plaintiff contended that defendant made complete performance impossible by running plaintiff away with a deadly weapon. *Held:* Allegations of defendant's conduct making complete performance impossible were proper as excusing want of complete performance by plaintiff and allegation of defendant's mistreatment were proper as being matter in aggravation of damages. *Barron v. Cain*, 282.

WILLS—*Continued.*

§ 6. Breach of Contract to Devise or Bequeath and Damages.

While care of a person during his lifetime is a prerequisite to a recovery on an alleged agreement to pay plaintiff for such care, when the person for whom the services are rendered breaches the contract by making performance impossible, plaintiff is discharged from further performance and may sue for breach of the agreement and recover the reasonable value of the services rendered prior to defendant's breach. *Barron v. Cain*, 282.

§ 14. Revocation by Subsequent Marriage.

A will is revoked by marriage, Michie's Code, 4134. *In re Will of Coffield*, 285.

§ 15. Republication and Revival.

A will which has been revoked by the marriage of the testator is revived and republished by a codicil properly executed subsequent to the marriage which refers to the prior will and expresses the intention of the testator that the will should be effective except as altered by the codicil. *In re Will of Coffield*, 285.

§ 17. Nature of Caveat Proceedings.

Caveat proceedings are *in rem* and must proceed to judgment, and nonsuits and directed verdicts against propounders are improper. *In re Will of Redding*, 497.

§ 21a. Validity of Execution.

Evidence tending to show that one of the subscribing witnesses signed the will as such in the presence of testatrix and the other subscribing witness, warrants the jury in finding that the witness' subscription met the requirements of C. S., 4131, notwithstanding that the witness wavered somewhat in her testimony. *In re Will of Redding*, 497.

§ 22. Presumptions and Burden of Proof.

While the fact that testatrix gives all her property to a stranger to her blood to the exclusion of her kinspeople may be evidence of mental incapacity or undue influence, it raises no presumption thereof and does not shift the burden of proof to the propounders. *In re Will of Redding*, 497.

§ 24. Sufficiency of Evidence, Nonsuit and Directed Verdict.

The holding of the trial court that there was no sufficient evidence of undue influence to be submitted to the jury, *held* correct. *In re Will of Coffield*, 285.

Proceedings to caveat a will are *in rem* and must proceed to judgment, and motions for judgment as of nonsuit or requests for a directed verdict will be disallowed. *In re Will of Redding*, 497.

§ 27. Verdict and Judgment.

The verdict of the jury on conflicting evidence on the question of the mental capacity of testator to execute the instrument *held* conclusive. *In re Will of Coffield*, 285.

§ 28. Costs and Attorneys' Fees.

The allowance of attorney fees to counsel for the propounders is in the sound discretion of the trial court. Michie's Code, 1244, as amended by chapter 143, Public Laws of 1937. *In re Will of Coffield*, 285.

§ 33a. Estates and Interests Created in General.

"I also leave to my son" certain realty *is held* an unrestricted devise, the word "leave" being construed as "devise." *Williams v. McPherson*, 565.

WILLS—*Continued.*

§ 33d. Estates in Trust or in Fee.

Precatory words merely expressing the wish of testatrix as to future use of land do not create a trust. *Williams v. Thompson*, 292.

§ 33f. Devises with Power of Disposition.

By the second item of his will testator devised to his wife all his property in fee with the exception of land devised to him by his father, and as to this land he devised her a life estate with remainder over to the children of his brothers and sisters; by the third item of the will he gave his wife full power to dispose of any part of his estate. *Held:* As to the property devised in fee, testator's wife already had full power of disposition and therefore to give any significance to the third item of the will the power of disposition must relate to the lands devised to testator by his father, and therefore the widow's deed to such land defeated the limitation over and vested all interest which testator had in the land at the time of his death in her grantee, who is not bound to see to the application of the purchase money. *Buncombe County v. Wood*, 224.

The will in question bequeathed and devised "my entire estate of every nature and wherever situated" to testator's wife "with full and complete power to her to use, consume and dispose of same absolutely," and subsequently provided that after the death of testator's wife any part of the estate remaining unconsumed and undisposed of should go to her nephew. *Held:* The bequest and devise to testator's wife was unrestricted and she takes the personalty absolutely and the realty in fee, C. S., 4162, and the subsequent provision for testator's nephew is repugnant thereto and is void, and will not defeat the devise and the bequest to testator's wife, nor limit either to a life estate. *Heefner v. Thornton*, 702.

§ 35a. Restraint on Alienation.

The language of the will in question was "I also leave to my son" certain realty, "said property never to be sold, bought or exchanged" except among the son's heirs. *Held:* The word "leave" is construed to mean "devise," so that the first quoted phrase conveys an unrestricted devise of real estate which vests the fee in the devisee under C. S., 4162, and the restraint on alienation thereto attached is void, and therefore the devisee takes the fee simple absolute in the property. *Williams v. McPherson*, 565.

§ 35b. Conditions Subsequent and Estates Upon Special Limitation.

A devise of a remainder after a life estate to a church to be used by its legal representatives as a parsonage and for no other purpose in order to secure the possession of testatrix' burying ground to the church *is held* to convey the fee, since the devise cannot be held upon condition subsequent since it does not provide for reëntry or forfeiture for condition broken, nor one upon special limitation, since it does not provide for reversion in the testatrix or her heirs nor for limitation over to any other person. *Williams v. Thompson*, 292.

§ 46. Nature of Title of Devisees and Right to Convey.

A devise of certain lands to a person "for his natural life in fee simple" followed by a residuary clause in favor of such person, gives the devisee the fee simple title to the lands, there being no other item of the will affecting the lands, since if the first devise carries only a life estate the residuary clause perfects title in the devisee. *Lee v. Lee*, 349.

CONSOLIDATED STATUTES AND MICHIE'S CODE CONSTRUED.

(For convenience in annotating.)

SEC.

74. Petition must aver value of personal estate and application thereof, and mere averment that personalty is insufficient to pay debts of estate is not sufficient. *Watson v. Peterson*, 343.

135. Beneficiaries of estate may maintain action against administrator and those profiting by alleged collusion for wrongful dissipation of assets. *Johnson v. Hardy*, 558.

354, 3930. Sheriff and surety are liable for wrongful arrest or for excessive force in making arrest. *Price v. Honeycutt*, 270.

363. When defendant does not put title in issue, processioning proceeding involves only location of true dividing line, and not title or right to possession. *Jackson v. Jernigan*, 401.

404. Action is commenced when summons is issued. *Cherry v. Whitehurst*, 340. Summons is not issued until it leaves hands and control of justice of the peace for service. *Ibid.*

407. In action for alleged wrongful act of defendant in causing plaintiff's detention in insane asylum, plaintiff was *non sui juris* as to defendant for time plaintiff was detained. *Jackson v. Parks*, 329.

439. Statute begins to run on bond of clerk from time of default, which cannot be later than end of term, even though clerk succeeds himself. *Thacker v. Deposit Co.*, 135.

441 (5). Cause of action based upon alleged wrongful act of defendant in swearing out warrant charging plaintiff with larceny instituted within three years of accrual of cause of action *held* not barred. *Jackson v. Parks*, 329.

441 (9). When funds are paid into clerk's hands with knowledge of beneficiary who is *sui juris*, this statute has no application. *Thacker v. Deposit Co.*, 135. Evidence *held* to sustain finding that action was instituted within time allowed from discovery of fraud or time it should have been discovered. *Wimberly v. Furniture Stores*, 732.

443 (3). Cause of action based upon alleged wrongful act of defendant in causing plaintiff to be detained in asylum instituted within one year from date plaintiff was discharged therefrom as sane, *held* not barred. *Jackson v. Parks*, 329.

455, 456. Demurrer for misjoinder of parties and causes *held* properly denied when all causes arose out of same automobile accident. *Powell v. Smith*, 242.

456. Where husband of owner of land builds dam in reliance upon parol agreement of owner of adjacent land to easement to pond water on both lands, he may recover amount expended to extent that value of adjacent land was enhanced, and therefore his wife is a necessary party. *Ebert v. Disher*, 36.

460. Intervener must file pleading. *Sykes v. Ins. Co.*, 353.

CONSOLIDATED STATUTES—*Continued.*

SEC.

466, 469, 470. Where, at time of hearing of motion for removal, nonresident plaintiffs and resident corporate defendant are only parties, defendant's motion to remove to the county of its residence is properly allowed. *Lewis v. Sanger*, 724.

471, 472, 473. Motion for change of venue or for special venire is addressed to discretion of the court. *S. v. Godwin*, 49.

475. Civil action is commenced by issuing summons. *Cherry v. Whitehurst*, 340.

483, 531. City manager of municipal corporation may verify municipality's answer in action instituted against it. *Grimes v. Lexington*, 735.

483 (3). Proceeding to declare person sane is summary, and neither service of notice on guardian nor service of summons on incompetent is necessary, notice to incompetent being sufficient. *In re Dry*, 427.

506 (2) Complaint should contain concise statement of essential facts, and not collateral, irrelevant, redundant, or evidential matter. *Barron v. Cain*, 282.

515. Exception to permitting defendant to amend answer after decision that demurrer to counterclaim should have been sustained, is untenable. *Cody v. Hovey*, 391.

517. Where it does not appear on face of complaint that prior action is pending, objection may be taken by answer treated as plea in abatement. *Thompson v. R. R.*, 554.

519. Allegation not relating to personal transaction may be denied upon information and belief. *Grimes v. Lexington*, 735. New matter must be properly alleged in answer in order to give notice that it will be used. *Cohoon v. Swain*, 317.

525. Appeal will lie from order overruling demurrer to answer which admits cause alleged and sets up an affirmative defense. *Cody v. Hovey*, 391.

535. Upon demurrer, complaint must be liberally construed. *Whitacre v. Charlotte*, 688.

564. Statement by court of reasons for its determination that confession was competent *held* not expression of opinion by court upon the evidence. *S. v. Fain*, 157. Any substantial error in portion of charge applying law to facts is perforce material. *Templeton v. Kelley*, 488. Failure to charge on credibility to be given testimony of accomplice *held* not error in absence of request. *S. v. Kelly*, 627. Charge which defines negligence and proximate cause in abstract terms but fails to apply the law to the evidence is insufficient. *Smith v. Bus Co.*, 22.

564, 1799. Court need not charge that failure of defendant to testify should not be considered against him in absence of request. *S. v. Jordan*, 356; *S. v. Kelly*, 627.

567. Motion to nonsuit *held* properly denied on conflicting evidence. *Smith v. Ins. Co.*, 152. Upon motion to nonsuit, evidence must be considered in light most favorable to plaintiff. *Calhoun v. Light Co.*, 256; *Coltrain v. R. R.*, 263; *Harris v. Smith*, 352; *Sides v. Tidwell*, 480. And only evidence favorable to plaintiff will be considered. *Jackson v. Parks*, 329.

CONSOLIDATED STATUTES—*Continued.*

SEC.

569. Written judgment granting defendant's motion to nonsuit is sufficient finding of facts by the court. *Ins. Co. v. Carolina Beach*, 778.

573 (3). When plea of adverse possession of lappage is based upon complicated question of boundary, plea is not one barring compulsory reference. *Fibre Co. v. Lee*, 244.

597 (b). Clerk may not enter any judgment except on Monday unless expressly authorized by statute. *Beaufort County v. Bishop*, 211.

600. It is error for court to set aside judgment under this section without a finding that defendant has meritorious defense. *Garrett v. Trent*, 162.

618. Defendant in negligent injury action is entitled to joinder of third person upon allegations that such third person was joint tort feasor. *Freeman v. Thompson*, 484.

626. Facts agreed should contain only pertinent facts and not evidence from which facts may be found, and court is restricted to facts agreed and cannot find additional facts. *Realty Corp. v. Koon*, 295.

632. Defendant may appeal from order denying his motion for joinder of another as defendant upon allegations that such other was joint tortfeasor, the denial of the motion directly affecting a substantial right. *Freeman v. Thompson*, 484.

637. Superior Court acquires jurisdiction on appeal from clerk, even though clerk did not have jurisdiction. *Bradshaw v. Warren*, 354.

798. An action to cancel judgment of *retraxit* will not support service of process by publication and attachment. *Stevens v. Cecil*, 350.

843, 844. Injunction will not lie as ancillary remedy in processioning proceeding. *Jackson v. Jernigan*, 401.

988. Permanent easement cannot be created by parol, nor does expenditure of funds in reliance thereon take the contract out of the statute. *Ebert v. Disher*, 38.

1097. Statute is made applicable to Utilities Commission by ch. 108, Public Laws of 1937. *Utilities Com. v. Coach Co.*, 325. Petitioner may appeal to Superior Court from adverse ruling of Utilities Commission on petition for removal of restriction from franchise. *Ibid.*

1244. Allowance of attorneys' fees to propounders is in sound discretion of trial court. *In re Will of Coffield*, 285.

1256. Judgment appealed from having been modified and affirmed, it is ordered that the costs be equally divided between plaintiff and defendant. *Ebert v. Disher*, 546.

1443, 1444. Court has authority to hear motions in civil cases at criminal term only upon due notice to adverse party, and therefore when it does not affirmatively appear that notice was given, granting of motion to be allowed to amend at criminal term is error. *Beck v. Bottling Co.*, 579.

CONSOLIDATED STATUTES—*Continued.*

SEC.

1665, 1666, 1667. In making allowance of alimony *pendente lite* or alimony without divorce, court is not limited to one-third of net annual income of husband's estate, it being only in the allowance of alimony following a decree of divorce *a mensa* that such limitation is applicable. *Wright v. Wright*, 693.

1666. Court is authorized to make allowance of alimony *pendente lite* in action for divorce, either *a mensa* or *a vinculo*. *Wright v. Wright*, 693.

1667. Provision empowering court to grant subsistence *pendente lite* is constitutional and does not deprive defendant of property right without jury trial. *Peele v. Peele*, 298. Court may reopen and amend prior orders awarding subsistence to wife and children. *Wright v. Wright*, 693. Provision that wife and children should occupy home place owned by entireties upheld. *Ibid.* In action for alimony without divorce, denial of abandonment and failure to support plaintiff raises issues for determination of the jury. *Masten v. Masten*, 24.

1695. Allegations in answer setting up provisions of statute as defense to action for trespass in maintenance of telephone poles on plaintiff's land along highway *held* improperly stricken out. *Hildebrand v. Tel. Co.*, 235.

1743. Action to quiet title may be maintained to determine conflicting claims of title to strip of land lying between lands of the parties. *Maynard v. Holder*, 524. Purchaser of land allotted to one tenant in common in partition may restrain foreclosure of deed of trust executed by other tenant before partition upon advertisement describing one-half interest in entire tract. *Rostan v. Huggins*, 386.

1779, 1780. Statutes not applicable when typewritten original statement of case on appeal as agreed to by counsel for both parties is properly identified. *Blalock v. Whisnant*, 417.

1790. Charge *held* erroneous in failing to instruct jury that it should not consider income derived from investments in ascertaining damages for wrongful death. *White v. R. R.*, 79.

1790, 1791. Upon sale of lands, life tenant is entitled to present cash value of her life estate in the purchase price, computed according to her expectancy of life, and remainderman is entitled to balance of purchase price. *Thompson v. Avery County*, 405.

1795. Widower has no interest in division of wife's lands among their children precluding his testimony as to agreement with her for division of both their lands among them. *Coward v. Coward*, 506.

1864 (i). In action to charge person accepting corporate check in payment of personal obligation of corporation's president, denial of fraud raises issue of fact for jury, and corporation's receiver is not entitled to judgment on the pleadings. *LaVecchia v. Land Bank*, 28.

2144. Does not render contract for sale of stocks on margin void when actual delivery of stocks is made to purchaser or his agent. *Cody v. Hovey*, 391.

CONSOLIDATED STATUTES—*Continued.*

SEC.

2287. Guardian of insane is not entitled to notice of proceeding to declare incompetent sane, and may not appeal from order discharging incompetent. *In re Dry*, 427.

2296. In proper instances, clerk, with approval of judge, may order guardian to purchase home for use of dependent of incompetent and to make proper allowances for her support. *Patrick v. Trust Co.*, 525.

2354. Does not preclude parties from making different agreement as to notice of intention to terminate tenancy. *Cherry v. Whitehurst*, 340.

2515. Agreement by husband and wife to pool their estates for division among their children is not an agreement under which any interest in the wife's lands passes to the husband, and it is not required that the agreement be executed in accordance with the statute. *Coward v. Coward*, 506.

2621 (47) (48). Failure of motorist to come to stop before entering upon crossing is not contributory negligence *per se*, but is only evidence thereof. *White v. R. R.*, 79.

2623 (7), 2898, 2899. City of Charlotte has power to create office of commissioner of police or safety. *Riddle v. Ledbetter*, 491.

2673, 2675, 2776 (r). Municipal ordinance regulating storage of gasoline in fire district *held* valid as exercise of police power in public safety. *Fayetteville v. Distributing Co.*, 596.

2688, 2787. Municipality has power to employ real estate agent to procure responsible bidder at public sale of lands acquired by it by foreclosure of tax and street assessment liens. *Mortgage Co. v. Winston-Salem*, 726.

2703-2728. Where municipality owns fee in land between street and the property assessed, assessment is void. *Winston-Salem v. Smith*, 1.

2716, 2717. Interest rate on street assessments is fixed by statute, and courts are without power to prescribe lower rate. *Zebulon v. Dawson*, 520.

2776 (b). Change in zoning regulations must be made in conformity with general law. *Eldridge v. Mangum*, 532.

2776 (y). Municipality may enjoin violation of its ordinance even though act prohibited is not a nuisance *per se*. *Fayetteville v. Distributing Co.*, 596.

2787. Defendant town *held* empowered to close street at railroad crossing in interest of public safety. *Sanders v. R. R.*, 312.

2791, 2688. Since city may purchase lands for streets and sell off any surplus so acquired, purchase of lot for street does not amount to dedication of entire lot therefor. *Winston-Salem v. Smith*, 1.

3010. Note payable to order is negotiated by endorsement of the holder and completed by delivery. *Warehouse Co. v. Bank*, 246.

3014. Endorsements may be in blank or special. *Warehouse Co. v. Bank*, 246.

3015. Note with special endorsement requires endorsement of person specified therein to further negotiation. *Warehouse Co. v. Bank*, 246.

CONSOLIDATED STATUTES—*Continued.*

SEC.

3101. When liability of surety is discharged by compromise and settlement, maker is entitled to credit only for amount actually paid by surety. *Bank v. Hinton*, 159.

3215, 3219. Mortgagee of one tenant in common is not a necessary party to special proceeding to partition the land. *Rostan v. Huggins*, 386.

3309. Prescribes priority for purchaser for value even though he has actual notice of unregistered conveyance or lien, but does not affect equities as between the parties. *Patterson v. Bryant*, 550.

4131. Waiver in testimony of subscribing witnesses does not preclude verdict that will was properly executed. *In re Will of Redding*, 497.

4162. Devise and bequest of entire estate with full power of disposition is unrestricted, and bequest is absolute and devise is in fee. *Heefner v. Thornton*, 702. Unrestricted devise *held* to be in fee and restraint on alienation thereto attached is void. *Williams v. McPherson*, 565.

4200. Homicide committed in perpetration, or attempt to perpetrate robbery is murder in first degree notwithstanding absence of fixed intent to kill or any previous purpose, design or plan. *S. v. Kelly*, 627.

4232. Evidence that defendants forced occupant into his dwelling at point of pistol *held* to show constructive "breaking." *S. v. Rodgers*, 572.

4246. Evidence *held* not to show felonious intent in taking of car, and therefore failed to show either common law or statutory larceny. *Funeral Home v. Ins. Co.*, 562.

4251. Provision of statute dividing larceny in two degrees has no application to burglary. *S. v. Richardson*, 304.

4623. Proof of assault with a brick or rock *held* not fatal variance with warrant charging assault with a brick. *S. v. Hobbs*, 14.

4640. Where there is no evidence of guilt of less degree of the crime, court need not submit the question to the jury. *S. v. Hobbs*, 14.

4643. Upon motion to nonsuit, evidence must be taken in light most favorable to the State. *S. v. Hammonds*, 67. Case must be submitted to jury if evidence considered in light most favorable to the State is sufficient to sustain verdict of guilty. *S. v. Lefevers*, 494.

4649. Statutory right of State to appeal in criminal cases may not be enlarged by order of court. *S. v. Cox*, 424. State may not appeal from adjudication that the duty to make payments required as special condition of probation had terminated. *S. v. McCullum*, 737.

6237. Whether court should order inquiry as to defendant's mental capacity to receive sentence rests in sound discretion of trial court. *S. v. Godwin*, 49.

6458. Contention that soliciting agent represented that policy should be in force from date of application and payment of premium rather than upon approval of application would seem in contravention of statute. *Jones v. Ins. Co.*, 300.

7111. Death certificate is *prima facie* evidence of facts stated therein but not conclusions or opinions expressed therein. *Rees v. Ins. Co.*, 428.

CONSOLIDATED STATUTES—*Continued.*

SEC.

7982. *Held:* Amount of unpaid taxes was properly allowed as offset against sum due life tenant from estate. *Meadows v. Meadows*, 413.

7990. Commissioner's deed to purchaser at foreclosure of tax lien conveys no title when clerk's order of confirmation is void because entered on day other than Monday. *Beaufort County v. Bishop*, 211. Owners are entitled to redeem lands from foreclosure of tax lien at any time before valid confirmation. *Ibid.*

8081 (a) (b). Employee *held* not covered while performing duties at employer's residence unconnected with duties at place of business. *Burnett v. Paint Co.*, 204.

8081 (mm) (t). Provision authorizing award for bodily disfigurement *held* constitutional, and award therefor may be made in addition to award for partial loss of member. *Baxter v. Arthur Co.*, 276.

CONSTITUTION, SECTIONS OF, CONSTRUED.

(For convenience in annotating.)

ART.

I, sec. 1. Act providing restrictions preventing unlicensed persons from engaging in pressing and dry cleaning business *held* to violate this section. *S. v. Harris*, 746.

I, sec. 7. Act providing for licensing of dry cleaners and pressers *held* unconstitutional as conferring exclusive privileges without reasonable basis. *S. v. Harris*, 746.

I, sec. 8. Provision of Compensation Act authorizing award for bodily disfigurement is not void as delegation of legislative power. *Baxter v. Arthur Co.*, 276.

I, sec. 17. North Carolina Fair Trade Act *held* not to deprive noncontracting retailers of any property right, but the act only protects property right of manufacturers and wholesalers in trade-mark. *Lilly & Co. v. Saunders*, 163. Act providing for licensing of dry cleaners and pressers *held* unconstitutional as being discriminatory. *S. v. Harris*, 746. Granting of municipal charter cannot have effect of defeating rights of individuals purchasing lots from private corporation to easement in streets shown by plat. *Ins. Co. v. Carolina Beach*, 778.

I, sec. 29. Constitution should be construed in light of its history, and liberal construction is especially required in interpreting those provisions safeguarding individual liberty. *S. v. Harris*, 746.

I, sec. 31. North Carolina Fair Trade Act *held* not to create or tend to create monopoly in violation of this section. *Lilly & Co. v. Saunders*, 163. Act imposing regulations on cleaning and pressing business *held* unconstitutional as creating monopoly. *S. v. Harris*, 746.

I, sec. 35. Motion for continuance is addressed to discretion of trial court to be determined by it in exercises of its duty to administer justice without sale, denial or delay. *S. v. Godwin*, 49.

CONSTITUTION, SECTIONS OF, CONSTRUED—*Continued.*

ART.

II, secs. 4, 5, 6. Reapportionment is a political and not a judicial question. *Leonard v. Maxwell, Comr. of Revenue*, 89.

II, sec. 29. Statute regulating trade is not special act if its application is based on reasonable classifications and applies equally to all coming within each classification, and North Carolina Fair Trade Act *held* not special statute. *Lilly & Co. v. Saunders*, 163.

IV, sec. 24. While office of sheriff is provided for by the Constitution, right of sheriff to appoint deputies is a common law right, and duties and authority of deputies relate only to ministerial duties imposed by law on sheriffs, and office of deputy sheriff and jailer are separate and distinct. *Gowens v. Alamance County*, 107.

V, Power to levy taxes is exclusive province of Legislature, and Superior Court has no jurisdiction of action to discover, list and assess property for taxation. *Henderson County v. Smyth*, 421.

V, sec. 3. License tax on dry cleaners *held* unconstitutional. *S. v. Harris*, 746.

X, sec. 2. Right of homestead is superior to lien of material furnisher. *Cameron v. McDonald*, 712.